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June 4, 2015

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

VIA ELECTRONIC FILING

RE: Agrium Inc. and Agrium U.S. Inc. v. Canadian Pacific Railway Company
Docket No. 42145

Dear Ms. Brown:

Attached for e-filing in the above referenced docket is Canadian Pacific Railway Company's Answer to the Complaint filed by Agrium Inc. and Agrium U.S. Inc.

Sincerely,

Stinson Leonard Street LLP

A handwritten signature in blue ink that reads "David F. Rifkind".

David F. Rifkind

Cc: Peter A. Pfohl

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**AGRIUM INC. and
AGRIUM U.S. INC.**

Complainant,

v.

**CANADIAN PACIFIC RAILWAY
COMPANY**

Defendant.

Docket No. 42145

ANSWER OF CANADIAN PACIFIC RAILWAY COMPANY

Canadian Pacific Railway Company (“CP”), by and through its undersigned counsel, denies all allegations in Complainants Agrium Inc. and Agrium U.S. Inc.’s (“Agrium”) Complaint except for those expressly admitted herein, and otherwise answers Agrium’s Complaint as follows:

1. As to the allegations in Paragraph 1 of the Complaint, CP is without information or knowledge sufficient to form a belief as to their truth and therefore denies.
2. As to the allegations in Paragraph 2 of the Complaint, CP is without information or knowledge sufficient to form a belief as to their truth and therefore denies.
3. As to the allegations in Paragraph 3 of the Complaint, CP admits that it is a Canadian corporation and that it is headquartered in Calgary, Alberta. CP admits that it has affiliates and subsidiaries. CP admits that the Canadian Pacific Railway Company conducts

common carrier rail operations in Canada and that its indirect United States rail operating subsidiaries, consisting of Soo Line Railroad Company, Delaware and Hudson Railway Company, Inc. and the Dakota, Minnesota & Eastern Railroad Corporation, conduct common carrier rail operations in the United States. The Canadian and United States rail operating entities operate under the trade name, Canadian Pacific.

4. As to the first sentence of Paragraph 4 of the Complaint, CP admits. As to the second sentence, CP admits that Tariff 8 is frequently incorporated by reference into CP pricing authorities and CP admits that it is incorporated into the Agrium pricing authority applicable to the rail transportation of anhydrous ammonia from Agrium's facilities in Alberta, Canada to Agrium's facilities in Leal, North Dakota and Glen Falls, New York.

5. As to the allegations in Paragraph 5 of the Complaint, CP admits that Exhibit A is an accurate copy of CP Tariff 8, Item 54.

6. As to the language quoted in Paragraph 6 of the Complaint, CP admits that it is an accurate quotation from CP Tariff 8, Item 54.

7. As to the allegations in Paragraph 7 of the Complaint, CP admits that in accordance with applicable Canadian and United States laws including 49 U.S.C. § 10702, CP establishes and maintains tariffs that set forth the terms of common carrier rail service that it and its affiliates provide in Canada and in the United States. These tariffs include CP Tariff 8, Item 54. The remaining allegations in Paragraph 7 of the Complaint are vague and ambiguous and, therefore, CP denies them.

8. As to the allegations in Paragraph 8 of the Complaint, CP admits.

9. The allegations in Paragraph 9 of the Complaint are vague and ambiguous and, therefore, CP denies them.

10. As to the allegations in Paragraph 10, the quoted language is selected excerpts of CP Tariff 8, Item 54 and therefore is not an accurate representation. CP Tariff 8, Item 54 speaks for itself and CP denies any characterization inconsistent therewith.

