

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CF Industries, Inc.,)
 Petitioner.)
))
 v.))
))
Indiana & Ohio Railway Company;)
Point Comfort and Northern Railway)
Company; Michigan Shore Railroad, Inc.,)
 Respondents.)
_____)

231904

Docket No. FD 35517

**ENTERED
Office of Proceedings**

FEB 27 2012

**Part of
Public Record**

**CF INDUSTRIES, INC.'S REPLY ARGUMENT
PUBLIC VERSION**

CF Industries, Inc. ("CF") hereby submits its Reply Argument pursuant to the procedural schedule issued by the Surface Transportation Board ("STB") on September 30, 2011. CF requests that the STB issue an expedited decision holding RailAmerica's¹ protocols for transporting TIH/PIH product to be unreasonable and unenforceable. As discussed below and in previous pleadings, RailAmerica has yet to put forth any evidence regarding the necessity and reasonableness of the protocols. Therefore, the protocols constitute unreasonable practices in violation of 49 U.S.C. § 10702; violate RailAmerica's common carrier obligation under 49 U.S.C. § 11101; and contravene the national transportation policy by decreasing safety and efficiency on the RailAmerica system.

¹ CF refers to "RailAmerica" to mean the entire railroad system consisting of the parent company RailAmerica, Inc. and its subsidiary railroads: Indiana & Ohio Railway Company ("IORY"), Point Comfort and Northern Railway Company ("PCNR"), Michigan Shore Railroad, Inc ("MSR"), and Alabama Gulf Coast Railway ("AGR"). Since Opening Arguments were filed in January, two additional subsidiary railroads, the Toledo, Peoria and Western Railway ("TPW") and the New England Central Railroad ("NECR"), have implemented the TIH/PIH protocols. The STB should make clear that any order in this docket also applies to these railroads (and any other RailAmerica railroad).

I. RailAmerica Continues To Roll Out Its New TIH/PIH Protocols Across Its System.

In its Opening Argument, CF noted that RailAmerica intended to implement its new TIH/PIH protocols across its entire system.² Since then, RailAmerica has informed CF that it will begin implementing its new protocols on two additional railroads – the Toledo, Peoria and Western Railway (“TPW”) and the New England Central Railroad (“NECR”). The STB should make clear in its order that its decision in this proceeding applies to all of RailAmerica’s subsidiary railroads, and not just those subsidiaries named in STB Doc. No. 35517 and STB Doc. No. 42129.

II. In Its Opening Argument, RailAmerica Fails To Justify Its Proposal.

The federal agencies with primary jurisdiction for establishing safety standards for transporting hazardous materials on railroads are the Federal Railroad Administration (“FRA”) and the Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (“PHMSA”). As noted in CF’s Opening Argument, both agencies have engaged in extensive rulemaking to ensure the safe transportation and handling of TIH/PIH.³ Neither agency has adopted regulations or procedures similar to RailAmerica’s. Federal regulations do permit RailAmerica to establish additional restrictions, but only when “local conditions” make transportation of hazardous materials “unusually hazardous.”⁴

In *Conrail*, a proceeding with a fact pattern similar to this one, the D.C. Circuit held that any railroad seeking to institute safety or security measures on hazardous materials beyond those mandated by federal regulations must overcome the presumption that the additional measures are

² See CF Industries, Inc.’s Opening Evidence and Argument (Public Version) at 6 (“CF’s Opening Argument”).

³ See *id.* at 2-5.

⁴ See 49 C.F.R. § 174.20(a) (“When local conditions make the acceptance, transportation, or delivery of hazardous materials unusually hazardous, local restrictions may be imposed by the carrier.”).

wasteful and unnecessary.⁵ In its Opening Argument, RailAmerica claims that *Conrail* is not applicable in the instant proceeding.⁶ However, the facts and law involved in *Conrail* are very similar to those in this proceeding, and therefore the precedent established in *Conrail* applies to this proceeding.⁷ In contrast, RailAmerica fails to cite any authority, relevant case law, or federal regulations that permit it to establish a priority train service, let alone in situations where federal agencies have an existing and comprehensive regulatory safety regime in place.

