

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AGRIUM INC. and AGRIUM U.S. INC.)	
)	
Complainants,)	
)	
v.)	Docket No. NOR 42145
)	238863
CANADIAN PACIFIC RAILWAY COMPANY)	ENTERED
)	Office of Proceedings
)	July 21, 2015
Defendant.)	Part of Public Record
)	

**AGRIUM'S REPLY IN OPPOSITION TO
CANADIAN PACIFIC RAILWAY COMPANY'S MOTION TO DISMISS**

AGRIUM INC. and AGRIUM U.S. INC.

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Complainant Agrium Inc. and Agrium U.S. Inc. (collectively “Agrium”) file this reply in opposition to Canadian Pacific Railway Company’s (“CP’s”) Motion to Dismiss (“Motion”) filed on July 1, 2015. CP’s Motion should be denied because Agrium’s Complaint clearly sets forth reasonable grounds for Board investigation and action and because CP fails to meet the high threshold set by the Board for motions to dismiss.

SUMMARY

Agrium alleges in its Complaint that CP is engaged in unlawful practices in violation of Title 49 with respect to the defense, indemnity, and liability provisions of CP Tariff 8, Item 54 (“Tariff” or “Assailed Tariff Item”), as applied to Agrium’s rail transportation service. Agrium’s Complaint contains detailed factual allegations and

legal bases for each of the counts of its Complaint.¹ As set forth in Agrium's Complaint, the Tariff in question is unlawful because, *inter alia*, it purports to attempt to immunize CP from liability and/or unreasonably shift defense and liability responsibilities for any CP train accidents and threatened tank car discharges from CP to Agrium in a myriad of events and actions, even where Agrium is not named as being potentially responsible or at fault, and even in the face of governmental findings of CP fault.

Agrium has a statutory right to bring its Complaint, and have its claim investigated and acted upon by the Board. *See* 49 U.S.C. §11701(b). This right is confirmed in the Board's recent decision in *Union Pac. R.R. – Petition for Declaratory Order*, FD 35504, slip op. at 2 (STB served Oct. 10, 2014), inviting shippers to bring complaints relating to railroad practices pertaining to liability and indemnity provisions to be investigated and decided by the Board, as Agrium has done here. Agrium's Complaint fully complies with the law and the Board's rulings, and provides more than sufficient basis for Board investigation and action. Indeed, while styled as a motion to dismiss, CP's Motion is really an impermissible collateral attack on the Board's recent Docket No. 35504 rulings.

CP's various arguments for dismissal are insufficient to carry its burden that there are no reasonable grounds for investigation and that there is no basis on which the Board could grant the relief sought by Agrium. CP also relies upon facts that are in

¹ The factual and legal underpinning of the action are set forth in detail in Agrium's Complaint at ¶¶ 1-26, and the four specific Complaint counts are set forth in detail at ¶¶ 27-45.

dispute and engages in premature arguments on the merits. In addition to being unverified and premature, CP's factual assertions and merits arguments are erroneous, misleading, raise issues of material facts in dispute, and, at best, provide additional bases for Board denial of CP's Motion.

As demonstrated herein, the Board unquestionably has the authority and responsibility under Title 49 to consider all of the allegations set forth in Agrium's Complaint and, once proven, to: (1) declare the implementation of and attempted continued enforcement of the Tariff by CP on Agrium to be unlawful; and (2) order CP to cease and desist from its unlawful practices.

ARGUMENT

A. CP Cannot Meet the Board's Demanding Standards for Motions to Dismiss

To survive a motion to dismiss, a complainant need only plead sufficient facts to establish a *prima facie* case for relief; the Board may dismiss a complaint only if it "does not state reasonable grounds for investigation and action." 49 U.S.C. § 11701(b); *Consumers Energy Co. v. CSX Transp., Inc.*, NOR 42142, slip op. at 1 (STB served June 15, 2015) ("*Consumers*"); *Terminal Warehouse, Inc. v. CSX Transp., Inc.*, NOR 42086, slip op. at 7 (STB served May 12, 2004). "In reviewing a motion to dismiss, all alleged facts are viewed in the light most favorable to the complainant." *Consumers*, slip op. at 1 (citing *Mont. v. BNSF Ry.*, NOR 42124, slip op. at 3 (STB served Feb. 16, 2011)). The burden of proof is borne by the party seeking dismissal, and complaints may be dismissed "only when we find that there is no basis on which we could grant the relief sought."

Sierra R.R. v. Sacramento Valley R.R., NOR 42133, slip op. at 3 (STB served Apr. 23, 2012).

Moreover, the Board has “stated frequently that motions to dismiss are disfavored and rarely granted.” *Entergy Ark., Inc. v. Union Pac. R.R.*, NOR 42104, slip op. at 3 (STB served Dec. 30, 2009) (“*Entergy*”); *Consumers*, slip op. at 1 (“Motions to dismiss are generally disfavored”); *Dairyland Power Coop. v. Union Pac. R.R.*, NOR 42105, slip op. at 4 (STB served July 29, 2008) (“*Dairyland*”); *Garden Spot & N. Ltd. P’Ship & Ind. Hi-Rail Corp. – Purchase and Operate – Ind. R.R. Line Between Newton & Browns, IL*, FD 31593, slip op. at 2 (ICC served Jan. 5, 1993).

Where a claim states a reasonable basis for further Board consideration, a motion to dismiss that claim must be denied as the Board has a “duty to investigate the complaint” *Brampton Enters., LLC v. Norfolk S. Ry.*, NOR 42118, slip op. at 4 (STB served Mar. 16, 2011) (“*Brampton*”). To be sustained at this initial stage, the claim does not need to allege enough facts to establish a *clear* violation by the defendant; it needs to only provide sufficient grounds for further investigation, and the party seeking dismissal must demonstrate that “there is no basis on which [the Board] could grant the relief sought.” *Id.*, slip op. at 3. Unless the Board finds at this stage “that there are no reasonable grounds for further investigation,” the complaint must be sustained. *Dairyland*, slip op. at 5.

1. Agrium's Claims Set Forth Reasonable Grounds for Investigation and Action By the Board

The allegations in Agrium's complaint, when considered in a light most favorable to Agrium, at a minimum make a *prima facie* case that CP is engaging in an unreasonable practice with regard to its establishment of the Assailed Tariff Item as applied to Agrium's traffic warranting further investigation. Pursuant to 49 U.S.C. § 10702(2), CP is required to establish reasonable "rules and practices on matters related to [the] transportation or service." Agrium's Complaint consists of four individual counts, making detailed, specific claims as to the unlawfulness of various parts of the Tariff, including alleging that the customer defense requirements (Count I); customer indemnity requirements (Count II); negligence/willful misconduct provisions (Count III); and customer joint liability requirements (Count IV) as applied to Agrium. Each one of these counts states reasonable grounds for investigation and action. As explained further below, CP fails to seriously address, let alone dispute, the adequacy of any one of Agrium's claims. CP also fails to meet its burden to demonstrate that there is "no basis" on which the Board could grant the relief sought with respect to all of the counts.

