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LAW OFFICES OF
LOUIS E. GITOMER, LLC.

LOUIS E. GITOMER
Lou@lgraillaw.com

MELANIE B. YASBIN
Melanie@lgraillaw.com
410-296-2225

600 BALTIMORE AVENUE, SUITE 301
TOWSON, MARYLAND 21204-4022
(410) 296-2250 • (202) 466-6532
FAX (410) 332-0885

February 28, 2012

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Public Record

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: Finance Docket No. 35517, *CF Industries, Inc. v. Indiana & Ohio Railway Company, Point Comfort and Northern Railway Company, and Michigan Shore Railroad, Inc.*

Dear Ms. Brown:

Enclosed for filing is an errata to Volume I of the Reply Statement that was filed yesterday with an earlier version of the pleading. Errata are enumerated below. Because of the changing in the numbering of footnotes, an entire pleading is attached. I apologize for any inconvenience caused to the parties or the Board. The errata are as follows:

Page 10, delete “{In the TPW instance, did the cars run together on in 3 trains of three?}” and replace it with “In the instance on RailAmerica’s Toledo, Peoria & Western Railway (TPW) referred to by Dow,¹ this was a one-time isolated incident where 6 cars were received by TPW at interchange when two separate trains of 3 cars each of anhydrous ammonia were consolidated by the BNSF. However, after due consideration by the railroad’s general manager and others of how best to transport the highly dangerous chemicals, TPW handled all 6 cars in one train at the same time. Unfortunately, the decision had to be made quickly due to the fact that no prior notice of the shipment of the cars was given to TPW pursuant to Tariff TPW 0900-2, Appendix A. Respondent Railroads continue to believe that shippers should openly discuss their needs with their rail carriers, especially their short line rail carriers who have limited resources and capabilities.”

Page 15, at the end of the first paragraph, delete “TALK ABOUT COST OF SPILL cannot afford a hazardous materials spill.”

¹ Dow’s Opening at 19.

Ms. Cynthia T. Brown
February 28, 2012

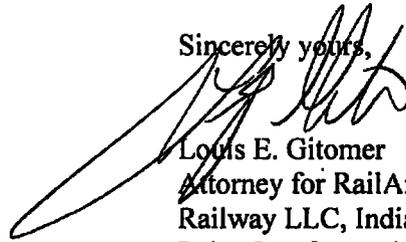
Page 15, insert in at the end of the next to last paragraph "The words "necessary" and "Reasonable" are not equivalent. Here, the question is not whether the requirements in the Tariffs are "necessary" but whether they are "reasonable."

Page 18, delete highlighting at top of page.

Page 18, delete the last paragraph on the page:

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
Michigan Shore Railroad, Inc.

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35517

CF INDUSTRIES, INC.

v.

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

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

**VOLUME I - REPLY
ERRATA**

Scott G. Williams Esq.
Kenneth G. Charron, Esq.
RailAmerica, Inc.
7411 Fullerton Street, Suite 300
Jacksonville, FL 32256
(904) 538-6329

Louis E. Gitomer, Esq.
Law Offices of Louis E. Gitomer
600 Baltimore Avenue
Suite 301
Towson, MD 21204
(410) 296-2250
Lou@lgrailaw.com

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

Dated: February 28, 2012

BEFORE THE
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COMPANY, AND MICHIGAN SHORE RAILROAD, INC.

Respondents¹ file this reply in accordance with the Surface Transportation Board's (the "Board") decision served on September 30, 2011. In response to CF Industries, Inc.'s ("CFI"), Dow Chemical Company's ("Dow"), American Chemistry Council's ("ACC"), Arkema, Inc.'s ("Arkema"), The Chlorine Institute, Inc.'s ("CII"), The Fertilizer Institute's ("FI"), and PPG Industries, Inc.'s ("PPG") (ACC, Arkema, CII, FI, and PPG are collectively referred to as "Complainants") opening evidence, Respondents assert that CFI, Dow, and Complainants

¹ 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."

incorrectly state the facts at issue regarding the TIH/PIH² Tariffs³, have the burden of proof that the Tariffs are unreasonable, and failed to show the Tariffs are an unreasonable practice.⁴

