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**LAW OFFICES OF
LOUIS E. GITOMER**

LOUIS E. GITOMER
LOU_GITOMER@VERIZON.NET

THE ADAMS BUILDING, SUITE 301
600 BALTIMORE AVENUE
TOWSON, MARYLAND 21204-4022
(202) 466-6532
FAX (410) 332-0885

May 5, 2011

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

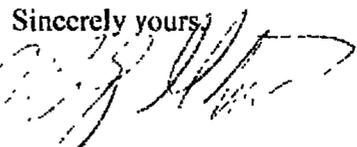
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RE: Docket No. 42129, *American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute, and PPG Industries, Inc v. Alabama Gulf Coast Railway LLC and RailAmerica, Inc.*

Dear Ms. Brown:

Enclosed for e-filing is a Motion to Dismiss the Complaint filed by Alabama Gulf Coast Railway LLC and RailAmerica, Inc.

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

Sincerely yours,


Louis E. Gitomer
Attorney for Alabama Gulf Coast Railway
LLC and RailAmerica, Inc.

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. 42129

AMERICAN CHEMISTRY COUNCIL, THE CHLORINE INSTITUTE, INC., THE
FERTILIZER INSTITUTE, AND PPG INDUSTRIES, INC.

v.

ALABAMA GULF COAST RAILWAY LLC AND RAILAMERICA, INC.

MOTION TO DISMISS

Scott G. Williams Esq.
Kenneth G. Charron, Esq.
RailAmerica, Inc.
Alabama Gulf Coast Railway LLC
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: ALABAMA GULF COAST
RAILWAY LLC and RAILAMERICA, INC.

Dated: May 5, 2011

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. 42129

AMERICAN CHEMISTRY COUNCIL, THE CHLORINE INSTITUTE, INC., THE
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MOTION TO DISMISS

Alabama Gulf Coast Railway LLC ("AGR") and RailAmerica, Inc. ("RailAmerica") respectfully move the Surface Transportation Board (the "Board") to dismiss the formal complaint filed on April 15, 2011 (the "Complaint") by the American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute, and PPG Industries, Inc. (collectively "Complainants").

Pursuant to 49 U.S.C. sections 10702, 11101, 11701, and 11704 the Complaint requests that the Board determine that the tariffs of RailAmerica, a non-carrier, and its subsidiary railroad AGR for handling TIIH/PIH cargo is an unreasonable practice and a violation of the railroad's common carrier obligation. The Complainants also seek a Board order under 49 U.S.C. §721(b)(4) enjoining implementation of what they claim is the "TIIH/PIH Standard Operating Practice" (the "SOP").

As of April 29, 2011, AGR canceled AGR tariff 0900 and canceled its adoption of tariff RA 1000, Section V. Later, on April 29, 2011, AGR published a new tariff AGR tariff 0900-1. AGR tariff 0900-1 substantially modifies the now canceled tariffs Complainants cite in their

complaint and clarifies the terms of shipment for TIIH/PIII commodities by AGR. The SOP was not and is not a published tariff. It is a proposal used to facilitate dialogue with TIIH/PIH shippers, outlines the concern AGR has for handling PPG's TIIH/PIII chemicals, and articulates ways to ameliorate the risks of handling such commodities to employees, communities and other stakeholders.

Because AGR tariff 0900 and the adoption of RA 1000 Section V are no longer in effect for shipments on the AGR, AGR and RailAmerica contend that the complaint no longer presents a case or controversy for the Board to resolve.

If the Board does not dismiss the Complaint in full, RailAmerica respectfully requests that the Board dismiss RailAmerica as a party to the Complaint because RailAmerica is not a rail carrier subject to the Board's jurisdiction. Under each section of the statute cited by the Complainants, the Board's jurisdiction is limited to actions by a rail carrier.