Brampton, slip op. at 3.

At this early stage, the Board should provide Agrium with a fair chance to make its case regarding the issues raised in its unreasonable practices claim. *See, e.g., Grain Land Coop. v. Canadian Pac. Ltd.*, NOR 41687, slip op. at 3-4 (STB served Dec. 8, 1999) (because the factual allegations, when viewed in a light most favorable to complainant Grain Land, could show that Canadian Pacific engaged in an unreasonable

practice in its car allocation policies, the Board stated it “must give [Complainant] the opportunity to make its case as to the issues raised in [its unreasonable practices claim]”). There is no basis to conclude at this point in the proceeding that Agrium’s claims could not under *any* circumstances provide a basis for further investigation and action. Especially when viewed in a light most favorable to Agrium, each of the counts of the Complaint makes a sufficient case for an unreasonable practices claim, including under 49 U.S.C. § 10702 and 49 C.F.R. § 1111.1(a). As such, CP’s Motion must be denied.

B. Agrium’s Complaint Conforms with the Board’s Rulings and Directives Instructing Shippers to File Individual Complaints Against Individual Carrier Defense, Liability, and Indemnity Tariffs

Agrium’s right to have its Complaint investigated and decided is confirmed and cemented in a series of recent Board decisions. In *Common Carrier Obligation of R.R.s. – Transp. of Hazardous Materials*, EP 677 (Sub-No. 1), slip op. at 4 n.8 (STB served Apr. 15, 2011) (“*Common Carrier Obligation*”), the Board denied the Association of American Railroad’s request that the Board issue a policy statement addressing liability-sharing arrangements for the movement of TIH materials. Instead, the Board instructed stakeholders it would “proceed according to its usual practice of resolving disputes related to the reasonableness of both requests to transport TIH cargo and the carriers’ responses *on a case-by case basis.*” *Id.* (emphasis added).

Following that decision, the Union Pacific Railroad Company (“UP”) filed a petition requesting the Board to issue a declaratory order pertaining to the reasonableness of certain of its liability/indemnity tariff items. UP had argued that its petition “presents precisely the type of concrete dispute over the reasonableness of a

request for common carrier rates to transport TIH, and the reasonableness of a railroad's response, that the Board has said it would address." UP Petition (filed Apr. 27, 2011) at 6, *Union Pac. R.R. – Petition for Declaratory Order*, FD 35504. Notably, CP "strongly support[ed]" the initiation of the proceeding, arguing that the matter was fully ripe and actionable as it was a "source of friction between CP and some of its TIH shippers," and that, in response to the Board's *Common Carrier Obligation* decision preferring case-by-case resolution of disputes, UP had presented "just such a case" of an actual dispute worthy of the Board initiating a declaratory order proceeding. CP Statement in Support of Petition (filed May 13, 2011) at 1-3, *Union Pac. R.R. – Petition for Declaratory Order*, FD 35504. The Board granted UP's request to initiate a declaratory order proceeding, finding that, even if it were true that the case lacked a "sufficiently active controversy," the proceeding should still be initiated based on the Board's responsibility to address and "remove the uncertainty raised in UP's petition regarding the reasonableness of its tariff provisions under 49 U.S.C. § 10702 and 49 U.S.C. § 11101(a)." *Union Pac. R.R. – Petition for Declaratory Order*, FD 35504, slip op. at 3 (STB served Dec. 12, 2011) ("*UP Declaratory Order I*").

After a hearing and investigation, the Board determined that UP had not carried its burden of proof as to the reasonableness of its tariff provisions, and it denied UP's request for a declaratory order that its tariff was reasonable. *Union Pac. R.R. – Petition for Declaratory Order*, FD 35504 (STB served Apr. 30, 2013) ("*UP Declaratory Order II*"). Following UP modification of its involved tariff provisions, and in response to a request for "show cause" order filed by shipper-stakeholders as to the revised UP

tariff, the Board declared and instructed that any such request needed to be made through the filing of a formal unreasonable practice complaint directed to the individual tariff. *Union Pac. R.R. – Petition for Declaratory Order*, FD 35504, slip op. at 2 (STB served Oct. 10, 2014) (“*UP Declaratory Order III*”). The Board further explained that, should such a complaint be pursued, it “would institute a procedural schedule for the presentation of evidence and argument in which the [involved shipper stakeholders] would be the complainants.” *Id.*

The Board has thus invited and instructed shippers like Agrium to bring formal complaints for investigation and resolution of issues pertaining to defense, indemnity and liability provisions of a rail carrier’s tariffs. Accordingly, Agrium’s Complaint complies and conforms precisely with the Board’s decision in *UP Declaratory Order III* that the Board “would institute a procedural schedule for the presentation and evidence and argument” upon the “the filing of a formal unreasonable practice complaint directed to the individual tariff.” *Id.* CP’s Motion should be rejected as a thinly veiled, collateral attack on the Board’s rulings in *UP Declaratory Order III*.

C. CP Does Not and Cannot Show That There Are No Reasonable Grounds for Investigation and Action by the Board and That There Is No Basis on which the Board Could Grant the Relief Sought

1. CP’s “Broad Pronouncements” Argument is Incorrect and Unavailing

CP urges the Board to refrain from investigation and action on Agrium’s Complaint on grounds that Agrium is seeking “broad pronouncements” concerning the

Assailed Tariff Item, instead of a “narrow adjudication[] of [a] specific tariff[.]” CP Motion at 10. CP’s “broad pronouncements” argument is grossly off-base.

First, Agrium did not file a request for a declaratory order seeking broad industry-wide pronouncements or directives on TIH shipments. CP has numerous tariffs, and dozens of tariff items addressing hazardous materials transportation service. This action involves a specific, narrow *Complaint* filed by one shipper against one railroad, challenging one discrete item (Item 54) of a 56-item tariff (CP Tariff 8) comprising CP’s various rules for hazardous materials transportation service as applied to Agrium’s common carrier service. *See* Agrium Complaint, Exh. A (containing CP Tariff 8).

Additionally, Agrium reemphasizes that, in bringing its Complaint, Agrium is following precisely the Board’s guidance and instructions in *UP Declaratory Order III*, that if affected shippers want the Board to take further action in investigating and addressing the reasonableness of specific liability/indemnity tariff items (in UP’s case, two broad liability tariff items), that the shippers should file a complaint against such items. *Id.*, slip op. at 2. Agrium has brought such a specific Complaint challenging one discrete CP tariff item contained in less than one page of a 16-page tariff.