11. The allegations in Paragraph 11 (and in the subsequent paragraphs for which this response is referenced) consist of legal arguments and conclusions regarding the interpretation and application of CP Tariff 8, Item 54 and of various unspecified laws and regulations to which no response is required. To the extent a response is required, CP denies. Further, the allegations are vague, ambiguous and speculative since the Complaint states no live case or controversy. CP Tariff 8, Item 54 speaks for itself and CP denies any characterization inconsistent therewith. By way of further response, CP states that Tariff 8, Item 54 in no way seeks to, or does, relieve CP of its obligations under federal regulations or of its responsibility for harm caused by CP's negligence or willful misconduct. TIH is one of the most lethal categories of substance. An accidental release could have catastrophic consequences and even a minor incident involving a train carrying TIH can give rise to substantial liabilities due to its dangerous nature. Notwithstanding the unique and catastrophic risks associated with TIH, CP's common carrier obligation currently requires that CP provide rail transportation service to TIH shippers. Shippers decide, *inter alia*, where to ship, how much TIH to ship, and the type of equipment in which to ship. Although these and other shipper decisions have a substantial impact on the amount of risk to CP and to the public associated with TIH rail transportation, under the existing regulatory framework, CP cannot properly account for the TIH specific risks in the transportation rate and has limited ability otherwise to influence such decisions. Tariff 8, Item 54 ensures that TIH shippers properly account for the risks associated with their decisions (other than the risk of CP negligence or willful misconduct) thereby promoting safer and more efficient rail

transportation and reducing public health and safety risks. Tariff 8, Item 54 is also intended to protect CP from incurring liability—liability which may be catastrophic—for TIH related harm that was not caused by CP.

12. See response to Paragraph 11.

13. See response to Paragraph 11.

14. See response to Paragraph 11.

15. See response to Paragraph 11.

16. See response to Paragraph 11.

17. See response to Paragraph 11.

18. As to the allegations in Paragraph 18 of the Complaint, CP admits that it moved anhydrous ammonia by rail from the Canadian origins to Leal, North Dakota and Glen Falls, New York pursuant to CP Contract #54457 and under prior contracts.

19. See response to Paragraph 11. Moreover, Contract #54457 speaks for itself and CP denies any characterization inconsistent therewith.

20. As to the first and second sentences of Paragraph 20 of the Complaint, CP admits. CP denies the remaining allegations. By way of further response, CP states that it often negotiates with its customers over the terms of service including the terms of CP Tariff 8, Item 54 and may make modifications based on these negotiations. CP is generally willing to modify its proposed defense, indemnity, and liability contract language if the TIH shipper agrees to take reasonable actions to reduce the risks associated with rail transportation of TIH such as committing to replacing older tank cars with newer tank cars that are manufactured to higher safety specifications.

21. As to the allegations in Paragraph 21 of the Complaint, CP states that it issued a common carrier rate pursuant to Agrium's request. CP further admits that Exhibit B is an accurate copy of Tariff CPRS 2244-B (Revision 3) ("CPRS 2244-B").

22. The first sentence of Paragraph 22 of the Complaint is a legal conclusion to which no response is required. To the extent a response is required, CP denies. As to the second sentence, CPRS 2244-B speaks for itself and CP denies any characterization inconsistent therewith.

23. As to the allegations in Paragraph 23 of the Complaint, CPRS 2244-B speaks for itself and CP denies any characterization inconsistent therewith.

24. As to the allegations in Paragraph 24 of the Complaint, CPRS 2244-B speaks for itself and CP denies any characterization inconsistent therewith.

25. The allegations in Paragraph 25 of the Complaint are vague and ambiguous and, therefore, CP denies them except that CP admits that CPRS-224B is not a contract under 49 U.S.C. §10709. By way of further response, CP states it was willing to negotiate with Agrium on the terms of service for the transportation covered by CPRS-2244B including defense, liability and indemnity provisions but Agrium opted instead to request a common carrier rate.

26. As to the allegations in Paragraph 26 of the Complaint, CP is without information or knowledge sufficient to form a belief as to their truth and therefore denies. By way of further response, CP states that Agrium does have a choice—CP offered Agrium contractual terms but Agrium refused.

COUNT I:

(Unreasonable Practice – Customer Defense Requirements)

27. CP restates and realleges its previous responses.
28. See response to Paragraph 11.
29. See response to Paragraph 11.
30. See response to Paragraph 11.

COUNT II:

(Unreasonable Practice – Customer Indemnity Requirements)

31. CP restates and realleges its previous responses.
32. See response to Paragraph 11.
33. See response to Paragraph 11.
34. See response to Paragraph 11.