Moreover, not only is RailAmerica's legal analysis lacking, RailAmerica has failed to put forth any evidence, studies, or analyses to show that the protocols are needed. In fact, *it did not even attempt to meet any of the standards in 49 C.F.R. § 174.20(a)* for adopting more stringent transportation requirements for hazardous products. Instead, RailAmerica makes erroneous and conclusory claims that the protocols do not impose safety measures in excess of the federal regulations⁸ or are mere safety-enhancing "recommendations."⁹

RailAmerica claims that it has a [redacted material from deposition]¹⁰ and "on their own."¹¹ But, as discussed below, these statements reflect RailAmerica's disregard for federal regulations designed and implemented by regulatory agencies with primary jurisdiction for matters of safety. The federal regulations contain a clear legal standard that railroads must meet if they impose measures beyond those in the regulations. A carrier must show that "local conditions" make transporting hazardous materials "unusually hazardous."¹² And the carrier

⁵ See *Consol. Rail Corp. v. ICC*, 646 F.2d 642 at 656 (D.C. Cir. 1981) ("*Conrail*"); see also *Trainload Rates and Radioactive Materials, Eastern Railroads*, 362 I.C.C. 756 (1980).

⁶ See Opening of RailAmerica, Inc., et al. in Docket No. 35517 at 12-14 (filed Jan. 13, 2012) ("*RailAmerica's* Opening Argument").

⁷ See CF's Opening Argument at 4-5 for a more detailed discussion of *Conrail*.

⁸ See RailAmerica's Opening Argument at 17.

⁹ *Id.* at 10.

¹⁰ See Deposition of J. Shefelbine at 78:15-21 (Dec. 14, 2011) (Shefelbine Deposition can be found at Opening Evidence of the Dow Chemical Company, Exhibit 5) [Highly Confidential].

¹¹ RailAmerica's Opening Argument at 8-9.

¹² See 49 C.F.R. § 174.20(a).

must report any restrictions to the Bureau of Explosives (“BOE”).¹³ RailAmerica has not met any prong of that standard.

A. RailAmerica Fails To Provide Any Evidence That Transporting TIH/PIH Is Unusually Hazardous.

In its Opening Argument, RailAmerica fails to identify and show evidence of how local conditions make transporting TIH/PIH “unusually hazardous” on any of its railroads. Instead, in order to “prove” that transporting TIH/PIH is extraordinarily dangerous, RailAmerica merely cites to a single prior TIH accident, but it fails to mention that the accident was caused by the railroad’s negligence.¹⁴ In addition, RailAmerica makes a general statement claiming that the new TIH/PIH protocols are necessary for “good stewardship” to employees and local communities.¹⁵ But such general safety assertions are not a basis for establishing stricter transportation protocols. In *Conrail*, the D.C. Circuit held that the “mere assertion of safety” to justify any particular expenditure by a railroad company is not sufficient to judge the reasonableness of that expenditure or the tariff based upon it.¹⁶ Because RailAmerica failed to provide any evidence showing why transporting TIH/PIH on its system is unusually hazardous or supporting the need for the new TIH/PIH protocols, the STB must reject RailAmerica’s proposal.

B. Despite The Requirement That Any Deviations From The Regulations Be Implemented On A Local Basis, RailAmerica Is Implementing Its Protocols Nationally.

Although RailAmerica characterizes the protocols as mere “recommendations” for shippers, discovery materials show that the protocols constitute “company policy.” Discovery materials (and subsequent developments on additional RailAmerica subsidiaries, as discussed in

¹³ See 49 C.F.R. § 174.20(b).

¹⁴ RailAmerica’s Opening Argument at 5. RailAmerica also makes an irrelevant comparison to chemical weapons during World War I. CF is not responding to this argument.

¹⁵ *Id.* at 6.

¹⁶ See *Conrail* at 648.

Section I above) show that the protocols are not mere recommendations and that RailAmerica is implementing the protocols nationwide.¹⁷

This nationwide rollout of its TIH/PIH protocols is in violation of federal regulations, which allow railroads to deviate from federal regulations in the event of *local* conditions. RailAmerica's attempt to implement its protocols on a system-wide basis, regardless of local conditions, violates 49 C.F.R. § 174.20(a) and proves that RailAmerica is not attempting to increase safety in response to local hazards, but rather is developing a new policy in the hopes of driving TIH/PIH shippers off the system.