Second, while CP quibbles that Agrium has made “sweeping assertions” in its Complaint, it does not dispute that any of Agrium’s allegations are inadequate, indefinite, or illegitimate. As even CP acknowledges, Agrium has provided multiple, detailed reasons to support a finding that CP’s tariff item is unlawful. CP has not moved to strike or dismiss any one of Agrium’s four counts on grounds that Agrium has failed to plead sufficient facts to prove its claims that CP’s practices are unreasonable, or has

failed to support with particularity any of its claims.² Instead, CP merely claims that resolving the Complaint will “require the Board to conduct a detailed” examination of the Complaint allegations filed by Agrium assailing specific Assailed Tariff Item terms. Such arguments clearly fall short of the requirement that CP demonstrate that Agrium’s Complaint offers no reasonable basis for further Board consideration. *See, e.g., DHX, Inc. v. Matson Navigation Co., et al.*, WCC-105, slip op. at 1 (STB served Dec. 21, 2001) (“DHX will have to . . . support with particularity its general claim that the carriers’ practices are unlawful. But we cannot conclude at this point that DHX has not raised any claims that, if proven, could demonstrate a violation of the law.”).

Third, as explained further below, CP asserts that the Board should not investigate, because if it does, and it determines Tariff unlawfulness, the Board “would relieve TIH shippers of risks associated with the very decisions that the Board has ruled are generally to be determined by the shipper.” CP’s “what if” rhetoric is grossly incorrect and unsubstantiated. There is no basis for CP’s assertion that Agrium is somehow immune from “risks,” claims, or potential liability absent the imposition and enforcement of CP’s unlawful Tariff.³ Besides being grossly inaccurate, CP’s “what if”

² In its Answer (Defenses ¶ 3), CP asserts that “[t]he Complaint fails to state a claim because CP Tariff 8, Item 54 is not unreasonable,” which of course, goes to the merits and provides no valid basis for Complaint dismissal.

³ For example, the follow-up claims and actions to the July 6, 2013 Lac Megantic, Quebec railroad tragedy involve dozens of entities that have been named in claims and lawsuits, including shippers, commodity suppliers, equipment lessors, and railroads. To date, over two-dozen of the named parties have agreed to settle, including the involved crude oil shipper, who has agreed to contribute \$110 million to a fund to compensate parties who suffered losses as a result of the derailment *See, e.g., In re: Montreal Maine*

arguments are premature, and only serve to bolster a finding that Agrium’s Complaint is properly brought at this time to determine the validity of arguments and factual matters in dispute between the parties. Moreover, CP appears to intimate that the Board should refrain from initiating proceedings that may pass judgments on controversial issues, but that clearly is not the standard in determining whether there is sufficient basis for dismissal. *See, e.g., Cargill, Inc. v. BNSF Ry. Co.*, NOR 42120, slip op. at 4 (STB served Jan. 4, 2011) (denying a motion to dismiss, finding that claims that the defendant carrier used its fuel surcharge to extract substantial profits and double-recover incremental fuel cost increases offered a “reasonable basis for further Board consideration”).

2. CP’s “No Actual Harm” Arguments Ignore the Law and Should Be Summarily Rejected

CP contends that Agrium’s Complaint should be dismissed because Agrium has alleged no “actual harm,” and that Agrium’s allegations are “speculative.” CP Motion at 11. However, even CP candidly admits harm when it asserts that it is effectively using its Tariff as “effective leverage” in its commercial dealings under the guise of a lawful tariff, and in expressing worry about Board action that might undermine CP’s “crucial leverage” with shippers like Agrium. *Id.* at 10. The fact that CP is actively using an unlawful Tariff to successfully extract commercial concessions or to otherwise dissuade shippers like Agrium from engaging in their right to obtain common carrier

& Atlantic Ry., Bk. No. 13-10670 (D. ME) (filed Aug. 7, 2013); News Release, World Fuel Services, World Fuels Services Corporation Announces Lac-Megantic Settlement (Jun. 8, 2015) (http://ir.wfscorp.com/phoenix.zhtml?c=101792&p=irol-newsArticle_Print&ID=2057333). (A listing of the involved settling parties as of July 16, 2015 is included hereto at Attachment A.)

service (49 U.S.C. § 11101(a)) is troubling.⁴ Agrium respectfully submits that the Board should not permit unreasonable and unlawful tariffs to stand unaddressed and uninvestigated, especially in the face of such carrier admissions over commercial harm.

Additionally, CP's newfound claims of no actual harm stand in stark contrast with its previous statements to the Board that very similar liability/indemnity unlawfulness claims present "actual disputes" that are entitled to investigation and action by the Board, even in instances where no actual complaint has been filed, as Agrium has done here. *See* CP Statement in Support of Petition (filed May 13, 2011) at 3, *Union Pac. R.R. – Petition for Declaratory Order*, FD 35504 (CP urged the Board to investigate and take action on carrier's request for a declaratory order as to the lawfulness of its indemnity/liability, because such action was in full accordance with the Board's "usual practice of resolving on a case-by-case basis actual disputes concerning the reasonableness of service terms governing rail common carrier transportation of TIH materials").

Moreover, CP's "no actual harm" assertions run up directly against the law. *See* 49 U.S.C. § 11701. For over a century, since the inception of the Interstate Commerce Act (originally Section 13 and reenacted thereafter), Congress has directed that no complaint shall be dismissed even in the absence of direct damage or harm to the Complainant. As the Supreme Court has explained:

⁴ CP's use of the Tariff as a means of attempting to end-running its common carrier obligations is of significant and immediate concern, especially as CP has emphasized that "CP would not participate in the movement of these commodities if given the choice." CP Motion at 2.

It is provided in the Act to Regulate Commerce, § 13, that “any person, firm corporation,” etc., complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the provisions thereof, may apply to said Commission by petition, etc. . . . [A]nd the section concludes: “*No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.*” *In face of this mandatory requirement that the complaint shall not be dismissed because of the want of direct damage to the complainant, no alternative is left the Commission but to investigate the complaint, if it presents matter within the purview of the act and the powers granted to the Commission.*

ICC v. Baird, 194 U.S. 25, 39 (1904) (emphasis added); *accord Backus-Brooks Co. v. N. Pac. Ry.*, 21 F.2d 4, 19 (8th Cir. 1927); *Carpenter-Hiatt ales Co. v. Atchison, Topeka & Santa Fe Ry.*, 200 I.C.C. 540, 541 (1934); *see also State of New Jersey v. U.S.*, 168 F.Supp. 324, 338 (D. N.J. 1958) (“[n]o language could be more broad” and this section “awards complainants basic rights, not mere steps in a cause”); *Georgia Pub. Serv. Comm’n v. Atl. Coast Line R.R.*, 186 I.C.C. 157, 160 (1932) (“duty is placed upon [Agency] to [i]nvestigate” complaints). Under the Interstate Commerce Commission Termination Act (“ICCTA”), “the Board may not dismiss a complaint made against a rail carrier providing transportation subject to the jurisdiction of the Board under this part because of the absence of direct damage to the complainant.” 49 U.S.C. §11701.