CFI & Complainants continue to ignore the plain language of the Tariffs (the only Respondent documents governing the movements) and rely on negotiating tools and canceled tariffs in an attempt to show that Respondent Railroads' procedures are unreasonable. Complainants ignore that the Federal Railroad Administration ("FRA") stated several years ago that "...parties are encouraged to go beyond the minimum regulatory requirements in establishing and implementing plans, rules, and procedures for safe transportation operations." *Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials*, 74 FR 1793 (January 13, 2009). Instead, DOW, CFI, and Complainants continue to assert that additional safety measures are unreasonable simply because they are not specifically mandated by FRA, Pipeline Hazardous Materials Safety Administration ("PHMSA"), and the Transportation Safety Administration ("TSA"). Finally, despite Respondent Railroads' attempt to meet with several Complainants to discuss the benefits of enhancing the safety of rail operations, Complainants have offered no evidence refuting the obvious safety benefits of Respondent Railroads' requirements that are specified in the Tariffs.

There are 3 practices that Complainants, CFI, or Dow claim are unreasonable: (1) train speed; (2) notice requirements; and (3) priority train service. With regard to these issues, the

² TIH/PIH is used as the abbreviation for Toxic Inhalation Hazards and Poison Inhalation Hazards.

³ Tariffs refers to AGR 0900-1, IORY 0900-1, PCN 0900-1, and MSR 0900, the tariffs at issue in this proceeding. It should be noted; however, that MSR 0900 expired and has not been replaced since MSR is a handling carrier for all TIH/PIH shipments.

⁴ On Opening, Respondents requested that the Board declare that the numerous versions of a PowerPoint presentation prepared by RailAmerica ("SOP") are mere proposals and not tariffs or enforceable contracts because the movement of trains containing TIH/PIH are governed by the Tariffs and not the SOP.

Tariffs require the following: (1) shippers are required to give notice “to [Respondent Railroad] upon tender of a car or cars containing TIH/PIH to a rail carrier for delivery to [Respondent Railroad];” (2) trains will travel at the appropriate speed for safe operation based on the conditions of the rail line, time of year, weather, and any other relevant factors deemed relevant by [Respondent Railroad] operating and/or safety personnel;” and (3) when a Respondent Railroad receives a car or cars, they will be put into priority trains. These trains will depart within the 48 hour period required by 49 CFR §174.14. “The priority train will also provide more expeditious service and safer transit to the receiver than handling the car or cars in the normal course of business that would require moving through yards, switching onto a regular train, and starting and stopping at different shippers along the route to the receiver.” See Tariffs Purpose Section. No more than 3 cars loaded with TIH-PIH commodities will be transported in the same priority train at any time, unless approved by the General Manager of the individual railroad. See Tariffs Item 1000 F-General Rules. In the attached Verified Statement of Gary Wolf (Exhibit A), he provides an engineering analysis of the handling of priority trains compared to the typical handling of local freight trains and concludes that the use of priority trains complies with FRA rules and is safer than using typical local freight trains.

Nevertheless, CFI and Complainants misrepresent the Tariffs’ content regarding train speed, notice requirements, and priority trains to support their unreasonable practice claims.

CFI argues that “protocols” (which it does not specifically define but seem to include the SOPs, canceled tariffs, and portions of existing Tariffs) are designed to force TIH/PIH shippers off of the various rail systems. CFI pointedly ignores the actual Tariff language in an attempt to support its claims and argues that TIH/PIH trains must move at a reduced speed of 10 mph and

that a shipper must provide a five-day prior notice requirement.⁵ Neither of these factual assertions is accurate.

Complainants maintain that a key element of the Tariffs requires that all priority trains be accompanied at all times by a Respondent Railroad employee. While the Tariffs do not include any language to that effect, if the train is being moved by Respondent Railroad, it would logically be accompanied by at least two Respondent Railroad's employees, the engineer and conductor. Respondent Railroads do not operate remote controlled trains transporting highly dangerous chemicals. Complainants also rely on misstatements about limited train speeds to support an argument about the safety of tank cars, when there are no train speed restrictions in the Tariffs. Respondents do not deny that when tank cars are manufactured in accordance with the governing regulations, the tank car structures are relatively secure. But, since train speed and mass are factors in tank car failures in train collisions, Respondent Railroads have chosen to go beyond the minimum regulatory requirements and adopt Tariffs that provide for additional safety measures.

On Opening, Respondents requested that the Board declare that the numerous versions of the SOP are mere proposals and not tariffs or enforceable contracts because the movement of trains containing TIII/PIH is governed by the Tariffs and not the SOP. Yet, Complainants and CFI continue to refer to different parts of multiple draft SOPs and canceled tariffs to support their claims.