COUNT III:

(Unreasonable Practice – Negligence/Willful Misconduct Provisions)

35. CP restates and realleges its previous responses.
36. See response to Paragraph 11.
37. See response to Paragraph 11.
38. See response to Paragraph 11.
39. See response to Paragraph 11.
40. The first sentence of Paragraph 40 consists of legal arguments and conclusions regarding interpretation and application of CP Tariff 8, Item 54 and federal regulations to which no response is required. To the extent a response is required, CP denies. The second sentence refers to a document that speaks for itself and CP denies any

characterization inconsistent therewith. As to the third sentence, CP is without information or knowledge sufficient to form a belief as to their truth except that CP acknowledges that it asserted as a defense that the accident was not caused by CP's negligence or willful misconduct. CP further states that the National Transportation Safety Board ("NTSB") reports on the Minot, ND, (2002) and Macdona, TX (2004) accidents in particular highlight the substantial impact that TIH shippers' choices, including the choice of tank cars used for rail transportation, have on the risk to public health and safety and the importance of ensuring that shippers properly account for such risks in making such decisions. In Minot, the TIH shipper provided non-normalized steel tank cars constructed before 1989 although such cars were known to be of inferior crashworthiness to available tank cars constructed from normalized steel and to higher specifications. The NTSB found that five of these inferior cars suffered "catastrophic failure" resulting in an "instantaneous release" of about 146,700 gallons of anhydrous ammonia which immediately formed a deadly plume. *See* National Transportation Safety Board, Railroad Accident Report NTSB/RAR-04/01, *Derailment of Canadian Pac. Ry. Freight Train 292-16 and Subsequent Release of Anhydrous Ammonia Near Minot, ND, January 18, 2002*, at 54. The NTSB concluded that use of such cars to transport TIH "poses an unquantified but real risk to the public" and recommended improved safety standards in rail tank car crashworthiness. *Id.* at 63. Notwithstanding the NTSB's concerns and recommendations, the Macdona accident also involved the failure of a shipper provided non-normalized steel tank car, prompting renewed tank car safety recommendations from the NTSB. *See e.g.*, National Transportation Safety Board, Railroad Accident Report NTSB/RAR-06/03, *Collision of Union Pac. RR Train MHOTU-23 with BNSF Ry. Co. Train MEAP-TUL-126-D With Subsequent Derailment and Hazardous Materials Release, Macdona, TX, June 28, 2004*, at 45-53. Even today, despite the known risks

and the availability of tank cars that are built to substantially higher safety standards, some TIH shippers, including Agrium, continue to ship TIH in older model tank cars.

41. See response to Paragraph 11.

COUNT IV:

(Unreasonable Practice – Customer Joint Liability Requirements)

42. CP restates and realleges its previous responses.
43. See response to Paragraph 11.
44. See response to Paragraph 11.
45. See response to Paragraph 11.
46. The allegations in Paragraph 46 are speculative and, therefore, CP denies them.

DEFENSES

1. The Complaint fails to state a claim that is ripe for consideration by the Surface Transportation Board because the events triggering application of CP Tariff 8, Item 54 have not occurred since the tariff's adoption.
2. The Complaint fails for lack of case or controversy because Agrium has suffered no injury as a result of CP Tariff 8, Item 54.
3. The Complaint fails to state a claim because CP Tariff 8, Item 54 is not unreasonable.
4. The Complaint fails for lack of jurisdiction because the pricing authority was issued in Canada and applies to railways primarily in Canada, outside the Board's jurisdictional authority.

WHEREFORE, CP requests that the Complaint be dismissed with prejudice; that Agrium's request that the Board enter an order directing CP to cease and desist from maintaining CP Tariff 8, Item 54 and barring enforcement thereof and any successor tariff be denied; that no relief of any kind be awarded to Agrium; that CP be awarded its costs; and that the Board grant CP such other and further relief as may be appropriate.

Respectfully submitted,



David F. Rifkind

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Dated: June 4, 2015

*Attorneys for Canadian Pacific Railway
Company*

CERTIFICATE OF SERVICE

I, David F. Rifkind, hereby certify that on this 4th day of June 2015, I caused a copy of Canadian Pacific Railway Company's Answer to the Complaint of Agrium Inc. and Agrium U.S. Inc. to be served by First Class United States mail and by e-mail on the following:

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David F. Rifkind