CP cites to the May 8, 2014 decision of the U.S. District Court for the District of North Dakota in alleged support of its lack of “case or controversy” arguments, because the court declined to rule on the lawfulness of the Tariff based on the complaint allegations. CP Motion at 14. However, the involved “case or controversy”

issues before the Court are not present here,⁵ the action did not involve any allegations brought under ICCTA as Agrium has done here,⁶ and the action did not seek to invoke the Board's jurisdiction through the filing of a formal complaint properly presented to the Agency (49 U.S.C. § 11701(b)) as Agrium has done here. CP says Agrium is asking the Board to “trek deep into the regulatory jungle” (*id.*), but that argument, at best, only serves to support the need for Board investigation and action here where Agrium has a statutory right to bring its Complaint and to have its claims be heard before the Board.

3. CP's Attempts to Re-Write Agrium's Complaint Should Be Rejected

In order to succeed in its motion to dismiss Agrium's Complaint, CP goes so far as to attempt to convert Agrium's Complaint into a petition for declaratory order, stating that it is “really a petition for declaratory order in substance, if not in form.” CP Motion at 11. Having created this “declaratory order” straw man, CP then attempts to show that the Board's declaratory order dismissal precedent favors dismissal.

⁵ As explained below, even if Agrium had brought a declaratory order request, which it did not, Unlike Article III Courts that have restrictions on entering advisory opinions, the Board's authority in declaratory order proceedings is not so limited. *See, e.g., The Quaker Oats Co. – Transp. Within Tex. & Cal. – Petition for Declaratory Order*, 4 I.C.C.2d 1033, 1034 (1987) (allegations of advisory opinions, lack of case or controversy, and ripeness “lack merit” before the Agency, as the Board “do[es] not exercise the judicial power of a Federal court, and the ‘case or controversy’ limitations on judicial power do not limit the powers of administrative agencies in declaratory order proceedings.”)

⁶ The North Dakota federal district court complaint alleged Tariff unlawfulness under specific state and federal laws, including under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*; the Locomotive Inspection Act, 49 U.S.C. §§ 20701-20703; the Safety Appliances Act, 49 U.S.C. §§ 20301-20306; the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9613; and other common law. No ICCTA claims were raised.

CP has no right to alter or convert Agrium's Complaint to something that it is not. Agrium invoked its right to bring a complaint under 49 U.S.C. §§ 10702, 10704, and 11701, it did not bring a declaratory order request. In bringing its Complaint, Agrium also invoked the Board's governing complaint procedures. CP has answered Agrium's Complaint (pursuant to 49 C.F.R. §1111.4) and has cooperated and engaged in the Board's Complaint procedures (pursuant to 49 C.F.R. §1111.10(a)). In light of the Board's mandatory requirement to investigate where, as here, reasonable grounds for investigation are brought, the Board has consistently recognized that it has no alternative "but to investigate the complaint, if it presents matter within the purview of the Act and the powers granted to the Commission." *ICC v. Baird*, 194 U.S. 25, 39 (1904).

CP argues that the Board has discretion to consider *declaratory order* requests, and should it decline that discretion here with regard to Agrium's *Complaint*, but clearly that authority is inapposite and inapplicable. CP provides no legal support for its attempt to convert Agrium's Complaint into a declaratory order. To the contrary, as stated *supra*, Agrium has followed the Board's explicit instructions in *UP Declaratory Order III* that if a shipper has a complaint about an individual liability/indemnity tariff, upon the "the filing of a formal unreasonable practice complaint directed to the individual tariff," the Board "would institute a procedural schedule for the presentation and evidence and argument." *Id.*, slip op. at 2.

Additionally, even in the absence of a specific complaint filed by Agrium as a matter of right (under 49 U.S.C. § 11701(b)), which is *not* the case here, a federal agency "with like effect as in the case of other orders, and in its sound discretion, may

issue a declaratory order to terminate a controversy or remove uncertainty.” 5 U.S.C. § 554(e). Clearly there is controversy and uncertainty here requiring resolution, as even CP has acknowledged. *See* CP Motion at 15 (arguing that the Tariff uncertainty issues can be worked out at a future time by the affected parties to a dispute to “address the kinds of specific implementation issues that Agrium raises in its Complaint”).

4. CP’s “Willing to Negotiate” and “Discretionary Enforcement” Arguments are Factually Incorrect, Misleading, and Unavailing, and Actually Support Agrium Claims

CP argues that Agrium’s Complaint is not worthy of investigation and action because “there is no guarantee that the specific Tariff provisions challenged in the Complaint will apply in the case of a TIH incident.” CP Motion at 14. However, the terms of the Tariff are non-discretionary (“Customer *shall* fully indemnify and defend CP against any and all liabilities . . .” and when there is partial CP fault, “Liabilities *shall* be adjudicated under usual principles of comparative fault.”) Additionally, any newfound CP offer to exercise discretion in enforcement in the face of Tariff language to the contrary provides little solace to Agrium, and, in actuality, provides further basis for Board investigation of Tariff unlawfulness. *See, e.g., Substitution of Rail Regular for Trailer-on-Flatcar Service*, 302 I.C.C. 725, 729-30 (leaving tariff enforcement to the “convenience” of the railroad in enforcement is unlawful as such “freedom of election is fraught with opportunities for discrimination among shippers and receivers”).

Moreover, even CP admits that Agrium’s Complaint raises legitimate objections about Tariff unlawfulness on grounds of vagueness, indefiniteness, and ambiguity, at least with respect to some of Agrium’s “narrower objections.” CP Motion

at 15. However, CP then asserts that Agrium and the Board need not be concerned or seek to investigate because “[i]f and when CP ever seeks to enforce this Tariff provision, the parties involved can address the kinds of specific implementation issues that Agrium raises in its Complaint based on the facts and circumstances of the particular situation.” *Id.* Again, CP’s admissions as to Tariff ambiguity only serve to bolster Agrium’s claims as to Tariff unreasonableness, and to warrant Board investigation at this stage. *See, e.g., Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, FD 35557, slip op. at 29-30 (STB served Dec. 13, 2013) (“overbroad and ambiguous” tariff language pertaining to shipper liability is unreasonable).

