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ENTERED
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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, DC 20423

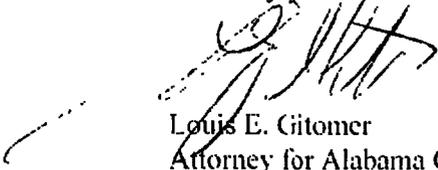
RE: Docket No. 42129, *American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute, and PPG Industries, Inc. v. Alabama Gulf Coast Railway LLC and RailAmerica, Inc.*

Dear Ms. Brown:

Enclosed for e-filing is the Response to the Complainants' Supplemental Information in Response to the Board's Order of September 30, 2011 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.

RESPONSE TO COMPLAINANT'S SUPPLEMENTAL INFORMATION IN RESPONSE TO
THE BOARD'S ORDER OF SEPTEMBER 30, 2011

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Dated: October 31, 2011

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The Alabama Gulf Coast Railway LLC ("AGR"), a Class III short line railroad, is complying with its common carrier obligation by continuing to handle all Toxic Inhalation Hazards and Poison Inhalation Hazards ("TIH/PIH") that are tendered to it for railroad service. TIH and PIH are very dangerous commodities that demand special handling as evidenced by the regulations at 49 C.F.R. Part 174. Defendants respectfully request the Surface Transportation Board (the "Board") to deny injunctive relief.

AGR and RailAmerica, Inc., on behalf of themselves and RailAmerica's other subsidiary railroads adopting similar tariffs ("RailAmerica" and together with AGR the "Defendants") are submitting this Response to the Complainants' Supplemental Information in Response to the Board's Order of September 30, 2011 (the "Supplement") filed on October 17, 2011.¹ Complainants have not complied with the Surface Transportation Board's (the "Board") direction to clarify "briefly what specific practices ... they are challenging and seeking to

¹ Complainants are the American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute, and PPG Industries, Inc. ("PPG").

enjoin.”² Complainants instead further obfuscate the issue by seeking injunction of “any restrictions on the movement of TTH materials other than those contained in valid and applicable federal regulations” and “any actions.” Supplement at 1. Complainants do not specify the practices or relate them to any of the “federal regulations” and the “any actions” request is anything but specific.

Complainants also seek to expand the proceeding in Docket No. NOR 42129 to six other RailAmerica railroads that are not parties to the Complaint. Complainants have not complied with the requirements of due process, much less the Board’s rules at 49 C.F.R. Part 1111. For that reason alone, the Board should deny the injunction against the six additional railroads.³

Not only have Complainants failed to comply with the *September 30 Decision*,⁴ they have failed to meet the Board’s criteria for injunctive relief as fully explained by Defendants in the Response to Motion for Injunctive Relief Under 49 U.S.C. §721(b)(4) filed on May 9, 2011, which Defendants adopt in this response.

Defendants contend that the regulations at 49 C.F.R. Part 174 are a floor and not a ceiling as to the actions railroads may take to provide for the safe transportation of Toxic

² *American Chemistry Council, the Chlorine Institute, Inc., The Fertilizer Institute, and PPG Industries, Inc. v. Alabama Gulf Coast Railway and RailAmerica, Inc.*, STB Docket No. NOR 42129 (STB served September 30, 2011) slip op. at 5.

³ The six railroads are the Cape Breton & Nova Scotia Railroad (“CBNS”), the Huron & Eastern Railway Company, Inc., the Indiana & Ohio Railway Company, Michigan Shore Railroad (“MSR”), Point Comfort & Northern Railway Company, and the Toledo, Peoria & Western Railway Corporation. It should be noted that CBNS is a railroad located entirely in Canada and not subject to the jurisdiction of the Board. In addition, MSR is not an entity; it is a division of the Mid-Michigan Railroad, Inc. Defendants urge the Board to reject Complainants’ improper unjustified backdoor attempt to include non-parties as part of this proceeding by dismissing or rejecting that portion of the Supplement.

⁴ *American Chemistry Council, the Chlorine Institute, Inc., The Fertilizer Institute, and PPG Industries, Inc. v. Alabama Gulf Coast Railway and RailAmerica, Inc.*, Docket No. NOR 42129 (STB served September 30, 2011) (the “*September 30 Decision*”).