RESPONDENT RAILROADS' TARIFFS ARE REASONABLE

Railroads may establish practices that are reasonable, and the burden is on the complainants or the petitioning party to prove that the practices are not reasonable. *See City of*

⁵ *See* CF Industries, Inc., Opening Evidence at 6, 8.

Lincoln v. STB, 414 F.3d 858 (8th Cir. 2005), and *North American Freight Car Association, et al. v. BNSF Railway Company*, STB Docket No. 42060 (Sub-No. 1) (STB served January 26, 2007). Respondent Railroads' Tariffs are a reasonable practice.

Notice Requirement

The Tariffs simply require advance notice that a TIH/PIH car is being sent to a receiver on a Respondent Railroad's line. The purpose of the notice is to allow the Respondent Railroads to track the TIH/PIH car as it makes its way across the country and to be prepared to receive that TIH/PIH car when it arrives at interchange. As PPG has stated, it takes 10 minutes to fill out the notice and fax it.⁶ Having that information so that Respondent Railroads can track the TIH/PIH car gives the short line railroads, who have limited resources, the ability to plan and effectively utilize their resources. The minimal burden of having to fill out a form is far outweighed by the safety enhancement of the receiving railroad knowing when a shipment is coming.⁷

In *Canexus Chemicals Canada L.P v. BNSF Railway Company*, STB Docket No. 42131 (STB served Feb. 8, 2012) ("*Canexus*") the Board did not say that BNSF's notice requirement was unreasonable, just that it weighed in favor of finding an interchange point unreasonable when compared to an interchange point that did not require prior notices. Even so, Respondent Railroads notice requirement is unlike BNSF's notice requirement in *Canexus*. BNSF required notice, when interchange takes place at a smaller yard that was not heavily staffed, to be given to the yard ahead of time by the interchanging carrier. Respondent Railroads require that notice be sent at the time the cars are tendered to the originating carrier, so that Respondent Railroads can track the progress of the cars and be prepared for interchange. The burden on the shipper is

⁶ See Exhibit C to Respondents Opening Statement.

⁷ Respondent Railroads note that CFI, Dow, and Complainants have not disagreed that it is safer to keep a rail car filled with highly dangerous chemicals moving as opposed to sitting unattended on interchange track.

minimal.⁸

It is important to point out that there is no prior notice requirement of 5 days prior to “delivery” as CFI claims. Shippers are required to give notice “to [Respondent Railroad] *upon tender* of a car or cars containing TIH/PIH to a rail carrier for delivery to [Respondent Railroad].”⁹ Emphasis added. Because there is no five-day prior notice requirement, CFI’s argument that notification is unreasonable is fatally flawed because it is attacking a practice that is not part of the Tariffs and does not exist.

Train Speed

Despite CFI’s assertion, there is no speed limit mandated under the Tariffs. The Tariffs specifically state that “[t]he train will travel at the appropriate speed for safe operation based on the conditions of the rail line, time of year, weather, and any other relevant factors deemed relevant by [Respondent Railroad] operating and/or safety personnel.” CFI asserts that it is Respondent Railroads’ policy to apply 10 mph train speeds to all Respondent Railroads by relying on an email that was sent out after the Tariff was published. A quick look at all Respondent Railroads TIH/PIH tariffs will show that despite this email less than 20% of the Respondent Railroads have implemented tariffs similar to those at issue here. More importantly, the email cannot amend the Tariff and it is the Tariff that controls the shipper/railroad relationship.¹⁰ Despite the cited email, although some of the original Tariffs may have had speed

⁸ Indeed, if shippers and their associations had engaged Respondents in dialogue when the SOP’s were presented, Respondent Railroads would have, and will still, consider reducing the information required in order to further reduce the burden on the shippers, while allowing the Respondent Railroads to track TIH/PIH shipments and be ready to receive and deliver them.

⁹ See Tariffs Exhibit B.

¹⁰ See *Newton Gum Co. v. Chicago B. & Q. R. Co.*, 16 I.C.C. 341 (tariffs are to be interpreted according to the reasonable construction of their language); *Goe. C. Speir & Co., Inc. v Atlanta & W.P.R. Co.*, 151 I.C.C. 705 (the tariffs are to be construed according to their terms and the

restrictions, there are no speed restrictions in the most recent governing Tariffs.