CP further alleges that no investigation and action is warranted because it was and would continue to be, willing to negotiate the liability provisions with Agrium if Agrium were to “replace older tank cars.” Such a statement is unsubstantiated, factually incorrect, and presents a red herring. CP unilaterally established its Tariff on Agrium’s traffic, and the Tariff was and is non-negotiable. Also, as the facts and evidence developed in this case will show, Agrium’s tank car fleet meets and exceeds all governmental equipment safety compliance rules. In fact, Agrium has led the industry in removing all “non-normalized” steel tank cars from its tank car fleet on an aggressive schedule completed in 2007, and it has continued its program of modernizing its tank car fleet with rollover protections in the form of shear-off valve upgrades, spending millions of dollars annually in safety initiatives that go above and beyond governing safety rules. Agrium has also received numerous safe handling awards from its railroad partners for its stellar safety performance. CP’s premature, incorrect, and misleading factual statements

as to Agrium's safety performance record thus are disputed and provide no basis for dismissal.

5. CP's "Recent Developments in Congress" Argument is Off-Base and Immaterial to the Question of Whether Agrium's Claims Set Forth Reasonable Grounds for Investigation and Action By the Board

Citing the recent introduction of a legislative amendment proffered in the Senate, that the railroad industry, including CP, is apparently supporting, CP argues that "recent developments in Congress counsel" dismissal, arguing that Congress *might* enact legislation that could lead to "a study on the level and structure of insurance for a railroad carrier transporting hazardous materials." However, nothing in the proposed amendment cited by CP, even if it were to be enacted, would restrict or alter the right of Agrium to bring its Complaint and have it investigated by the Board, or provide any basis for Board dismissal.

Additionally, even if any proposed or pending legislation actually did seek to restrict shipper complaint rights, which none does, CP's speculation as to what Congress might do in this area is clearly insufficient grounds for avoiding resolution of Agrium's Complaint at this time. *See, e.g., The Denver & Rio Grande W. R.R. Discontinuance of Trains Nos. 17 & 18 Between Denver, CO, & Salt Lake City, UT*, 336 I.C.C. 691, 723 (1970) ("[b]ills pending before Congress . . . are many, diverse, and controversial," however "[i]n evaluating th[e] record we are dutybound to carry out the intent of Congress expressed in the existing law.") Additional Board guidance instructs:

We are bound to carry out the manifest intent of Congress as embodied in the existing law, notwithstanding the possibility

that changes may be in the making. Many changes are considered by Congress but we have no discretion to render a decision in a proceeding now before us based on our speculation as to what action Congress may take in the future. As previously stated, we must act within the confines of existing statute

Penn Cent. Transp. Co. Discontinuance of 34 Passenger Trains, 338 I.C.C. 380, 471

(1970). Again, Agrium’s Complaint is brought as a matter of statutory right and in full compliance with the Board’s recent guidance in *UP Declaratory Order III*. CP’s preference to restrict Agrium from bringing its Complaint pending possible future action by Congress that might afford further study, and in the meantime, allow CP’s unlawful Tariff to stand, is bereft of legal support, wholly inappropriate, and provides insufficient grounds for dismissal.

D. CP’s Glaring Factual Misstatements and Erroneous Merits Arguments

CP admits that in ruling on its motion to dismiss, factual allegations are to be construed “in the light most favorable to Agrium.” *Id.* at 7. However, in a transparent attempt to sway the Board, CP improperly argues the facts and dives in prematurely to arguments on the merits. For example, as explained above, CP makes unsupported and spurious claims about the safety of Agrium’s tank car fleet. In doing so, CP disparages the use of certain non-normalized steel tank cars by shippers, which CP considers “unsafe,” even if they are fully compliant with governmental safety standards.

Even if CP’s premature factual assertions and merits arguments had some proper bearing on CP’s dismissal motion, which they do not, they lack support. For example, as explained above, Agrium simply does not use non-normalized steel tank cars

in its service and in fact took proactive steps to remove all such cars from its service over a decade ago, which initiative was completed in 2007. Agrium also continues to engage in considerable additional tank car equipment upgrades, even though such initiatives are not required, and its cars, even before Agrium's improvements, have remained fully compliant with all governing safety rules. CP's "unsafe tankcars" factual statements and arguments are erroneous and simply a smoke screen designed to block proper Board investigation of Agrium's Complaint.

Also, despite specific governmental findings of carrier fault for individual railroad accidents such as CP's 2002 Minot ND accident,⁷ CP still denies any responsibility, negligence, or willful misconduct (*see* CP Answer at ¶ 40), insisting that its Tariff is needed to protect CP against such civil tort claims, and to allow it to assign responsibility to its shippers such as Agrium that are not at fault. For example, CP cites the use of "unsafe" shipper-supplied tank cars as being the problem, if not the cause, of the Minot accident. *Id.*, Motion at 3. However, even assuming *arguendo* that CP was right as to the Minot accident cause, which it is not, CP's "unsafe cars" contentions are misdirected here, because, as stated, none of the types of non-normalized, so-called

⁷ Agrium's Complaint (at ¶ 40) references that CP's Tariff is unreasonable because it attempts to improperly shift from CP to Agrium full defense and indemnity responsibilities even in the face of governmental findings of railroad fault. *See, e.g.*, National Transportation Safety Board, Railroad Accident Report NTSB/RAR-04-01, *Derailment of Canadian Pac. Ry. Freight Train 292-16 & Subsequent Release of Anhydrous Ammonia Near Minot, N.D., Jan. 18, 2002*, at 69 ("NTSB Minot Accident Report") (the "probable cause of the derailment . . . was an ineffective Canadian Pacific Railway inspection and maintenance program that did not identify and replace cracked joint bars before they completely fractured and led to the breaking of the rail at the joint."). In CP's Answer, and again in its Motion, CP acknowledges that it disputed carrier negligence claims in following civil tort claim litigation (*see* CP Answer at ¶40).

“unsafe” steel tank cars that CP cites as being involved in the derailments in *Minot* are used in Agrium’s service, nor have any such cars been used in Agrium’s service for the past eight years.

CP also attempts to justify its Tariff on the merits on grounds that it is a reasonable means of removing potential CP liability “where an incident is caused by acts or omissions of a TIH shipper, intentional or negligent actions of third parties, or acts of nature (*e.g.*, extreme weather, earthquakes and avalanches).” CP Motion at 4. Besides being premature and irrelevant to determining CP’s dismissal motion, these additional merits argument are unsubstantiated. CP fails to provide any legitimate support for its allegations, or explain to the Board that CP is largely protected from such liability under the broad preemption provisions of federal law (at 49 U.S.C. § 20106).⁸

The only support provided for its allegations is through an unverified weather analysis.⁹ Besides being unverified and unsubstantiated,¹⁰ CP’s analysis provides no valid support for CP’s merits arguments. For example, while carriers have in place

⁸ Section 20106 provides that railroads are not liable at common law (including negligence suits) for accidents (including discharge of hazardous materials), when they are operating in accordance with governing federal safety standards.