Inhalation Hazards and Poison Inhalation Hazards (“TIH/PIH”). The regulations permit States to adopt more stringent requirements. 49 C.F.R. §174.2(b). Indeed, local restrictions may be imposed by a carrier. 49 C.F.R. §174.20(a).

BACKGROUND

The instant proceeding concerns the handling of TIH/PIH, chemicals that are extremely dangerous. AGR adopted tariffs to address the unique characteristics of short line handling of highly dangerous commodities. AGR believes that the prescribed operating methods will reduce the dangers inherent in handling these chemicals. Under AGR Tariff 0900-1, AGR’s particular operating methods are tailored to hauling dangerous TIH/PIH commodities, including those of PPG. The operating methods focus on the short line characteristics of AGR’s movement, in contrast to the longer Class I railroad movements, including the low density nature of AGR’s traffic, unscheduled train starts, less work shifts, lower equipment availability, lower class of track with reduced train speeds, and shorter distances of transporting goods.

Complainants filed the Complaint on April 15, 2011 seeking a finding from the Board that Defendants violated 49 U.S.C. §§ 10702 and 11101 through the publication of tariff AGR-0900 and the adoption of tariff RA-1000, Section V by AGR as a means of handling TIH/PIH. Complainants also contend that the “TIH/PIH Standard Operating Practice (SOP)” document (the “SOP,” copy attached in Exhibit A) results in an unreasonable practice and prevents AGR and RailAmerica from complying with the common carrier obligation.

Tariffs AGR-0900 and RA-1000, Section V were both canceled on April 29, 2011. Therefore, there is no longer a case or controversy concerning these two tariffs. AGR published a new tariff AGR-0900-1 on April 29, 2011 (Exhibit 2 to the Supplement), concerning the

transportation of TIH/PIH. The new tariff responds to Complainants' misinterpretation of some of the terms contained in AGR Tariff 0900.

The SOP is not a tariff and Complainants do not contend that it is. The SOP is a PowerPoint presentation that was shared with PPG, among others, as a "**proposal to modify...policies and procedures for handling TIH/PIH commodities.**" Consequently, the SOP cited by Complainants was simply a document intended to propose, address and resolve issues of safety in order to open a dialogue between AGR and affiliated railroads and shippers of TIH/PIH. AGR hoped that these discussions would lead to enhanced safety for the movement of Complainants' TIH/PIH, which would benefit all stakeholders, including the employees of AGR and its affiliated railroads and the citizens in the communities through which AGR and its affiliated railroads transport Complainants' TIH/PIH. The "SOP" referred to in the Complaint, only "**recommended**" certain actions, most of which were not adopted by AGR or other railroads owned by RailAmerica. In short, the SOP was not binding and certainly does not supersede published tariffs. The attached verified statement from Mr. James Shefelbinc explains the origins and intended use of the SOP. He further explains that the SOP is not an operating protocol enforced on AGR, or any of its affiliated railroads.

THE REQUESTED RELIEF

In the *September 30 Decision*, at 5, the Board stated:

Thus, complainants are directed to file supplemental information in Docket No. NOR 42129 clarifying briefly what specific practices, whether found in the SOP, replacement tariff, or elsewhere (including the actual tariff or other items that are the subject of the request for injunctive relief), they are challenging and seeking to enjoin.

In response to the *September 30 Decision*,

Complainants request that Defendants and all RailAmerica subsidiary railroads be enjoined during the pendency of this proceeding from: (1) requiring that TIH materials be moved in dedicated special or priority trains; and (2) imposing any restrictions on the movement of TIH materials other than those contained in valid and applicable federal regulations. Complainants further request that this injunction apply to any actions by RailAmerica and its subsidiary railroads whether they be by subsidiary railroad tariff, the RailAmerica SOP or otherwise.

Supplement at 1.

The most egregious problem with the Supplement is that it does not clarify “specific practices.” Moreover, it introduces terminology (dedicated special) that is not part the SOP, which is not binding on AGR, or the relevant tariff, AGR Tariff 0900-1.