As Respondents stated on opening,¹¹ assuming there are not additional track issues or other conditions, like standing water or ice, for example, a train delivering TIH/PIH can move at FRA designated speeds for that track. On AGR the train delivering TIH/PIH from interchange to Arkema will travel at 10 miles per hour because the track it is traveling over is FRA Class I track with a 10 mile per hour speed limit. On the IORY, MSR, and PCN the track where the TIH/PIH shipments move is FRA Class II, except that there are slow orders on the MSR causing it to handle TIH/PIH at 10 mph. On the New England Central Railroad Company (“NECR”)¹², another subsidiary railroad of RailAmerica, TIH/PIH trains travel at 25 miles per hour. Therefore, contrary to CFI’s arguments, there is nothing that mandates a maximum speed of 10 miles per hour. As stated in them, the Tariffs require speed appropriate to existing conditions, and it is undisputed that there is no maximum speed restriction under the Tariffs of 10 miles per hour to transport TIH/PIH commodities. Further, it is not a mandated practice of all RailAmerica’s railroads, as evidenced by the NECR operations.

Priority Trains.

With regard to priority trains, when a Respondent Railroad receives a car or cars, they will be put into priority trains. These trains will depart within the 48 hour period required by 49 C.F.R. §174.14. “The priority train will also provide more expeditious service and safer transit to the receiver than handling the car or cars in the normal course of business that would require moving through yards, switching onto a regular train, and starting and stopping at different

intention of the framers is not controlling); and *Kenner Truck Farmers’ Assn. v. Illinois Central R. Co.*, 32 I.C.C. 1 (the tariffs must be applied according to the plain language employed).

¹¹ Respondents Opening at 18.

¹² NECR has published NECR 0900-2, which is a tariff similar to the Tariffs at issue here. See Exhibit C.

shippers along the route to the receiver.” *See Tariffs Purpose Section and Verified Statement of Gary Wolf.* No more than 3 cars loaded with TIH-PIH commodities will be transported in the same priority train at any time, unless approved by the General Manager of the Respondent Railroad. *See Tariffs Item 1000 F-General Rules.*

Respondent Railroads set the car limit at 3 cars based on the historic shipments of AGR which shipped no more than three TIH/PIH cars in a train. This was not because AGR limited the number of TIH/PIH cars, but merely because it was the maximum number of TIH/PIH cars that AGR received. Respondent Railroads are still open to discussing with Dow, CFI, Complainants and others the limits on the number of TIH/PIH cars included in priority trains. While the Tariffs limit the TIH/PIH cars to 3 per train, the Tariffs also provide a mechanism for moving more than 3 cars per train, if such move is approved by the railroad’s general manager. In the instance on RailAmerica’s Toledo, Peoria & Western Railway (TPW) referred to by Dow,¹³ this was a one-time isolated incident where 6 cars were received by TPW at interchange when two separate trains of 3 cars each of anhydrous ammonia were consolidated by the BNSF. However, after due consideration by the railroad’s general manager and others of how best to transport the highly dangerous chemicals, TPW handled all 6 cars in one train at the same time. Unfortunately, the decision had to be made quickly due to the fact that no prior notice of the shipment of the cars was given to TPW pursuant to Tariff TPW 0900-2, Appendix A. Respondent Railroads continue to believe that shippers should openly discuss their needs with their rail carriers, especially their short line rail carriers who have limited resources and capabilities. Thus, if the shippers are willing to communicate with the railroads about their needs, the railroads can work to meet those needs.

¹³ Dow’s Opening at 19.

Burden of Proof

Respondent Railroads do not carry the burden of proof, to show that the Tariffs are reasonable. Despite Dow, CFI and Complainants protestations to the contrary, the burden of proof for showing that the Tariffs are unreasonable falls squarely on them. In a declaratory order proceeding, which is not at the behest of a court, the burden of proof falls on the party requesting the declaratory order. *See City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005).

Dow, Complainants, and CFI assert that there is a comprehensive regulatory regime already in place that governs the safety of hazardous materials transported by rail and it is managed by the FRA, PHMSA, and the TSA. Because this comprehensive safety system exists and is administered by an agency other than the Board, Dow, Complainants, and CFI believe that the Respondent Railroads have the burden of proving under *Consolidated Rail Corp. v. ICC*, 646 F.2d 642, 648 (D.C. Cir. 1981) ("*Conrail*") that the additional safety measures are necessary.

