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April 16, 2012

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

ENTERED  
Office of Proceedings  
April 16, 2012  
Part of  
Public Record

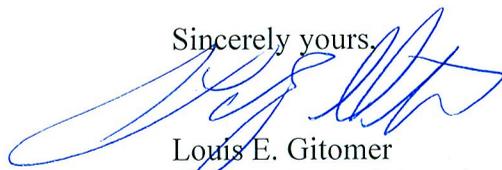
RE: **Finance Docket No. 35517, *CF Industries, Inc. v. Indiana & Ohio Railway Company, Point Comfort and Northern Railway Company, and Michigan Shore Railroad, Inc.***

Dear Ms. Brown:

Enclosed for e-filing is a Reply to the Motion for Expedited Decision of RailAmerica, Inc., Alabama & Gulf Coast Railway LLC, Indiana & Ohio Railway Company, Point Comfort and Northern Railway Company, and Michigan Shore Railroad, Inc.

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

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STB Finance Docket No. 35517

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

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

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AND MICHIGAN SHORE RAILROAD,  
INC.

Dated: April 16, 2012

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Finance Docket No. 35517

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CF INDUSTRIES, INC.

v.

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

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Respondents<sup>1</sup> file this reply to the impermissible sur-rebuttal, denominated a Motion for an Expedited Decision (the “Motion”) filed by CFI Industries, Inc. (“CF”) on March 26, 2012. Respondents reply is permitted by and is due on April 16, 2012, pursuant to 49 C.F.R. §1104.13(a).

The Motion is procedurally improper and substantively in error. Respondents respectfully request that the Surface Transportation Board (the “Board”) conduct the analysis necessary to resolve the important issues raised in this proceeding in a timely manner without regard to the artificial and unjustified deadline CF seeks to impose on the Board.

The Board established an expansive procedural schedule providing for discovery and three rounds of filing by all parties.<sup>2</sup> The record closed with the filing of Rebuttal on March 13, 2012. The *Procedural Decision* did not provide for the filing of the Motion or for the filing of

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<sup>1</sup> 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.”

<sup>2</sup> *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, slip op. at 9 (STB served September 30, 2011) (the “*Procedural Decision*”).

any other pleadings after March 13. CF could have easily asked for expedited handling in its Rebuttal filing, but for unknown reasons did not. Nor does CF cite to any provision of the Board's regulations that permit the filing of the Motion or that allow CF to seek permission to file the Motion. The Motion is merely a thinly veiled attempt by CF to file an improper sur-rebuttal in this proceeding seeking to recast facts that CF did not prove or disprove in its first three rounds of evidence and argument. Indeed, CF's facts are limited to documents provided by Respondents in discovery and statements submitted by the Department of Transportation and a university professor in another proceeding.<sup>3</sup> CF did not submit any verified statements as Respondents did. For these reasons alone, Respondents request the Board to deny the relief sought in the Motion.

As far as the sur-rebuttal filed by CF, it fails to justify the relief sought when discussing the record in this proceeding. Any financial harm caused to CF is due to the fact that it diverted traffic to other modes rather than use IORY, MSR or PCN. Respondents will respond to the four areas of sur-rebuttal addressed by CF.

**The Evidence speaks for itself.** CF continues to argue that the Board should ignore over a century of precedent in interpreting tariffs (see Respondents' Reply at 8) and instead rely on emails in lieu of the specific language of tariffs to interpret the tariffs.

Respondent Railroads do require an advance notice that a TIH/PIH shipment will be forwarded to their lines, but as PPG indicated, the notice only requires about 10 minutes to complete (Respondents' Opening at 16). Respondent Railroads do restrict the speed of priority trains to the circumstances of the specific line, such as the AGR line being an FRA Class 1 line with a 10 mile per hour speed limit. The New England Central Railroad handles TIH/PIH shipments at 25 miles per hour based on operating conditions. Respondent Railroads believe that

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<sup>3</sup> Ex Parte No. 677 (Sub-No. 1) *Common Carrier Obligation of Railroads-Transportation of Hazardous Materials*.

it is safer to provide priority train service for TIH/PIH because of the reduced handling and special attention afforded the deadly TIH/PIH commodity, and Mr. Wolf's study proves this to be true. Respondents have not hidden the number of RailAmerica subsidiary railroads adopting tariff 0900. Indeed, the tariffs are public.

CF raises a new argument in its improperly filed motion and now contends that the Respondent Railroads did not conduct a "study" prior to implementing the 0900 tariffs. However, CF has not proven a study was necessary prior to Respondent Railroads adopting the 0900 tariff. Moreover, Respondents submitted Mr. Wolf's verified, expert and in depth study with their February 27, 2012 Reply – Volume II. CF claims that Mr. Wolf's study was insufficient, but did not take advantage of the opportunity to submit rebuttal evidence and a study refuting Mr. Wolf's study. Indeed, CF did not submit any evidence refuting Mr. Wolf's study.

CF claims that Respondent Railroads did not follow Federal requirements in publishing the 0900 tariffs. The Railroad Respondents did comply with the Board's requirements by issuing the tariffs. Indeed, CF has not shown that the 0900 tariff does not comply with the requirements of 49 C.F.R. Part 174. The Respondent Railroads have submitted the required information to the Bureau of Explosives, as required by 49 C.F.R. §174.20.

Respondents urge the Board to take a realistic look at the evidence submitted in this proceeding and reject the unfounded claims that CF made in the Motion.