ADDITIONAL BACKGROUND

PPG is a large global company involved in aerospace, automotive, marine and other large manufacturing industries. As reported publicly, PPG’s sales in 2010 totaled \$13.4 billion. PPG is a significant generator of products that move by rail and is a customer of virtually all the Class I railroads. As a result, PPG’s business with the Class I railroads is significant and critical to PPG. By contrast, AGR is a Class III short line railroad and has limited business with PPG. AGR’s revenue is insignificant when compared to a company the size of PPG and companies as large as Class I railroads. AGR is a 348-mile railroad operating in Florida, Alabama and Mississippi. AGR does not run scheduled service like many of the Class I railroads. It provides primarily an on demand type of service, it will pick up a car from interchange with another railroad or from a shipper with the next train once it is notified that the shipment is ready. AGR interchanges traffic with five Class I railroads. Due to the volume of traffic, interchange with each of the Class I’s occurs once a day in a yard of the Class I railroad. Unlike Class I railroads, AGR does not have yards all over its system where it interchanges dozens of trains per day. As

relevant to PPG. AGR receives PPG shipments destined to Arkema, Inc. ("Arkema") through interchange from the Illinois Central Railroad Company ("IC") subsidiary of the Canadian National Railroad Company at the IC yard in Mobile, AL. After IC sets out all cars (PPG and other customers) in interchange to AGR, IC contacts AGR and AGR sends a locomotive to Mobile to pick up the cars from IC. Upon interchange of all cars, AGR conducts the inspection required under 49 C.F.R. 174.9(a) and as provided for in AGR Tariff 0900-1, Item 1000(C). Once interchanged, PPG and/or its customer, Arkema is able to immediately see in AGR's online system that the cars have been received by AGR and are available to be delivered pursuant to 49 C.F.R. 174.16(b), as provided in AGR Tariff 0900-1, Item 1000(D).

In order to expedite delivery of the TIH/PIH to Arkema, as required by 49 C.F.R. 174.14(a), AGR cuts out the cars containing TIH/PIH and assigns a priority train as provided in AGR Tariff 0900-1, Item 1000(F). Unlike the trains operated by its Class I partners over hundreds or even thousands of miles, AGR operates its priority trains over a distance of approximately 20 miles. A priority train operating over 20 miles at 10 miles per hour instead of 25 miles per hour because of track or other conditions will take about two hours instead of one hour, which is a difference of about the same amount of time as doing the brake test of a large manifest train. Further, the priority train will not stop to drop off and pick up cars along the way. Thus it will reach its destination much faster than a regular non-priority train in order to make prompt delivery of TIH/PIH as required by 49 C.F.R. 174.14(a).

While Complainants have not clarified the specific objection, Complainants continue to request that the Board mandate AGR's train speed, a requested mandate that has no practical effect in AGR's short haul operations. In delivering TIH/PIH to PPG, AGR travels along its line

at reasonable speed, as permitted by 49 C.F.R. 174.20(a). But, AGR's line is FRA Class I. Therefore, AGR cannot operate at the **maximum** speed of 50 miles per hour permitted by 49 C.F.R. 174.86(b). AGR notes that FRA does not provide a minimum speed in the rules, although it does prescribe a maximum speed of 15 miles per hour for certain commodities at 49 C.F.R. 174.86(a). But here, the track conditions are important to consider since AGR cannot exceed 10 miles per hour on Class I track. 49 C.F.R. 213.9(a) (The "Rules"). Since only PPG ships TIH/PIH on AGR's line, AGR initially issued AGR Tariff 0900 to properly reflect the conditions and circumstances of the track between the interchange with CN and the delivery to the consignee, Arkema, which is the only route a priority train can take to make delivery. The issuance of AGR Tariff 0900-1 modified the language to eliminate the specific reference to 10 miles per hour, but the fact remains that track conditions will not permit AGR to exceed 10 miles per hour and still comply with the Rules.

It should also be mentioned that AGR adopted the three car limit as provided in AGR Tariff 0900-1, Item 1000(F) because its experience has been that IC interchanges no more than three TIH/PIH cars at a time to AGR. Certainly if PPG had engaged AGR in discussions of the SOP about the number of cars instead of initiating litigation, AGR would have been willing to modify the number of cars, based upon PPG's reasonable and realistic needs. AGR is still willing to modify the number to be consistent with PPG's needs and AGR's operational limitations (e.g. track conditions). AGR believes that because PPG is such a large company that ships significant volumes of TIH/PIH by rail, that PPG's objections appear to be more relevant to long haul traffic on Class I railroads than in opposition to a tariff governing short line operations on Class I track.