While both here and in *Conrail*, the traffic at issue was highly dangerous that is where the comparison between the two proceedings ends. *Conrail* was decided in a different context and under a different statutory scheme.

Prior to the Staggers Act, in an investigation, the burden of proof was on the railroad. *Bituminous Coal, Hiawatha, Utah, to Moapa, Nevada*, 361 I.C.C. 923, 928 (1979). The Staggers Act shifted the burden of proof to suspend (or enjoin) a proposed rule or practice to the protestant (here Dow, CFI, and Complainants). 49 U.S.C. §10707(c)(2) repealed. The requesting party in an investigation proceeding has had the burden of proof for over 30 years.

There are significant distinctions between the tariffs addressed in *Conrail* and here. First, the tariffs in *Conrail* were subject to regulation by FRA and the NRC. The Tariffs here are not subject to regulation by the NRC. The Board itself has acknowledged that *Conrail* was premised

“on a statutory scheme predating the Staggers Act.”¹⁴ Specifically, a pre-Staggers Act provision expressly placed the burden of proof on the carrier that proposed a rate or practice change that was suspended or investigated before it became effective. See 49 U.S.C. §10707(e) (1980). Unlike this petition for declaratory order or a complaint proceeding, *Conrail* involved tariffs filed in response to an Interstate Commerce Commission investigation, thus the statutory scheme demanded that the railroad carry the burden of proof.¹⁵ The decision in *Trainload* occurred nearly six months before the Staggers Act became law and was governed by pre-Staggers Act law.

Dow, CFI, and Complainants maintain that under *Conrail* the Respondents must show that the additional safety measures are necessary. In *Conrail*, the railroads were asking for additional regulations not required under the regulatory scheme. Unlike in *Conrail*, Respondent Railroads are not asking the Board to impose additional safety measures beyond what the FRA allows.

Under 49 C.F.R. Part 174 (the “Rules”) enforced by the FRA, the Respondent Railroads may impose additional safety conditions on their own. In the final rules for Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials, FRA and PHMSA stated that “...parties are encouraged to go beyond the minimum regulatory requirements in establishing and implementing plans, rules, and procedures for safe transportation operations.” 74 FR 1793 (January 13, 2009). Unlike in *Conrail*, the Rules also specifically provide for additional safety measures “[w]hen local conditions make the acceptance, transportation, or delivery of hazardous materials unusually hazardous, local restrictions may be imposed by the carrier ” 49 C.F.R.

¹⁴ *North American Freight Car Association, et al. v. BNSF Railway Company*, STB Docket No. 42060 (Sub-No. 1) (STB served January 26, 2007) (“*North American*”).

¹⁵ See *Trainload Rates on Radioactive Materials, Eastern R.R.*, 362 I.C.C. 756, 757 (1980) (“*Trainload*”).

§174.20(a). Thus, the Railroads may impose additional restrictions based on local conditions as long as it reports those conditions.

Based on the language of 49 C.F.R. §174.20 (a) the Rules are not exhaustive, but leave room for private industry to supplement the regulations based on line specific concerns. The need for additional restrictions is at the discretion of the railroads and the states. Therefore, even if the Staggers Act had not shifted the burden of proof to the shipper, *Conrail* would not control in this case.

Dow, CFI, and Complainants insist that Respondents must justify that the Tariffs are necessary under *Conrail*. But as discussed above, Dow, CFI, and Complainants carry the burden of proving that the priority train service and other aspects of the Tariffs are unreasonable.

Dow, CFI, and Complainants Have Not Shown that the Tariffs Constitute an Unreasonable Practice.

Dow claims that because Respondents have not shown that the existing regulatory scheme is insufficient, any additional safety measures are unreasonable. CFI and Complainants, argue that Respondents have not met their burden under *Conrail* of providing justification for imposition of more stringent requirements. Specifically CFI and Complainants contend that Respondents must prove that the expected benefit is commensurate to the cost and that when compared to other safety measures they represent an economical means of achieving the safety benefits.¹⁶ As discussed above, Dow's, CFI's and Complainants' reliance on *Conrail* is misguided.

The Board, in *North America*, determined that it need not follow *Conrail* in determining what constitutes a reasonable practice.

¹⁶ Complainants Opening at 8, citing *Conrail* at 648.