⁹ CP says that its Tariff is justified based on a Federal Railroad Administration study described in one sentence, that CP has undertaken on derailments caused by “extreme weather.” CP Motion at 4, n.2.

¹⁰ CP fails to provide any back-up support or workpapers, or clarify, for example, how many of the cited weather incidents involved hazardous materials trains, how many involved loaded trains (versus empty return trains), how many resulted in a release of hazardous materials, or how many involved incidents where derailments could have still been avoided, for example, where a carrier failed to follow its own protocols and rules pertaining to the reporting of weather incidents and the operation of trains in extreme weather conditions.

internal reporting requirements and operational protocols relating to extreme weather to reasonably address “acts of nature,” carrier failure to abide by such rules certainly can, and does, cause or contribute to derailments, even though the carrier may strongly disavow any negligence or willful misconduct in subsequent civil tort litigation.¹¹

Finally, CP argues that Board investigation and consideration of its Tariff should be avoided here because a determination of unreasonableness could have “significant unintended consequences for public health and safety.” CP Motion at 10. CP’s heightened “public safety” rhetoric is unsubstantiated and fails to provide a sufficient basis for Complaint dismissal, especially since it is CP’s Tariff, and not Agrium’s Complaint, or the Board’s investigation of same, which was unilaterally established by CP to CP’s benefit and which could have significant unintended public safety and public interest consequences.

¹¹ See, e.g., Transp. Safety Bd. of Canada, Ry. Investigation Report R12W0165, *Main-Track Derailment, Canadian Pac. Ry. CP Freight Train 113-26 Mile 34.3, Carberry Subdivision Poplar Point, Manitoba, July 29, 2014*, at 12 (“derailment occurred when high winds resulting from severe weather in the area blew over the intermodal container cars . . . loaded with empty double-stacked containers. While Canadian Pacific Railway had protocols in place to deal with severe weather conditions, a lapse in posting ‘Wind Warning’ information delayed notification of the train crew. This resulted in the train continuing without mitigating action being taken, and likely contributed to the derailment.”).

What CP is really asking the Board to do here is to ignore longstanding precedent¹² and industry practice,¹³ by permitting CP to unilaterally impose, without check and investigation through a valid Complaint, new and onerous liability and indemnity rules that would not further safe transportation service of TIH commodities (and in fact may further the opposite behavior). CP's Tariff also has potential adverse impacts on the prevention-oriented statutory and common law regimes governing liabilities that CP is attempting to alter through its Tariff. Agrium respectfully submits that CP's "public health and safety" arguments are not a valid basis for dismissal of Agrium's Complaint.

Contrary to CP's erroneous factual assertions and premature merits arguments, the allegations in Agrium's Complaint, when considered in a light most favorable to Agrium, show that Agrium has made at least a *prima facie* case that CP is engaging in an unreasonable practice in its application of Item 54 of CP Tariff 8 terms to Agrium's tariff, and warrants further investigation.

¹² See, e.g., *Perishable Freight Investigation*, 56 I.C.C. 449, 483 (1920) ("tariff provisions which purport to state the law, fix limitations of the carriers' liability, or define the legal obligations of the parties are . . . generally objectionable").

¹³ A carrier's common carrier obligations to move traffic are shaped by the long history of common carriage, as well as the continuing national need for such carriage. See, e.g., *Akron, Canton & Youngstown R.R. v. ICC*, 611 F.2d 1162, 1167 (6th Cir. 1979).

ATTACHMENT A

SCHEDULE A to DISCLOSURE STATEMENT / EXHIBIT 2 TO PLAN
List of Released Parties

The list below consists of the parties who have executed settlement agreements with Montreal Maine & Atlantic Canada Co. (“MMAC”) and Robert J. Keach in his capacity as Chapter 11 Trustee of Montreal, Maine & Atlantic Railway Ltd. (the “Trustee”). Nothing in this list shall supersede, effect, modify or amend any such settlement agreement and to the extent of any conflict between the descriptions in this list and any such settlement agreement, the settlement agreement shall govern. All such settlement agreements are subject to court approval and other conditions, and the inclusion of any person or entity on this list does not create or imply the release of such person or entity from any claim; in all respects, the settlement agreements, and the court orders pertaining to the settlement agreements, shall govern. The term “Affiliate” used in this Schedule “A” means with respect to any entity, all other entities directly or indirectly controlling, controlled by, or under direct or indirect common control with such entity. The other capitalized terms used herein have the meaning ascribed to them in the Plan. The Released Parties are as follows:

1. **Devlar Energy Marketing LLC together with their parents Lario Oil & Gas Company and Devo Trading & Consulting Company (collectively “Devlar”)**, as well as their subsidiaries, Affiliates and each of their former and current respective employees, officers and directors, successors and permitted assignees, attorneys and insurers, (including St. Paul Fire and Marine Insurance Company and its direct and indirect parents, subsidiaries and Affiliates), but only to the extent of coverage afforded to Devlar by such insurers in relation to the Derailment.

2. **Oasis Petroleum Inc. and Oasis Petroleum LLC (jointly, “Oasis”)**, together with their parents, subsidiaries, Affiliates and each of their former and current respective employees, officers and directors, successors and permitted assignees, attorneys and insurers (including St. Paul Fire and Marine Insurance Company and its direct and indirect parents, subsidiaries and affiliates) but only to the extent of coverage afforded to Oasis by such insurers in relation to the Derailment, as well as the entities identified in Schedule 2 hereto but strictly as non-operating working interest owners or joint venturers

in the specific Oasis-operated wells that produced oil that was provided and supplied by Oasis that was transported in the train involved in the Derailment.

3. **Inland Oil & Gas Corporation, Whiting Petroleum Corporation, Enerplus Resources (USA) Corporation, Halcón Resources Corporation, Tracker Resources, Kodiak Oil & Gas Corp. (now known as Whiting Canadian Holding Company, ULC) and Golden Eye Resources LLC**, together with each of their respective parents, subsidiaries, Affiliates, and each of their former and current respective employees, officers, directors, successors and permitted assignees and attorneys, but strictly as non-operating working interest owners or joint venturers in any wells that produced oil that was provided, supplied and transported in the train involved in the Derailment.
4. **Arrow Midstream Holdings CCC. (“Arrow”)** together with its parents, subsidiaries, Affiliates, successors, officers, directors, principals, employees, attorneys, accountants, representatives, and insurers. For the avoidance of doubt, Arrow shall include its current parent Crestwood Midstream Partners LP; and insurers mean only those insurers who have issued liability insurance policies to or in favor of Arrow actually or potentially providing insurance for Claims against Arrow arising from or relating to the Derailment, including without limitation, Commerce and Industry Insurance Company under policy no. 3023278 and National Union Fire Insurance Company of Pittsburgh, Pa. under policy no. 41131539.
5. **Marathon Oil Company (“Marathon”)**, together with its parent, subsidiaries, successors and assigns, Affiliates, officers, directors, principals, employees, attorneys, accountants, representatives, insurers (to the extent strictly limited to coverage afforded to Marathon in relation to the Derailment), as well as the entities identified in schedule 5 attached hereto, but strictly as non-operating working interest owners or joint venturers in the specific Marathon-operated wells that produced and supplied oil that was transported on the train involved in the Derailment. For the avoidance of doubt, insurers, as used in this definition, shall include all insurers that issued liability policies to or for the benefit of Marathon and that actually or potentially provided coverage for Claims relating to or arising from the Derailment, including, but not limited to, Yorktown Assurance

Corporation policy number XSL-7-2013 and Old Maine Assurance Ltd. (reinsurance Agreement).