ARGUMENT

Defendants will address each of the issues raised by Complainants in the Supplement.

Priority train. Complainants seek to enjoin the use of “priority trains” by AGR. AGR is required to promptly deliver TIH/PIH trains by 49 C.F.R. 174.14. Priority trains comply with the regulatory requirement. Reasonable and prompt service is provided to the receiver by AGR. Complainants have provided no rationale to explain that the service in a priority train is not reasonable and, in the Supplement, have not demonstrated that there is an unreasonable burden on Complainants for such expedited services. If, as AGR believes, Complainants issue with priority service is with the rate that AGR is charging, then Complainants can seek relief by challenging the rate under existing Board procedures, instead of claiming that AGR is engaging in an unreasonable practice because it has not conducted scientific studies to prove that priority trains are safer than regular trains that engage in switching, picking up and dropping off cars on the way to deliver TIH/PIH. AGR is a short line rail carrier that is transporting an average of 1-3 tank cars to their final destination only 20 miles away. AGR believes that moving 1-3 TIH/PIH cars in a single priority train is safer than moving those same TIH/PIH cars within a 100 car manifest train that would be making many switching movements while picking up and dropping off non-TIH/PIH cars. To experienced railroad professionals, this conclusion would appear self-evident, but Complainants would seem to want a scientific study proving it is safer to instruct your children to look both ways before crossing a street.

Complainants contend that the priority train requirement will also require AGR employees to accompany the TIH/PIH shipment at all times. Supplement, Piciacchio Verified Statement at 3. Complainants are right, but for the wrong reason. AGR will not require special

or additional employees to accompany a TIH/PIH shipment. As previously explained, when AGR is notified by IC to pick up a shipment in interchange with TIH/PIH, AGR will send a locomotive and an inspector to the IC yard. Under 49 C.F.R. 174.9, AGR cannot accept delivery of the TIH/PIH shipment prior to completion of the inspection. AGR will then take delivery in the priority train and deliver the TIH/PIH shipment to the receiver. There will be an AGR engineer to operate the locomotive and conductor on the priority train who will stay with the TIH/PIH shipment until it is delivered to the receiver. The Complainants' argument in this instance just highlights the illogical lengths that Complainants will go to in order to complain about AGR Tariff 0900-1. Of course AGR employees will be with the TIH/PIH shipment until it is delivered. If there were no AGR employees operating the train, and thereby accompanying the shipment, the TIH/PIH would never be delivered.

Three car trains. Complainants' issue with the three car maximum seems to be primarily the rates and not the number of cars.

AGR has tried and is still willing to discuss the number of cars in the train, but PPG declined the opportunity to engage in constructive dialogue when AGR's representatives provided PPG with the SOP. Instead, PPG initiated this litigation. Moreover, AGR came to the three car limit as a result of its experience with its customers. Based on such experience, AGR does not receive more than three TIH/PIH cars at any time to deliver to Arkema or any other TIH/PIH customer. Therefore, AGR concluded that restricting priority trains to three cars would comport with actual operations.

PPG contends that three TIH/PIH cars could arrive within hours of each other on the AGR and AGR would ship these cars in three different trains. Supplement at 3. In the Motion

for Injunctive Relief under 49 U.S.C. 721(b)(4) (the “Motion”), Complainants argue that marshaling TIH/PIH cars for special train service raises security concerns. Motion at 6. In both pleadings, Complainants have argued that the Class I railroad and not Complainants control the delivery of TIH/PIH cars to AGR.⁵ Although Complainants do not provide any specific rationale to object to specific items in AGR Tariff 0900-1, AGR notes some inconsistency with Complainants’ arguments. Complainants are unhappy because AGR might hold cars waiting for other cars (Motion) and Complainants also object because AGR might not hold cars waiting for other cars to arrive (Supplement). Complainants are advocating two contradictory positions, neither of which is accurate when viewed in light of AGR’s actual operations as a short line carrier.

