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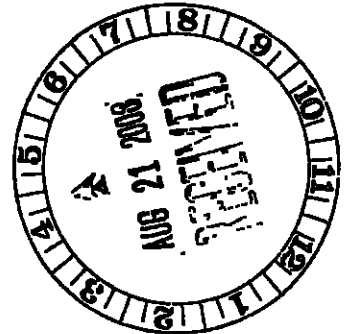
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August 21, 2008

The Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20024-0001



**Re: STB Ex Parte No. 677 (Sub No. 1),  
Common Carrier Obligation of Railroads**

ENTERED  
Office of Proceedings

AUG 21 2008

Part of  
Public Record

Dear Secretary Quinlan.

CF Industries, Inc. hereby submits an original and 10 copies of the Supplement Comments of CF Industries, Inc. in the above-referenced proceeding.

An additional 4 copies of this submission are enclosed herewith. Please date-stamp these additional copies and return them to our messenger.

Should you have any questions concerning this matter, please do not hesitate to contact the undersigned.

Sincerely,

Patrick E. Groomes

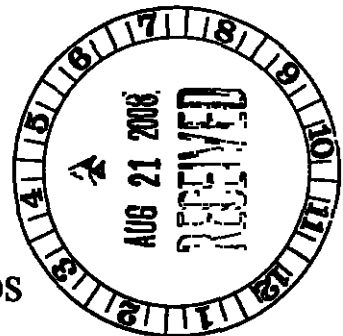
Counsel for CF Industries, Inc.

Enclosures

223338

**BEFORE THE SURFACE TRANSPORTATION BOARD**

\_\_\_\_\_  
Ex Parte No. 677 (Sub-No. 1)  
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**COMMON CARRIER OBLIGATION OF RAILROADS**

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**SUPPLEMENTAL COMMENTS OF  
CF INDUSTRIES, INC.**  
\_\_\_\_\_

**ENTERED**  
**Office of Proceedings**  
**AUG 21 2008**  
**Part of**  
**Public Record**

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*Counsel for CF Industries, Inc.*

August 21, 2008

On July 22, 2008, the Surface Transportation Board (“Board”) held a hearing to discuss issues associated with transportation of toxic inhalation hazard (“TIH”) materials. During the hearing, Chairman Nottingham noted that the record would remain open for 30 days from the date of the hearing to allow interested parties to submit supplemental comments. While CF Industries, Inc. (“CF Industries”) joins in the supplemental comments of The Fertilizer Institute, CF Industries submits these supplemental comments to highlight three fatal flaws with the railroads’ request to shift liability for their negligence.

The railroads requested that the Board issue a policy statement *granting a railroad the right to “require the shipper of TIH materials to indemnify the carrier* for the full amount of any liability or exposure resulting from a release of TIH materials above a threshold level that would be the greater of the amount of insurance that the railroad carries for such an incident or, for Class I railroads, \$500 million; and *require the shipper to obtain insurance* or other forms of assurance to support such indemnification at levels depending upon the circumstances of the TIH materials transportation (including the size and financial ability of the shipper).”<sup>1</sup> The Board cannot grant the railroads’ request.

#### **The Board Does Not Have The Authority To Grant The Railroads’ Request**

There was significant discussion during the hearing about the Board’s authority to require indemnification as a condition of carriage of TIH materials. The Board has no such authority.

- Prior to 2007, the railroads generally were immune from tort liability (even liability arising from their negligence) associated with the transportation of TIH

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<sup>1</sup> See Written Testimony of the Association of American Railroads at 5-6, Ex Parte No. 677 (Sub No 1), filed July 10, 2008

materials pursuant to the preemption provision of the Federal Rail Safety Act ("FRSA").

- In 2007, Congress determined that the railroads should no longer be shielded from liability arising from their negligence and amended the FRSA.<sup>2</sup>
- Congress did not modify the Interstate Commerce Commission Termination Act ("ICCTA").
- The Board cannot modify the ICCTA to relieve railroads of liability incurred as a result of Congress' amendment to the FRSA.

### **The Statement The Railroads Have Requested Constitutes A Rule**

Even if the issue in this proceeding were one over which the Board had jurisdiction, it still could not grant the railroads' request. The railroads have requested that the Board issue a "formal policy statement" granting them the *right* to require shippers to indemnify the railroads for all liability associated with the release of TIH materials above a stated threshold and the *right* to require shippers to obtain insurance or other forms of assurance to support such indemnification. Such a statement would reflect the Board's settled position on the issue of the railroads' right to require indemnification as a condition of carriage and grant the railroads such a right. This would be a rule.<sup>3</sup> The Board's classification of such a statement as a formal policy statement would be of no effect, as an "agency's characterization of its own action is not controlling if it self-servingly disclaims any intention to create a rule with the 'force of law,' but

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<sup>2</sup> Pub. L. No. 110-53, § 1528, 121 Stat. 266 (2007) (codified at 49 U.S.C. § 20106(b)).