6. **QEP Resources, Inc. (“QEP”)**, together with its parents, subsidiaries, Affiliates, successors and assigns, officers, directors, principals, employees, attorneys, accountants, representatives, insurers (to the extent strictly limited to coverage afforded to QEP in relation to the Derailment), as well as those entities identified in schedule 6 attached hereto, but strictly as non-operating working interest owners or joint venturers in the specific QEP-operated wells that produced and supplied oil that was transported on the train involved in the Derailment. For the avoidance of doubt, insurers, as used in this definition, shall include all insurers that issued liability policies to or for the benefit of QEP and that actually or potentially provided coverage for Claims relating to or arising from the Derailment, including, but not be limited to, National Union Fire Insurance Company of Pittsburgh, Pa. (policy number 194-99-62); American Guarantee & Liability Insurance Company (policy number UMB6692611-02).
7. **Slawson Exploration Company, Inc. (“Slawson”)**, together with its parents, subsidiaries, Affiliates, successors and assigns, officers, directors, principals, employees, attorneys, accountants, representatives, insurers (to the extent strictly limited to coverage afforded to Slawson in relation to the Derailment), as well as those entities identified on schedule 7 attached hereto, but strictly as non-operating working interest owners in the specific Slawson-operated wells that produced oil that was transported on the train involved in the Derailment. For the avoidance of doubt, insurers, as used in this definition, shall include all insurers that issued liability policies to or for the benefit of Slawson and that actually or potentially provided coverage for Claims relating to or arising from the Derailment, including, but not be limited to, Federal Insurance Company (policy 3579 09 19 and 7981 72 74), Arch Specialty Insurance Company (policy EE00039761 03), and AIG (policy BE031941993).
8. **Indian Harbor Insurance Company, XL Insurance, XL Group plc and their Affiliates** (strictly as insurers of MMA and MMAC).

9. **Edward A. Burkhardt, Larry Parsons, Steven J. Lee, Stephen Archer, Robert C. Grindrod, Joseph C. McGonigle, Gaynor Ryan, Donald Gardner, Jr., Fred Yocum, Yves Bourdon and James Howard, in their capacity as directors and officers of MMA and MMAC, Montreal, Maine & Atlantic Corporation and/or LMS Acquisition Corporation (the “D&O Parties”).**
10. **Hartford Casualty Insurance Company, together with its parents, subsidiaries, Affiliates, officers and directors** (strictly as insurer of Rail World, Inc.).
11. **Chubb & Son, a division of Federal Insurance Company** (strictly as insurers of Rail World, Inc. and Rail World Holdings, LLC).
12. **Rail World Holdings LLC; Rail World, Inc.; Rail World Locomotive Leasing LLC; The San Luis Central R.R. Co.; Pea Vine Corporation; LMS Acquisition Corporation; MMA Corporation; Earlston Associates L.P.,** and each of the shareholders, directors, officers or members or partners of the foregoing, to the extent they are not D&O Parties (the “**Rail World Parties**”). For the avoidance of doubt, (i) Rail World Parties also includes Edward A. Burkhardt, solely in his capacity as director, officer and/shareholder of certain of the Rail World Parties; and (ii) the inclusion of the above entities within the definition of “Rail World Parties”, except for the purpose of the settlement agreement executed with MMAC and the Trustee, shall not be construed to create or acknowledge an affiliation between or among any of the Rail World Parties.
13. **General Electric Railcar Services Corporation, General Electric Company** and each of its and their respective parents, Affiliates, subsidiaries, limited liability companies, special purpose vehicles, partnerships, joint ventures, and other related business entities, and each of its and their respective current or former parents, Affiliates, subsidiaries, limited liability companies, special purpose vehicles, partnerships, joint ventures, other related business entities, principals, partners, shareholders, officers, directors, managers, partners, employees, agents, insurers, attorneys, accountants, financial advisors, investment bankers, consultants, any other professionals, any other representatives or advisors, and any and all persons who control any of these, as well as any predecessors-

in-interest of, or any assignors or vendors of any equipment involved in the Derailment to, any of the foregoing entities and any of the successors and assigns of any of the foregoing entities.

14. **Trinity Industries, Inc., Trinity Industries Leasing Company, Trinity Tank Car, Inc., and Trinity Rail Leasing 2012 LLC, Trinity Rail Group LLC, RIV 2013 Rail Holdings LLC, and Trinity Rail Leasing Warehouse Trust**, inclusive of each of their respective predecessors, agents, servants, employees, shareholders, officers, directors, attorneys, representatives, successors, assigns, parents, subsidiaries, Affiliates, limited liability companies, insurers, and reinsurers (but strictly to the extent of coverage afforded to the such parties by said insurers and reinsurers), including but not limited to whether such entities are in the business of leasing, manufacturing, servicing or administrating rail cars.
15. **Union Tank Car Company, the UTLX International Division of UTCC, The Marmon Group LLC and Procor Limited (the “UTCC Parties”)**, and each of their respective predecessors, servants, employees, owners, members (strictly with respect to The Marmon Group LLC), shareholders, officers, directors, partners, associates, attorneys, representatives, successors, assigns, subsidiaries, Affiliates, and parent companies, insurers, and reinsurers listed in schedule 15 attached hereto, but strictly to the extent of coverage afforded to the UTCC Parties by said insurers and reinsurers, regardless of whether such entities are or were in the business of leasing, manufacturing, servicing, or administering rail car leases or otherwise.
16. **First Union Rail Corporation (“First Union”)**, together with its parents, subsidiaries, Affiliates, officers, directors, predecessors, successors, assigns, servants, employees, shareholders, attorneys, representatives and insurers and reinsurers (strictly to the extent limited to coverage afforded to First Union, and including, but not limited to, Lexington Insurance Company (including pursuant to the Pollution Legal Liability Select Policy no. PL52675034 and Stand Alone Excess Liability Policy no. 018403252) and Superior Guaranty Insurance Company (including pursuant to Excess Liability Policy no. 404-1XSCI13)).