[I]n section 10702, Congress did not limit the Board to a single test or standard for determining whether a rule or practice is reasonable; instead, it gave the Board “broad discretion to conduct case-by-case fact-specific inquiries to give meaning to those terms, which are not self-defining, in the wide variety of factual circumstances encountered.”

The Board reaffirmed its adherence to *North American* when it stated: “Whether a particular practice is unreasonable depends upon the facts and circumstances of the case. The Board gauges the reasonableness of a practice by analyzing what it views as the most appropriate factors.” *Arkansas Electric Cooperative Corporation—Petition for Declaratory Order* (STB Finance Docket No. 35305) (STB served Mar. 3, 2011) (“*Coal Dust*”) at 5. Dow, CFI, and Complainants have the burden of proving the practices under the Tariffs are unreasonable. Respondents do not have to prove that the practices under the Tariffs are reasonable. Nevertheless, the practices provided for in the Tariffs are reasonable because they do not interfere with the Respondent Railroads common carrier obligation, are not a burden on the shippers, and increase safety on the Respondent Railroads.

The practices under the Tariffs will not cause Respondent Railroads to violate their common carrier obligation. In the recent *Canexus* decision, the Board stated that the common carrier obligation created two interrelated requirements, one, the railroad must provide, in writing, a common carrier rate to any person that requests them and two, the railroad must provide rail service pursuant to those rates upon reasonable request. *Citing* 49 U.S.C. §11101(a) and (b) and *Union Pac. R.R.—Pet. for Declaratory Order*, Finance Docket No. 35219, slip. op at 3-4 (STB served June 11, 2009).

Respondent Railroads agree that they have a common carrier obligation to quote rates and provide service for the transportation of TIH/PIH. The Tariffs do not prevent Dow from requesting a common carrier rate and they do not impair Respondent Railroads from providing

such service pursuant to those rates. Therefore, Respondent Railroads have and are continuing to fulfill their common carrier obligation.

Dow claims that the priority train service places unreasonable preconditions and restrictions on rail service for certain shippers.¹⁷ The priority train service does not create unreasonable preconditions or restrictions on TIH/PIH movements. Aside from paying the rate for the shipment, the notice requirement is the only requirement on the shipper. Taking 10 minutes to fill out a form required by the railroad so that it knows a TIH/PIH car is on the way is not a burden. Indeed, it expedites delivery by allowing the receiving railroad to track the car number so “you can watch it come across country. When it’s a day out...you can start gathering the resources” (see Deposition of Harry Shugart at Page 41, lines 2-4, Exhibit F of the Opening Statement), such as arranging for personnel and equipment to meet the train at interchange for inspection as required by FRA, and ensuring that the crew and locomotive are available to operate the priority train, probably within 12 hours of receipt of the car in interchange, instead of waiting for the next available train, which may be several days where there is two or three day per week service. “That’s the purpose of it, we just need to know its coming” Id. at page 41 (lines 5-6).

CFI takes issue with RailAmerica applying priority trains on a system-wide basis without accounting for local conditions. RailAmerica does not apply priority trains on a system wide basis. Of RailAmerica’s 43 railroads, only 7 have priority trains as part of their tariffs. The Respondent Railroads are all short line railroads and have varying local conditions. In handling TIH/PIH the railroads have the following characteristics: AGR travels 21 miles from CN interchange in Mobile, AL, milepost 873.5, to Arkema at Le Moyne, AL, milepost 852.5 on FRA

¹⁷ Dow Opening at 7.

Class I track; MMRR travels 37.5 miles from CSXT interchange at Waverly Yard in Holland, MI, milepost 23.6, to Bayer Crop Sciences on the Bayer Spur track, milepost 61.1 on FRA Class II track, which is subject to slow orders requiring 10 mph operations; PCN travels 13.3 miles from UP interchange at Lolita, TX, milepost 0, to the Simplot Plant at Point Comfort, TX, milepost 13.3 on FRA Class II track; and IORY travels 10.3 miles from the CSXT interchange at NA Tower, milepost 5.49, to Dow Chemical at Reading, OH, milepost 15.79 on FRA Class II track. None of the Respondent Railroads provide scheduled service. They all have a limited number of employees.