The Board has acknowledged that RailAmerica is a non-carrier in decisions where RailAmerica sought authority to acquire, through a subsidiary rail carrier, an existing railroad¹ and where RailAmerica sought to continue in control of existing non-carrier subsidiaries when they became railroads.² The Railroad Retirement Board (the "RRB") determined that RailAmerica was not an employer under 45 U.S.C. §231 (a)(1)(i) of its governing statute, which

¹ See *RailAmerica, Inc., Palm Beach Holding, Inc., RailAmerica Transportation Corp., Central Railroad Company of Indianapolis, Chicago Ft. Wayne and Eastern Railroad Division, Fortress Investment Group, LLC and RR Acquisition Holding, LLC—Control Exemption - Delphos Terminal Company, Inc.*, STB Finance Docket No. 35379 (STB served August 26, 2010).

² *RailAmerica, Inc., Palm Beach Holdings, Inc., RailAmerica Transportation Corp., RailTex, Inc., Fortress Investment Group, LLC, and RR Acquisition Holding, LLC—Continuance in Control Exemption—Conecuh Valley Railway, LLC, Three Notch Railway, LLC, and Wiregrass Central Railway, LLC*. STB Finance Docket No. 35489 (STB served April 22, 2011).

defines an employer as a carrier by railroad subject to the Interstate Commerce Act.³ The RRB has determined that RailAmerica is not a rail carrier subject to the Interstate Commerce Act for purposes of interpreting its own jurisdiction and the Board has acknowledged in its decisions that RailAmerica is a non-carrier. Thus under sections 10501(a)(1), 10702, 11101, 11701(a) and (b), and 11704 (a), (b), and(c), the Board does not have jurisdiction over RailAmerica.

Section 721 addresses the administrative powers of the Board. It bestows broad powers to investigate complaints of non-compliance with the Interstate Commerce Act or the Board's own orders. *See Moore v. Bhd of Locomotive Eng'rs*, 166 L.R.R.M. 2171 (District of Kansas 2000). Section 721 also allows the Board to prevent irreparable harm by issuing an appropriate order without regard to the procedural requirements of 5 U.S.C. §§551-559. *See Arkansas Electric Cooperative Corporation—Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Nov. 5, 2010). Section 721 does not expand the jurisdiction bestowed on the Board by the ICCTA, to include non-carriers within its jurisdiction beyond what is allowed in 49 U.S.C. §721(b)(2). Section 721(b)(2) authorizes the Board to collect data from persons controlling a carrier. *See Proposal to Require Consolidated Reporting by Commonly Controlled Railroad*, Ex Parte No. 634 (STB served Sept. 25, 2000). Section 721(b) does not expand the Board's jurisdiction to a company that the Board would otherwise not have jurisdiction over under a different provision of the Interstate Commerce Commission Termination Act of 1995 (the "ICCTA").

If Congress had intended to give the Board jurisdiction over non-carrier parent companies similar to its jurisdiction over rail carriers Congress would have done so, as it did prior to

³ See Employer Status Determination, RailAmerica, Inc. Exhibit A.

ICCTA. *See* former 49 U.S.C. §11348, repealed. Under 49 U.S.C. §11348, when the Interstate Commerce Commission (the "ICC") approved a transaction under former sections 11344 and 11345 where "a person not a carrier providing transportation subject to the jurisdiction of the Commission ... acquires control of at least one carrier subject to the jurisdiction of the Commission, the person is subject, as a carrier to the following provisions of this title that apply to the carrier being acquired by that person...". the ICC had explicit authority to impose limited conditions. Under 49 U.S.C. §721 Congress did not specifically grant the Board jurisdiction to treat a non-carrier, who acquired control of a carrier, as if it were a carrier for purposes of unreasonable practice complaints. Thus, section 721 does not provide the Board with jurisdiction over a non-carrier and RailAmerica respectfully requests that it be dismissed as a party to this Complaint.

CONCLUSION

For the forgoing reasons, AGR and RailAmerica respectfully request that the Board dismiss the Complaint filed in this proceeding. In the alternative, RailAmerica requests that the Board dismiss RailAmerica from this proceeding for lack of jurisdiction.