C. RailAmerica Fails To Comply With Federal Reporting Requirements.

RailAmerica continues to show disregard for the regulations by failing to report local conditions and restrictions to the BOE. At the time Opening Arguments were filed, the BOE never received any report from RailAmerica.¹⁸ At present, it is CF's understanding that RailAmerica has still not submitted the requisite report to the BOE.

RailAmerica has not met its obligation of showing that the TIH/PIH protocols are necessary because of "unusually hazardous" "local conditions." Nor has it made the required filing with the BOE. In sum, it has failed to meet any of the obligations required by the regulations.

¹⁷ See, e.g., Email from H. Shugart to E. Johnson, July 28, 2011 (after describing the new policy, "[w]e plan on following our new policy with all roads.") (attached to CF's Opening Argument as App. A, Doc 1).

¹⁸ See CF's Opening Argument at 10.

III. RailAmerica's Protocols Violate Its Common Carrier Obligations And Are Intended To Drive Up Costs So As To Either Force Shippers Off The System Or Increase Profits.

The protocols violate both RailAmerica's common carrier obligation to provide service on reasonable request and reasonable terms and national transportation policy.

A. RailAmerica's Protocols Are Not Designed To Improve Safety.

As discussed in detail in CF's Opening Argument, financial concerns rather than safety concerns led RailAmerica to design the protocols to increase prices for shippers on the system in order to dissuade shipper requests for TIH/PIH shipments.¹⁹ Discovery shows that RailAmerica seeks a "controlled retreat from the market place by increasing prices . . . 'to levels that encourage customers to engage in other transportation alternatives' for all TIH/PIH hazmat commodities."²⁰

RailAmerica attempts to disguise obstacles to obtaining service as "safety enhancing" policies. In reality, the protocols would deter shippers from transporting on the RailAmerica railroads because: (1) shippers would have difficulty providing advance notice in some circumstances since they cannot dictate when their TIH/PIH shipments would arrive at RailAmerica's facilities; (2) the reduced speed limit would slow down the transportation of TIH/PIH and keep shippers from meeting customer needs; and (3) shippers' costs would increase due to the need for more crews to manage longer trips. Collectively, these obstacles and costs to shippers are designed to force shippers off the system.

But even if shippers are not forced off the system, RailAmerica may still receive a windfall benefit. RailAmerica's policies substantially increase profits. According to the discovery materials, implementing the protocols could increase RailAmerica's revenue by almost

¹⁹ See CF's Opening Argument at 7.

²⁰ See Email from K. Greer to B. Schroeder, Apr. 22, 2008, (attached to CF's Opening Argument as App A, Doc 7).

[dollar figures redacted].²¹ RailAmerica fails to provide any justification or reasoning for these excessive and arbitrary costs. The only justification appears to be the desire for increased profits or to scare away TIH/PIH shippers.

B. RailAmerica's Protocols Violate National Transportation Policy.

RailAmerica is implementing the protocols and ignoring the potentially adverse impacts on the safety and efficiency of the system. Delivery of TIH/PIH pursuant to the protocols could have the perverse effect of slowing down transportation and increasing congestion and risk. Such concerns have been expressed by RailAmerica personnel.²² Nevertheless, RailAmerica instituted these policies after becoming aware of the issues, and despite being advised that regular train service is “the best way” to transport TIH/PIH. As RailAmerica’s own personnel observed when corporate executives were developing the protocols: “[R]unning [TIH/PIH] as we do in regular train service is the best way to handle them. . . . We have experimented in the past with running the hazmats on one ‘key’ train, but it was determined there was no advantage to that.”²³ In this regard, the protocols are excessive and violate the national transportation policy designed to promote efficient and safe transportation.