**The legal arguments are straight-forward.** CF reiterates its erroneous assumption that the law that was in effect prior to the Staggers Act of 1980 and the ICC Termination Act of 1995 governs this proceeding. Respondents have argued in their Opening, Reply and Rebuttal that the law has changed and that the burden of proof is on CF. Even the Rebuttal of the American Chemistry Council, Arkema, Inc., The Chlorine Institute, Inc., The Fertilizer Institute, and PPG

Industries, Inc. agrees with Respondents that they and CF bear the burden of proof in this proceeding. *See City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005); *North American Freight Car Association, et al. v. BNSF Railway Company*, STB Docket No. 42060 (Sub-No. 1) (STB served January 26, 2007); and *Arkansas Electric Cooperative Corporation—Petition for Declaratory Order* (STB Finance Docket No. 35305) (STB served March 3, 2011).

The law is straight-forward that the burden of proof is on CF and the other shippers in this proceeding to prove that Respondent Railroads 0900 tariffs constitute an unreasonable practice, and that they have failed to meet their burden.

**RailAmerica continues to implement the protocols on additional lines.** CF is also wrong in this instance. As explained through three rounds of pleadings, RailAmerica does not implement protocols for handling TIH/PIH on its railroads. Each individual railroad determines whether to issue the 0900 tariff based on its operations. Some subsidiaries have determined that the 0900 tariff will not work on the specific railroad and have not adopted a 0900 tariff or the supposed protocols mentioned, but not identified by CF. Other railroads have adopted the 0900 tariff, which governs their operations, not the supposed “protocols.”

CF concludes this section of the Motion by stating that the “protocols,” which have not been identified by CF, will negatively impact shippers, although the negative impact has not even been identified by CF, even after making another filing to argue the merits after the record is closed.

**Absent a decision, there is no way to protect TIH shippers.** CF contends that the 0900 tariffs impose significant burdens and costs on shippers. Setting aside rates for the moment, the only burden and cost on shippers in the 0900 tariffs is the notice that takes 10 minutes to prepare. Respondent Railroads ask the Board to weigh the burden and cost of 10 minutes against the risk

of transporting TIH/PIH and then conclude that if there is a burden and cost it is outweighed by the risk of carrying TIH/PIH.

CF next contends that the 0900 tariffs impact shippers' ability to move TIH/PIH to market expeditiously. As explained by Mr. Bjornstad in his verified statement submitted in Respondents Rebuttal, the 0900 tariff results in TIH/PIH moving over Respondent Railroads to destination **faster** than if it moved in typical local trains. The 0900 tariff positively impacts the ability of TIH/PIH shippers to move their commodity to market expeditiously.

IORY, MSR, and PCN ask the Board to look at the number of TIH/PIH cars moving over their lines that originated from CF. There are none. IORY, MSR, and PCN next invite the Board to look through the railroads' records with their General Managers and to see that no TIH/PIH carload shipped by CF has moved over IORY, MSR or PCN since each railroad implemented the 0900 tariff. Finally IORY, MSR, and PCN invite the Board to review CF's responses to Interrogatory Nos. 1 and 2, submitted in Exhibit D to Respondents' Opening, where CF responded that it has not shipped TIH/PIH under any of the three tariffs identified in the Petition.<sup>4</sup>

Having seen that CF is not using IORY, MSR, or PCN, and therefore not paying the tariff rates under the 0900 tariffs, Respondent Railroads invite the Board's attention to the statements of CF on pages 4-5 of the Motion where it states: "And, to the extent that the protocols raise rates, they increase costs on shippers (with no opportunity for a refund even if the shippers prevail in this proceeding). Because there is no way to protect shippers' interests absent an order approving CF's petition, CF requests the Board expeditiously issue an order in this proceeding requiring RailAmerica to cease using the TIH protocols on its system." Not only are the

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<sup>4</sup> Under the Board's rules, a discovery response must be updated if there are changes. CF has not updated its discovery response to indicate that it now ships TIH/PIH over IORY, MSR, and PCN. Thus, there are no CF TIH//PIH shipments on these railroads.

preceding two sentences disingenuous, they erroneously attribute rates to unidentified “protocols” while ignoring the language in the 0900 tariffs and, further, they indicate that RailAmerica - a non-rail carrier - is using the protocols, when it is the Respondent Railroads issuing tariffs.

Although intentionally omitted from its improper filing, CF has diverted the TIH/PIH traffic off of IORY, MRS, and PCN to other modes. Any charges incurred by CF have been incurred due to its own self-help. CF has not paid the rates under the 0900 tariff.<sup>5</sup> CF has taken the steps it deemed necessary to protect its interests. CF cleverly has not told the Board that it diverted traffic to other modes and did not pay the tariff rates under the 0900 tariff. Indeed, through its self-help, CF has demonstrated that IORY, MSR, and PCN are not market dominant railroads as far as TIH/PIH shipments by CF are concerned, and that CF is not entitled to any rate relief in an appropriate proceeding.

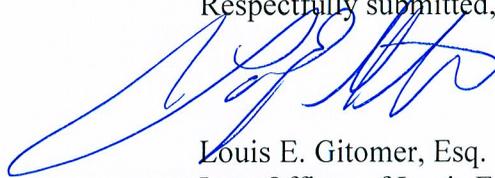
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<sup>5</sup> Even if it were permitted by law, which it is not, regardless of any decision by the Board, CF is not entitled to a refund from Respondent Railroads because CF has not shipped under the 0900 tariffs.

## CONCLUSION

Respondents respectfully request that the Board deny the relief sought by CF in the Motion and strike its arguments as improper.

Respectfully submitted,



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Dated: April 16, 2012

## CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was served

electronically on

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April 16, 2012