Respectfully submitted,



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

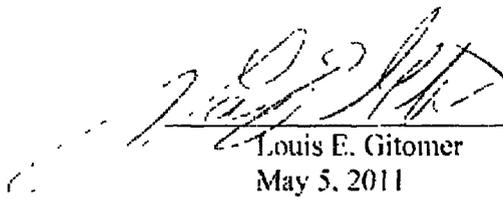
Louis E. Gitomer, Esq.
Law Offices of Louis E. Gitomer
600 Baltimore Avenue
Suite 301
Towson, MD 21204
(410) 296-2250
lou@lgrailaw.com

Attorneys for: ALABAMA GULF COAST
RAILWAY LLC and RAILAMERICA, INC.

Dated: May 5, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served upon counsel for American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute, Inc., and PPG Industries, Inc. electronically.



Louis E. Gitomer
May 5, 2011

EXHIBIT A-RAILROAD RETIREMENT BOARD DETERMINATION

**Employer Status Determination
RailAmerica, Inc.**

This is the decision of the Railroad Retirement Board regarding the status of RailAmerica, Inc. as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. Information concerning RailAmerica has been provided by Ms. Mary Todd Carpenter who is counsel for RailAmerica.

RailAmerica was incorporated March 31, 1992. It is the parent company of Huron & Eastern Railway Company and Saginaw Valley Railway Company, Inc., rail carrier employers under the Acts (B.A. Numbers 3267 and 3282, respectively). Ms. Carpenter advises that RailAmerica:

* * * is a business holding company, one of whose functions is to seek acquisitions of shortline railroads and light density branch lines purchased from larger railroads and other entities, and also to acquire stock in other companies] either related or unrelated to railroads. The company identifies and evaluates candidates to be acquired for operation at the subsidiary level, including rail properties to be operated as shortline or regional railroads and other businesses.* * *.

Ms. Carpenter states that RailAmerica has no employees and that it "retains consultants, accountants and legal specialists to assist in evaluation of acquisition candidates." She states that M. John H. Marino is President and a Director of RailAmerica and of both railroads mentioned above; Mr. Gary O. Marino is Chairman of the Board, Vice-President, a Director, and Treasurer of RailAmerica and is Chairman of the Board, Vice-President, and a Director of both railroads; Mr. Eric D. Gerst is Vice-President, Secretary, General Counsel, Assistant Treasurer, and a Director of RailAmerica and of both railroads; and Donald D. Redfearn is Vice-President, Assistant Secretary, and a Director of RailAmerica and of both railroads.

The definition of an employer contained in section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231 (a)(1)) reads in part as follows:

The term 'employer' shall include-

(i) any express company, sleeping car company, and carrier by railroad, subject to [the Interstate Commerce Act];

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and

which operates any equipment or facility

or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad * * *.

Section 1(a) of the Railroad Unemployment Insurance Act (45 U.S.C. § 351(a)) provides a substantially identical definition.

There is no evidence that RailAmerica is an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act. Accordingly, we turn to section 1(a)(1)(ii) in order to determine whether RailAmerica is an employer within the meaning of that section. Under section 1(a)(1)(ii), a company is a covered employer if it meets both of two criteria: if it provides "service in connection with" railroad transportation and if it is owned by or under common control with a rail carrier employer. If it fails to meet either criterion, it is not a covered employer within section 1(a)(1)(ii).

The evidence here shows that RailAmerica does not perform any service in connection with railroad transportation--either for its own rail subsidiaries or for any other carriers. RailAmerica is, therefore, not an employer within section 1(a)(1)(ii), and the Board does not need to address the issue of whether RailAmerica, the parent, is "under common control" with its subsidiary railroad. The Board notes that this issue is involved in a recent tax case involving identical language in the Railroad Retirement Tax Act. In that case, the Claims Court held that a parent company is not under common control with its subsidiary. Union Pacific Corporation v. United States, 26 Cl. Ct. 739 (1992).

It is the determination of the Board that RailAmerica is not an employer under the Acts.

Glen L. Bower

V. M. Speakman, Jr.

Jerome F. Kever