IV. CF Is Not Requesting Any Rate Regulation At This Time.

RailAmerica contends that CF is using the declaratory order process as a “thinly veiled attempt” to engage the STB in rate regulation.²⁴ This is not true. While it may be correct that the protocols increase shippers’ costs, the reasons for rejecting the protocols go beyond the impact on rates, and include the facts that RailAmerica failed to conduct even a single study as to

²¹ See CF’s Opening Argument (Highly Confidential Version) at 7 [Highly Confidential].

²² See CF’s Opening Argument at 11-12.

²³ See Email from H. Shugart to C. Patterson *et al.*, Mar. 26, 2008 (indicating that he has been advised by T. Rountree that operating the trains at lower speeds would cause congestion on the tracks, and that regular train service is the “best” way to satisfy safety concerns) (attached to CF’s Opening Argument as App A, Doc 11).

²⁴ RailAmerica’s Opening Argument at 24.

the protocols' reasonableness; failed to meet even a single standard of the regulations; and because the new practices impose burden on shippers, impair service, and potentially reduce safety on the system. This proceeding goes far beyond just rates.

Regardless, the STB has already recognized that this proceeding is not fundamentally about rates. In the September 30th Order, the STB stated "[t]he RailAmerica railroads' contention that CF's reference to the transportation charges in the challenged tariff provisions turns this into essentially a rate reasonableness complaint would not, even if correct, preclude a declaratory order proceeding. CF's petition is not limited to arguments regarding costs, but rather encompasses a variety of practices."²⁵

V. The STB Has Jurisdiction Over RailAmerica's Practices.

RailAmerica argues that the STB does not have jurisdiction over RailAmerica's TIH/PIH protocols because many of the protocols are hidden in the Standard Operating Procedures ("SOP") and not explicitly spelled out in the tariff. It argues that "black letter law . . . makes clear that the Tariffs are to be considered without respect to the SOP since it is neither within the four corners of the Tariffs, nor is it incorporated by reference in the Tariffs."²⁶ This argument is nonsense. Regardless of whether the protocols are in the SOP or in the tariffs, the results are the same: the protocols constitute a system-wide practice for handling TIH/PIH materials. The statutes give the STB jurisdiction over "rates" and "rules and practices."²⁷ Nowhere in the statute is there any limitation to "tariffs." RailAmerica's protocols qualify as "rules and practices" and thus are squarely within the four corners of the STB's jurisdiction. Moreover, the fact that RailAmerica's protocols are within its SOP and are being implemented on a system-

²⁵ *CF Industries, Inc. v. Indiana & Ohio Railway Co., et al.*, Doc. No. 35517 at n. 5 (Sept. 30, 2011).

²⁶ RailAmerica's Opening Argument at 10.

²⁷ See 49 U.S.C. § 10702.

wide basis further illustrates that the protocols are not mere “recommendations” and instead represent a practice implemented at the corporate level.

VI. Conclusion.

RailAmerica seeks permission to unilaterally impose any conditions on transportation that it sees fit, without the requirement to determine if such conditions are needed or reasonable. Or, as RailAmerica puts it, it seeks permission to “develop and implement any practice without first conducting a scientific study to justify the practice.”²⁸ Unfortunately for RailAmerica, the regulations and case law demand more. RailAmerica has failed to provide a single study or analysis showing why its TIH/PIH protocols are appropriate. Instead, it relies on rhetoric and misleading arguments (instead of scientific studies) to justify its proposal. The STB should not accept such methodologies.

CF requests that the STB issue an expedited order declaring RailAmerica’s protocols as unreasonable practices and require the entire RailAmerica system to immediately cease such practices. CF also requests that the STB prohibit RailAmerica from using the protocols to establish rates, terms, and conditions for shipping TIH/PIH materials, and grant any further relief that the STB may deem appropriate.

²⁸ RailAmerica’s Opening Argument at 4.

Respectfully submitted,



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February 27, 2012

CERTIFICATE OF SERVICE

I certify that, on February 27, 2012, I have sent a Public Version of CF Industries, Inc.'s Reply Argument to all parties of record on the service list for Docket No. FD 35517. Furthermore, I have sent a Highly Confidential Version of CF Industries, Inc.'s Reply Argument to all parties that have notified me that they have signed the appropriate undertakings attached to the Protective Order governing this docket.


Jeffrey J. Williamson