AGR has no more than one interchange per day from IC that could contain TIH/PIH bound for Arkema. So, AGR will not be receiving cars within a couple of hours of each other. For example, the TIH/PIH cars that AGR receives in interchange from IC on Monday will be placed in a priority train for prompt delivery to PPG on Monday (or possibly Tuesday if interchanged to AGR very late in the evening on Monday). The same will happen for cars interchanged on Wednesday. However, AGR will not hold the cars delivered on Monday to await the cars being delivered on Wednesday. AGR will neither wait to marshal cars or deliver cars in separate trains because they were delivered by the Class I several hours apart, especially since AGR receives only one interchange per day.

⁵ AGR - like Complainants argue in the Supplement - does not control the delivery of TIH/PIH cars from its Class I connections. However, Complainants do control the tender of cars to the Class I railroad and the routing of the trains. AGR believes that Complainants could (and should) use self-help and reduce any perceived burden by delivering the cars to the Class I at the same time and providing the same routing directions for all of the cars. However, AGR cannot control Class I delivery times or routing.

More important than PPG's inconsistent and illogical concerns is AGR's compliance with the Carriage by Rail regulations. AGR cannot marshal TIH/PIH cars. 49 C.F.R. 174.14(b). AGR must deliver the TIH/PIH cars promptly. 49 C.F.R. 174.14(a). Contrary to the rules, Complainants are asking the Board to require AGR to both marshal TIH/PIH cars and not to deliver them promptly. It is Complainants who are suggesting an unreasonable and unlawful practice.

Reduced Speed. Complainants also contend that AGR will operate its trains at 10 miles per hour because that speed limit was contained in the SOP and in the canceled AGR Tariff 0900. Complainants further contend that operating a train carrying TIH/PIH at 10 miles per hour violates the Carriage by Rail rules. Complainants are wrong in all of their arguments. AGR will deliver TIH/PIH shipped by PPG and interchanged from IC to Arkema at 10 miles per hour because the track that AGR operates over is FRA Class I with a maximum legal speed of 10 miles per hour. No document issued by AGR (whether it's an SOP, tariff, or something else) can change that.

As was stated before, the SOP was a marketing tool for the purpose of generating discussion of the safe handling of TIH/PIH. The SOP is not binding, mandatory or even a protocol for AGR to operate at a set speed in all conditions. This is evident if the contents of the SOP are compared to AGR Tariff 0900-1. AGR Tariff 0900-1 provides for reasonable speed based on existing conditions. If the AGR line serving Arkema was struck by a hurricane and there was standing water along the right of way that was two feet below the top of the rail, AGR may proceed at less than the posted speed limit because of the existing conditions. In all normal operating circumstances and consistent with applicable laws and industry best practices, AGR

will operate based upon track conditions at the time of transporting PPG's highly dangerous products and taking into consideration weather, time of day (day or night), and line congestion. Operating speed is the result of many factors, but on AGR and the RailAmerica railroads, **it will not exceed the speed allowed under the law.** See 49 C.F.R. 213.9.

With regard to the speed requirements in the Carriage by Rail rules, the only requirement is that trains "may not **exceed 50 mph**". 49 C.F.R. 174.86 (emphasis added). There is no minimum speed. AGR delivers to PPG over a line that is FRA Class I. AGR cannot operate at a speed greater than that permitted on the line. Complainants state that "it is clear beyond question that some speed below" FRA Class will be used. Supplement 3-4. AGR does not understand the basis for that assertion and Complainants have not provided any justification for that broad statement. AGR Tariff 0900-1 does not say that. The Tariff provides for reasonable speed based on current conditions. AGR cannot operate in excess of 10 miles per hour on Class I track to deliver PPG's cars to Arkema. The distance to deliver the TIH/PIH cars on the Class I track is a short distance of only 20 miles. So long as it does not conflict with the Rules, AGR should be permitted to consider that tank cars are designed to withstand impacts at lower speeds.⁶ Thus, it is eminently logical, even without conducting extensive and timely studies, that operating these dangerous commodities trains at such lesser speeds enhances safety and should be permitted.