<sup>3</sup> *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020-21 (D.C. Cir. 2000). See also, *Ass'n of Irrigated Residents v. EPA*, 484 F.3d 1027 (D.C. Cir. 2007); *CropLife Am. v. EPA*, 329 F.3d 876 (D.C. Cir. 2003) ("*CropLife*") (finding that a policy was a legislative rule because "it create[d] a 'binding norm' that [wa]s 'finally determinative of the issues or rights to which it [wa]s addressed.'" (quoting *Chamber of Commerce v. US Dep't of Labor*, 174 F.3d 206, 212 (D.C. Cir. 1999))

the record indicates otherwise.”<sup>4</sup> Although the record in this proceeding is sparse with regard to evidence supporting any of the railroads’ claims, the railroads’ request is clear on its face – that the Board determine that it is a reasonable condition of carriage for the railroads’ to require indemnification from shippers for releases of TIH materials. The Board could not issue such a proclamation without engaging in formal rulemaking, which it has not done in this proceeding.

**Shifted Liability May Be Uninsurable For Shippers**

Even if the facts above were not fatal to the railroads’ proposal, the proposal itself is fatally flawed. An underlying premise of the railroads’ proposal, and ostensibly of the Board’s receptiveness thereto, is that shippers can insure against the liability arising from the railroads’ own negligence and failure to comply with law. However, the record in this proceeding is devoid of any evidence addressing the ability of shippers to obtain insurance for the indemnification obligation proposed by the railroads. As set forth in Attachment 1 to these supplemental comments, CF Industries’ insurance broker has indicated that, as a general matter, CF Industries may not be able to obtain insurance to support such an indemnification obligation to the railroads. Furthermore, even if such insurance were available, it would not cover all of the risks the railroads seek to shift to shippers. It would be reasonable to assume that one category of liabilities that insurance carriers may be unwilling to insure against are those that could have been avoided had the railroads complied with law. It is also clear that the railroads’ willful misconduct would be uninsurable. As the railroads’ proposal requires shippers to obtain insurance for uninsurable liabilities, their proposal is flawed on its face.

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<sup>4</sup> *CropLife*, 329 F.3d at 883.

Respectfully submitted,



Mitchell F. Hertz

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*Counsel for CF Industries, Inc.*

August 21, 2008

## **ATTACHMENT 1**



August 21, 2008

Telephone (312) 621-4700  
Website [www.willis.com](http://www.willis.com)  
Direct Line (312) 621-4797  
Direct Fax (312) 621-8886  
E-mail [betty.grodek@willis.com](mailto:betty.grodek@willis.com)

Mr. Randall N Giagnorio  
Director, Risk Management  
CF Industries, Inc.  
4 North Parkway, Suite 400  
Deerfield, IL 60015-2590

Re. TFI Insurance Proposal

Dear Randy:

You inquired regarding the availability of insurance for CF Industries, Inc. ("CF") to cover an indemnity obligation to the railroads for liability the railroads incur in connection with the transportation of anhydrous ammonia. As you know, we have been working with CF and The Fertilizer Institute ("TFI") on a proposal that would make a secondary insurance pool available to the railroads for liability incurred in connection with the transportation of certain hazardous materials, including anhydrous ammonia. This proposal is still under review and it is unclear at this time what the specifics of any such policy would be. We have not investigated whether insurance would be available to CF to insure against any indemnification obligation to the railroads resulting from liability the railroads incur in connection with the transportation of hazardous materials. Although it is impossible to determine whether such insurance would be available without knowing the specific liabilities that the railroads are proposing that CF indemnify them for, there is a very real possibility insurance carriers would be unwilling to issue coverage for such an indemnification obligation. Furthermore, even if the insurance carriers were willing to issue a policy covering CF for certain liabilities arising under such an indemnification obligation, it is likely that they would not cover all such liabilities. It is certain they will not cover willful misconduct.

Sincerely,

David Thompson  
Executive Vice President  
Willis of Illinois, Inc.

Willis of Illinois, Inc.  
10 South LaSalle Street  
Suite 3000  
Chicago IL 60603