CFI does not address whether the Respondent Railroads' practices are unreasonable. Not once in its opening statement does CFI make the argument that Respondent Railroads' actual practices are unreasonable. Rather, CFI asserts that the "protocols" are designed to ultimately force TIH/PIH shippers off of the Respondent Railroads' systems but primarily focuses on whether Respondent Railroads' practices are "necessary" for safety. The words, "necessary" and "reasonable" are not equivalent. Here, the question is not whether the requirements in the Tariffs are "necessary" but whether they are "reasonable."

CFI also argues that the "protocols" have significant impacts on shippers. Even assuming that CFI means the "SOP", Respondents disagree that the impacts are significant but even if there were significant impacts, CFI has not demonstrated that the impacts were unreasonable considering the inherent danger of the commodities being shipped. But, two of the three "protocols" that CFI contends are unreasonable practices (10 mph train speed and 5-day notification) are not included in the Tariffs and are not a requirement that the Respondent Railroads seek to enforce.

Complainants, Dow, and CFI claim that priority train service decreases safety on the line but they do not provide any studies to support their claims. Instead they refer to Respondent Railroads' internal emails which show an open dialog between operations and marketing personnel regarding the development of one of the Tariffs. CFI, pointing to internal Respondent Railroads' emails discussing the safety of implementing priority trains (again, none of the Tariffs place limits on the speed TIH/PIH trains can travel) on the Carolina Piedmont Railroad ("CPDR") argue that because CPDR thought priority trains would increase safety concerns on its lines, such safety concerns would apply across all RailAmerica's railroads. As a result, of CPDR's concerns, CPDR did not implement priority trains on its lines.

Complainants assert that if Respondent Railroads want to make changes to the current safety scheme they should petition the FRA or PHMSA. Under the regulations currently in place, the Respondent Railroads do not need to seek modifications of tank car designs or of railroad operating procedures to increase safety measures on their rail lines. Under the Rules, Respondents do not have to seek authority from FRA or PHMSA to add safety measures of the kind at issue here. 49 C.F.R. §174.20(a). The Tariffs do not impose safety measures that conflict with those imposed by the regulatory agency at 49 C.F.R. Part 174. In fact, the Tariffs' requirements are complementary to the Rules and assist the Respondent Railroads in complying with the Rules. Therefore, Respondent Railroads have taken to heart that "parties are encouraged to go beyond the minimum regulatory requirements in establishing and implementing plans, rules, and procedures for safe transportation operations." *Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials*, 74 FR 1793 (January 13, 2009).

THIS PROCEEDING IS NOT AN APPROPRIATE FORUM TO ADDRESS THE RATES SET IN THE TARIFFS.

It has been recognized that there is “a conceptual overlap between railroads’ ‘practices’ and their ‘rates.’” *Union Pacific Railroad v. ICC* (“*Union Pacific*”), 867 F.2d 646, 649-650 (D.C. Cir. 1989). When CFI, Dow, and Complainants continues to argue that the purpose of the Tariffs is to increase profitability and not for safety purposes,¹⁸ it is difficult to believe that the true reason for the petition for declaratory order is to stop an unreasonable practice.

Despite there being no maximum speed limit but for FRA standards, CFI argues that the 10 mph speed limit substantially increases shippers’ costs.¹⁹ CFI also argues that the 3 cars per train will require customers to buy additional service²⁰, ignoring the fact that CFI has no history of shipping more than 3 cars at a time, even though it could request that additional cars move in one priority train. Complainants assert that the priority train service was implemented “with a clear view towards how much additional revenue and profit could be obtained for RailAmerica.”²¹ And Complainants argue that the priority train charges are a “subterfuge for a scheme designed and implemented to greatly inflate RailAmerica profits under the guise of improved safety measures.” *Id.* Complainants mention rates and profits again on page 6 of their Opening and Dow even declares in bold: “PTS has become a profit center for Defendants”.²² If the parties truly believe the purpose behind these safety measures is to unreasonably increase

¹⁸ CFI Opening at 7, Dow Opening at 25, Complainants Opening at 3-4.

¹⁹ CFI Opening at 9.

²⁰ CFI Opening at 9.

²¹ Complainants Opening at 2.

²² Dow Opening at 25. Dow further asserts that “Defendants refused” to participate in an empirical study, but Dow failed to inform the Board that such offer would require significant financial investment and long delay while short line railroads would be expected to suspend any attempts to enhance safety.

profits, they should have brought a rate reasonableness complaint asking the Board to find that the rates contributing to profits were unreasonable.