17. **CIT Group, Inc.**, and its Affiliates, Federal Insurance Company solely in its capacity as an insurer of CIT Group, Inc. and its Affiliates and not in any other capacity, and Arch Insurance Group solely in its capacity as an insurer of CIT Group, Inc. and its Affiliates, and not in any other capacity.
18. **ConocoPhillips Company (“ConocoPhillips”)**, together with its subsidiaries, Affiliates, and each of their former and current respective employees, officers and directors, successors and permitted assignees, attorneys, and insurers (and the insurers direct and indirect parents, subsidiaries and Affiliates), but with regards to such insurers, only to the extent of coverage provided to ConocoPhillips by such insurers in relation to the Derailment, as well as those entities identified in Schedule 18 hereto, but strictly as non-operating working interest owners in the specific ConocoPhillips operated wells that produced and supplied oil that was transported on the train involved in the Derailment.
19. **Shell Oil Company and Shell Trading (US) Company**, together with their subsidiaries, Affiliates, and each of their former and current respective employees, officers and directors, successors and permitted assignees, attorneys, and insurers (and the insurers’ direct and indirect parents, subsidiaries and Affiliates), but with regards to such insurers, only to the extent of coverage provided to Shell Oil Company and Shell Trading (US) Company, by such insurers in relation to the Derailment.
20. **Incorr Energy Group LLC (“Incorr”)**, together with its subsidiaries, Affiliates and each of their former and current respective employees, officers and directors, successors and permitted assignees, attorneys and insurers but only with respect to coverage afforded by such insurers to Incorr in relation to the Derailment.
21. **Enserco Energy, LLC**, together with its parent, subsidiaries, Affiliates, and each of their former and current respective employees, officers and directors, successors and permitted assignees, attorneys, and insurers (and the insurers’ direct and indirect parents, subsidiaries and Affiliates), but with regards to such insurers, only to the extent of coverage provided to Enserco Energy, LLC, by such insurers in relation to the Derailment.

22. **The Attorney General of Canada, the Government of Canada, Her Majesty the Queen in Right of Canada and the departments, crown corporations and agencies including the Canadian Transportation Agency, and including all past, present and future Ministers, officers, employees, representatives, servants, agents, parent, subsidiary and affiliated crown corporations and agencies, and their respective estates, successors and assigns.**
23. **(i) Irving Oil Limited, Irving Oil Company, Limited, Irving Oil Operations General Partner Limited and Irving Oil Commercial G.P.,** (ii) any of their Affiliates (as defined in the settlement agreement), (iii) any predecessors, successors and assigns of any of the foregoing Persons named in clauses (i) and (ii) of this paragraph 23, and (iv) any directors, officers, agents and/or employees of any of the foregoing Persons named in clauses (i), (ii) and (iii) of this paragraph 23 (the “**Irving Parties**”), and the insurers listed in Schedule 23 attached hereto, but only in their respective capacities as insurers of the Irving Parties under the insurance policies listed by policy numbers in said Schedule 23 (the “**Irving Insurers**”). Notwithstanding the foregoing or anything else in this list and the Plan, the claims (including the Claims) and/or other rights that the Irving Parties have (or may have) against their insurers (including but not limited to the Irving Insurers) or any one or more of them under any applicable policies, at law, in equity or otherwise, are fully preserved and said insurers (including but not limited to the Irving Insurers) are not Released Parties in connection with said claims (including any Claims) and/or other rights of the Irving Parties.
24. **(i) World Fuel Services Corporation, World Fuel Services, Inc., World Fuel Services Canada, Inc., Petroleum Transport Solutions, LLC, Western Petroleum Company, Strobel Starostka Transfer LLC (“SST”), Dakota Plains Marketing LLC, Dakota Plains Holdings, Inc., DPTS Marketing Inc., Dakota Plains Transloading LLC, Dakota Petroleum Transport Solutions LLC (the “World Fuel Parties”),** (ii) any of their Affiliates, (iii) any predecessors, successors and assigns of any of the foregoing Persons named in clauses (i) and (ii) of this paragraph 24, and (iv) any directors, officers, agents and/or employees of any of the foregoing Persons named in clauses (i), (ii) and (iii) of this paragraph 24. and the insurers listed in schedule 24 attached hereto, but only

in their respective capacities as insurers under the insurance policies listed by policy number in said schedule 24 (the “**World Fuel Insurers**”). Notwithstanding the foregoing or anything else in this list and the Plan, the claims (including the Claims) and/or other rights that the World Fuel Parties have (or may have) against their insurers (including but not limited to the World Fuel Insurers), SST or its insurers, or any one or more of them under any applicable policies, at law, in equity or otherwise, are fully preserved and SST, as well as said insurers (including but not limited to the World Fuel Insurers) are not Released Parties in connection with said Claims and/or other rights of the World Fuel Parties.

25. **The SMBC Parties, namely: SMBC Rail Services, LLC f/k/a Flagship Rail Services, LLC, and its respective predecessors, servants, employees, independent contractors, owners, shareholders, officers, directors, associates, attorneys, accountants, representatives, successors, assigns, agents, subsidiaries, affiliates, and parent companies, and including without limitation Sumitomo Mitsui Financial Group, Inc., Sumitomo Mitsui Finance & Leasing Company, Limited, Sumitomo Mitsui Banking Corporation of Canada, Sumitomo Mitsui Banking Corporation, SMBC Capital Markets, Inc., SMBC Leasing and Finance, Inc., SMBC Nikko Securities America, Inc., JRI America, Inc., Manufacturers Bank, SMBC Global Foundation, Inc., SMBC Financial Services, Inc., SMBC Cayman LC Limited, SMBC Capital Partners LLC, SMBC Leasing Investment LLC, SMBC Marine Finance, Inc., Sakura Preferred Capital (Cayman), Limited, TLP Rail Trust I, FRS I, LLC, and FR Holdings, LLC and its subsidiaries. “SMBC Parties” also means TLP Rail Trust I, a Delaware Statutory Trust, SMBC Rail Services, LLC, as the owner participant and beneficiary of TLP Rail Trust I, and Wilmington Trust Company, Trustee of TLP Rail Trust I. “SMBC Parties” also means Liberty Mutual Holding Company, Inc. and its subsidiaries and affiliates, Liberty Mutual Group Inc., Liberty Mutual Insurance Company, Liberty Insurance Underwriters Inc., Liberty Surplus Insurance Corporation, and Liberty International Underwriters (collectively, “**Liberty**”) and any reinsurers that Liberty has any policy, agreement, contract, or treaty with that relates in any way to any of the SMBC Parties or any insurance policy issued by Liberty to any of the SMBC Parties.**

Notwithstanding the foregoing or anything else in this list, and without implying or providing any limitation, the term “Released Parties” as used herein or above does not include, and shall not be deemed to include Canadian Pacific Railway Company.