While it may be understandable for Complainants to argue against broad application of a 10 mile per hour maximum speed on a transcontinental long haul, that is not the case here. AGR

⁶ In its Final Rule dated January 13, 2009, the FRA noted that it had proposed that the standards be improved for both shell and tank-head puncture-resistance to withstand impacts at speeds up to 25 and 30 miles per hour, respectively. Thus, the FRA recognizes that slower speeds are safer even if Complainants do not. *Hazardous Materials Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials*, Docket No. FRA-2006-25169, 74 Fed. Reg. 1770, 1773-1776 (2009).

operates its priority train for only a 20 mile movement, on Class I track conditions, and AGR does not want TIH/PIH to remain on its property and as its responsibility (liability) any longer than necessary.

Notification. Complainants also broadly contend that the advance notification required in AGR Tariff 0900-1, Item 1000(B) and Appendix A, is an unreasonable practice because it is “impossible for a shipper such as PPG to know what date the line-haul carrier will tender a TIH car to the RailAmerica subsidiary.” Supplement at 3. In addition to misinterpreting the language contained in the body of the tariff, it appears to AGR that Complainants’ only concern with the notification is one question on the form attached to AGR Tariff 0900-1 that requests the “date AGR is requested to take possession”, which Complainants misinterpret as AGR demanding that Complainants predict the date of delivery. If this is too burdensome for Complainants to obtain, AGR is willing to amend AGR Tariff 0900-1 to delete that request for information. It is AGR’s primary intent to be alerted when a TIH/PIH shipment is tendered to a carrier where AGR will be the delivering railroad so that AGR can track the shipment with the railroad or railroads in the route. AGR would like to be prepared when the shipment arrives so that AGR can notify the receiver of when to expect delivery so that Arkema can be prepared to receive the TIH/PIH shipment in accordance with 49 C.F.R. 174.16(b) and without delay caused by Arkema’s unavailability of track space, necessity of constructive placement and redelivery or other normal and practical concerns.

AGR is surprised that a shipper such as PPG would not keep a close eye on a shipment as critically important to PPG, or as dangerous to others, as one or more cars of TIH/PIH. AGR also believes that it is not an unreasonable burden for PPG to cooperate with AGR in projecting

the date of delivery to PPG's customer and ensure priority delivery, especially if the risk of loss transfers at such point in time.⁷ However, as stated above, AGR is willing to amend the tariff to remove the request for the expected date of delivery from Appendix A.

AGR also points out that the advance notice of receipt allows AGR to plan to have an inspector and train available when IC calls AGR to pick up the interchange. Unlike a Class I railroad, AGR does not have mechanical inspectors present around the clock, nor does AGR have extra locomotives and crews always available to handle TIH/PIH. However, with advance notice, AGR can track the progress of the shipment and plan to have the personnel and equipment in place to properly handle priority delivery of the TIH/PIH cars.

Injunction Request. Defendants have demonstrated in the reply filed on May 9, 2011 that Complainants have not met their burden to justify an injunction. Defendants adopt that pleading here.

Defendants also want to address the burden of proof analysis that underlies all of Complainants' claims. Complainants argue that Defendants must prove that AGR Tariff 0900-1 will result in safer operations than the Carriage by Rail rules through scientific studies. Complainants are wrong.

The Board addressed this same issue in *Arkansas Electric Cooperative Corporation—Petition for Declaratory Order*, Docket No. FD 35305 (STB served March 3, 2011) (“*AECC*”), where Board determined that *Consolidated Rail Corp. v. Interstate Commerce Comm’n*, 646 F.2d 642 (D.C. Cir. 1981) (“*Conrail*”) was not controlling.

⁷ Complainants' contention that it is “impossible to know when a car will arrive at a particular destination” (Supplement at 3) is unfounded when considering that the modern Class I railroad provides tracking services and modern cars with GPS technology.

Complainants reliance on Conrail is not supported by the facts.

Generally, complainants carry the burden of proof when claiming an unreasonable practice. See *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*”). Complainants’ creative attempts to show a basis for doing so does not establish a need to diverge from that general rule here.