While couching it in terms of an unreasonable “surcharge” Dow goes so far as to state that the priority train service “does much more than merely recover Defendants costs of providing” priority train service, it asserts that priority train service unreasonably acts a revenue enhancer. Dow relies on *Rail Fuel Surcharges*, STB Ex Parte No. 661 (STB served Jan. 26, 2007), to support its claim that the “surcharge” is an unreasonable practice rather than an unreasonable rate. What Dow claims as a “surcharge” here is not the same as the surcharge in *Fuel Surcharges*. The fuel surcharge was found to be unreasonable because it was a percentage of the base rate and not tied to the actual attributes of the movement that directly affected the amount of fuel used. What Dow is really complaining about here is a percentage over the actual costs of the move, to provide for profits or other intangible cost associated with the movement that the Respondent Railroads include in the base rate they quote to shippers.²³ Thus, the percentage that Dow complains of is truly a “rate” issue and not a practice. If the parties believe that the rates for services are unreasonable, the proper forum is a complaint proceeding seeking a rate reasonableness inquire.

The Respondent Railroads continue to contend that in order for the Board to address the excessive cost issue raised by CFI, Dow, and Complainants, they are requesting the Board to “engage in rate regulation,” under the guise of a declaratory order, a practice proscribed by *Union Pacific*. The Board addressed a similar issue in *Cargill, Incorporated v. BNSF Railway Company*, STB Docket No. NOR 42120 (STB served January 4, 2011) at 6, and concluded that the “claim would necessarily focus on whether the level of the rate is justified, contrary to *Union*

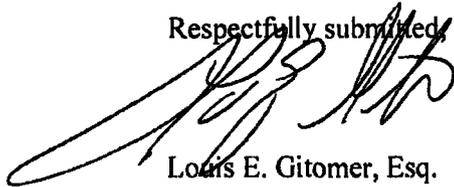
²³ Shefelbine Deposition at 52-55.

Pacific" and therefore dismissed the rate reasonableness element of the unreasonable practice complaint.

CONCLUSION

Based on the evidence submitted, CFI, Dow, and Complainants have failed to show that the SOP is included in the Tariffs and that the actual Tariffs requirements are an unreasonable practice. Respondents respectfully request the Board to deny the relief sought by CFI, Dow, and Complainants in this proceeding.

Respectfully submitted,



Louis E. Gitomer, Esq.
Law Offices of Louis E. Gitomer
600 Baltimore Avenue
Suite 301
Towson, MD 21204
(410) 296-2250
Lou@lgrailaw.com

Scott G. Williams Esq.
Kenneth G. Charron, Esq.
RailAmerica, Inc.
7411 Fullerton Street, Suite 300
Jacksonville, FL 32256
(904) 538-6329

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

Dated: February 28, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was served electronically and by first class mail postage pre-paid on

Keith T. Borman
Vice President & General Counsel
American Short Line and Regional Railroad Association
50 F Street, N.W.
Suite 7020
Washington, DC 20001
kborman@aslrra.org

Paul M. Donovan
LaRoe, Winn, Mocrman & Donovan
1250 Connecticut Avenue, N.W.
Suite 200
Washington, DC 20036
paul.donovan@laroelaw.com

Patrick E. Groomes
Fulbright & Jaworski, L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, DC 20004-2623
pgroomes@fulbright.com

Paul R. Hitchcock
Associate General Counsel
CSX Transportation J-150
500 Water St.
Jacksonville, FL 32223
Paul_Hitchcock@CSX.com

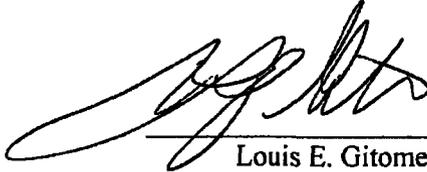
Michael F. McBride
Van Ness Feldman
1050 Thomas Jefferson Street, N.W.
Washington, DC 20007-3877
mfm@vnf.com

Jeffrey O. Moreno
Thompson Hine LLP
1920 N Street, N.W.
Suite 800
Washington, DC 20036
jeff.moreno@thompsonhine.com

Michael L. Rosenthal
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004-2401
mrosenthal@cov.com

John M. Scheib
Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, VA 23510-9241
john.scheib@nscorp.com

Louis P. Warchot
Association of American Railroads
425 Third Street, S.W.
Washington, DC 20024
lwarchot@aar.org



Louis E. Gitomer
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