There are significant distinctions between the tariffs addressed in *Conrail* and AGR Tariff 0900-1. First, the tariffs in *Conrail* were subject to regulation by FRA and the NRC. AGR Tariff 0900-1 is not subject to regulation by the NRC. *Conrail* arose under a pre-Staggers Act provision that expressly put 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.⁸ The decision in *Trainload* occurred nearly six months before the Staggers Act became law and was governed by pre-Staggers Act law.

Complainants maintain that under *Conrail* the AGR 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*, AGR is not asking the Board to impose additional safety measures beyond what the FRA allows. AGR is simply exercising its authority to safely and efficiently manage its business, which consists of providing common carrier rail

⁸ See *Trainload Rates on Radioactive Materials, Eastern R.R.*, 362 I.C.C. 756, 757 (April 11, 1980) (“*Trainload*”).

services to its customers under the Rules. Therefore, even if the Staggers Act had not shifted the burden of proof to the shipper, *Conrail* would not control in this case.

The Board has previously declined to follow Conrail.

The Board has also determined that it has discretion as to whether to follow *Conrail*. See *North American*, where the Board stated:

[T]he *Conrail* decision was premised on facts not present here and on a statutory scheme predating the Staggers Act. In any event, in 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.”

After addressing the *North American* burden of proof in proceedings involving whether a practice is reasonable, the Board reaffirmed its adherence to *North American* when it stated:

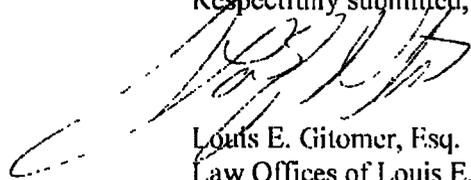
“Whether a particular practice is unreasonable depends upon the facts and circumstances of the case. The Board gauges the reasonableness of a practice by analyzing what it views as the most appropriate factors.” *AECC* at 5.

The Railroads request the Board to adhere to the *North American* ruling and to enter a similar holding on the facts and circumstances of this proceeding involving the services provided by a Class III railroad when transporting highly dangerous T/H/PIH commodities.

CONCLUSION

For the forgoing reasons, AGR and RailAmerica respectfully request that the Board deny the Motion and not grant Complainants injunctive relief.

Respectfully submitted,



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INC.

Dated: October 31, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served electronically

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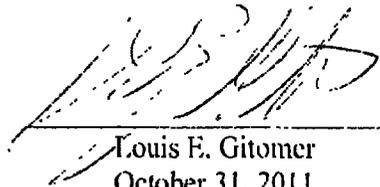
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Louis E. Gitomer
October 31, 2011

EXHIBIT A-VERIFIED STATEMENT

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.

VERIFIED STATEMENT OF JAMES SHEFELBINE

I am James Shefelbine. I am the Vice President of Marketing of RailAmerica, Inc. ("RailAmerica"), the parent company of the Alabama Gulf Coast Railway LLC ("AGR"). The purpose of this statement is to provide facts regarding the "TIH/PIH Standard Operating Practice" document (the "SOP") and AGR's operations.

The SOP and Tariff. RailAmerica realized that its investment in its subsidiary railroads was in danger if there was ever an accident involving the release of Toxic Inhalation Hazards and Poison Inhalation Hazards ("TIH/PIH"). A team composed of experienced employees from different aspects of the industry was assembled to address this issue in a way that would provide additional protection for the RailAmerica railroads while complying with their common carrier obligation. The team was encouraged to come up with as many ideas as possible and then go and seek input from the railroads' customers. As a result of meetings among the team, that has centuries of experience in safe railroad operations, the myriad of ideas were thoroughly discussed and vetted with others for operational efficiency, compliance with laws and safety enhancements. This is how the SOP was developed. The team recommended operational methods and means unique to the short line railroad handling of highly dangerous commodities

that we believed would reduce the danger in handling TIH/PIH. The team considered short line railroad characteristics of its movement, in contrast to the longer Class I railroad movements, including the low density nature of the traffic, unscheduled train starts, less work shifts, lower equipment availability, lower class of track and required train speeds, and shorter distances of transporting goods.

The SOP was intended to be a marketing tool to use in meetings with TIH/PIH shippers. The SOP is not a binding operational protocol to be observed by the railroad subsidiaries of RailAmerica or enforced by RailAmerica. It was and is a marketing tool representing numerous hours of effort to benefit both the railroads and the shippers. We presented the SOP to our customers and their associations in order to receive constructive feedback from a series of meetings that were held. We believed that discussions about safer railroad operations in the movement of the highly dangerous TIH/PIH would be a topic that our TIH/PIH shippers would embrace. I attended a number of these meetings, including meetings with representatives of the Fertilizer Institute and the Chlorine Institute. We were dismayed and disappointed by the shippers' unwillingness to engage in a conversation that we thought would be in everyone's best interest.

Without the shipper input that we had hoped for, it was determined that tariffs would be put in place for the handling of TIH/PIH based on our best business judgment and recognizing that the tariff must be compatible with the rules at 49 C.F.R. Part 174 that applied to the movement of TIH/PIH by railroad. The tariffs did not incorporate all aspects of the SOP. The immediate response to the AGR Tariff 0900, was the filing of the complaint in this proceeding. Although we were disappointed that the first response to our proposal was litigation, we took the

litigation as a misinterpretation of some of the language in the tariff. In response, AGR cancelled AGR Tariff 0900 and issued AGR Tariff 0900-1.⁹

AGR remains ready to discuss AGR Tariff 0900-1 and to make modifications to it to reduce shippers' concerns. AGR is willing to eliminate the box in Appendix A requesting that shippers identify the projected date of delivery of a TIIH/PIH shipment to AGR. AGR wants the notice information to be able to track the shipment so that it can make available its assets to safely handle the TIIH/PIH shipment when it is interchanged to AGR by one of its Class I partners. In the case of TIIH/PIH shipped by PPG Industries, Inc. ("PPG"), traffic is interchanged to AGR by the Illinois Central Railroad Company (the "IC").

AGR is also willing to discuss the three car limit set forth in AGR Tariff 0900-1, Item 1000(F). This limit was developed because of the actual low number of TIIH/PIH cars historically tendered by IC to AGR in interchange. AGR's experience is that IC does not interchange more than three cars at a time to AGR. And that is the reason the three car limit was adopted for the AGR Tariff.

AGR Operations. AGR is a Class III railroad. The portion of AGR that carries the PPG TIIH/PIH from interchange with IC to the receiver, Arkema, Inc. ("Arkema"), is Class I track, which has a speed limit of 10 miles per hour.

As relevant to PPG, AGR receives cars from PPG in interchange from the Illinois Central Railroad Company ("IC") subsidiary of the Canadian National Railroad Company at the IC yard in Mobile, AL. After IC sets out all cars (PPG and other customers) to interchange to AGR, IC contacts AGR and AGR sends a locomotive to Mobile to pick up the cars from IC. Upon

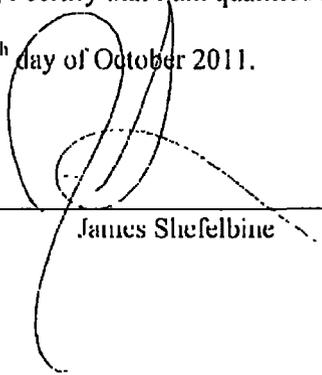
⁹ Several of RailAmerica's other subsidiary railroads have issued similar tariffs.

interchange of all cars, AGR conducts the inspection required for TIH/PIH cars that are interchanged. Once interchanged, Arkema is then able to immediately see that the cars have been received by AGR and are available to be delivered.

In order to expedite delivery of the TIH/PIH to Arkema, AGR cuts out the cars containing TIH/PIH and assigns a priority train. Unlike the trains operated by its Class I partners over hundreds or even thousands of miles, AGR operates its priority trains serving Arkema a distance of approximately 20 miles. A priority train operating over 20 miles at 10 miles per hour instead of 25 miles per hour because of track or other conditions will take about two hours instead of one hour, which is a difference of about the same amount of time as doing the brake test of a large manifest train. Further, the priority train will not stop to drop off and pick up cars along the way. Thus it will reach its destination much faster than a regular non-priority train in order to make prompt delivery of TIH/PIH.

VERIFICATION

I, James Shefelbine, declare under penalty of perjury that to the best of my knowledge the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement. Executed this 31th day of October 2011.



James Shefelbine