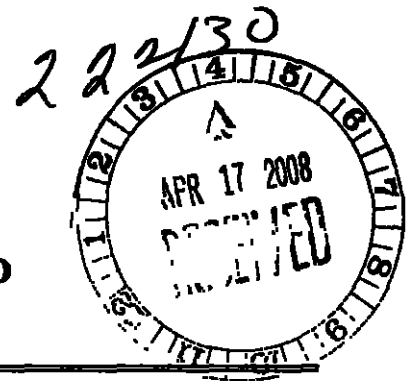


**BEFORE THE
SURFACE TRANSPORTATION BOARD**



**COMMON CARRIER
OBLIGATION OF RAILROADS**

)
) **Ex Parte No. 677**
)
)

**COMMENTS OF
WESTLAKE CHEMICAL CORPORATION**

ENTERED
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Dated: April 17, 2008

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Ex Parte No. 677

**STATEMENT OF
WESTLAKE CHEMICAL CORPORATION**

In accordance with the notice served by the Surface Transportation Board ("STB" or "Board") in this proceeding on February 22, 2008 ("Notice"), Westlake Chemical Corporation ("Westlake") submits these comments on the common carrier obligation of railroads, which is of considerable interest to Westlake as a consumer of railroad freight transportation services.

IDENTITY AND INTEREST

Westlake is an integrated manufacturer and marketer of petrochemicals, vinyls, polymers, and fabricated products, based in Houston, Texas. Westlake has over 11 billion pounds per year of active aggregate production capacity from 15 manufacturing sites in North America. Westlake supplies the building blocks for a number of vital and widely-used consumer products, including food plastic wraps, PVC pipes (essential to ensuring clean water), and the frames that secure consumer windows and doors.

Westlake depends on the railroads to provide timely and reliable transportation delivery service of its products. In 2007, Westlake shipped approximately

24,000 rail cars of outbound rail movements and provided the tank cars for all movements. Without dependable and reliable rail transportation service, Westlake's business mission to provide quality products and services to commodity chemical, plastics, and related fabricated products markets would be impaired. Accordingly, Westlake has a substantial interest in this proceeding. This is only the third proceeding before the Board, or its predecessor, the Interstate Commerce Commission ("ICC"), in which Westlake has participated in Westlake's 22 years of existence. Westlake is submitting these comments because it believes the importance of the common carrier obligation necessitates Westlake's participation, and because Westlake has a significant interest in helping to ensure that the carriers fulfill their common carrier obligations to meet the essential transportation service needs of Westlake.

I.

COMMENTS

In its Notice instituting this proceeding, the Board acknowledges that the railroads have a statutorily imposed common carrier obligation to provide "transportation or service on reasonable request." Notice at 1 (citing 49 U.S.C. § 11101(a)). The Board further acknowledges that "[a] railroad may not refuse to provide service merely because to do so would be inconvenient or unprofitable." *Id.* Westlake strongly believes that the common carrier obligation needs to be upheld and supported by the Board through all means available, and to protect against any unreasonable practices or activities that might

impede the movement by rail of Westlake's essential business products and materials in interstate commerce.

The Board's Notice states that this proceeding "seeks to highlight the importance of the common carrier obligation, to provide a better understanding of it, and to assist the Board in its monitoring and compliance work." Notice at 1-2. In particular, the Board states that this proceeding is designed to focus on several areas of concern, including on "cost and safety issues related to the transportation of hazardous materials, especially poison inhalation hazards" ("PIHs"), and on other issues relating to the railroads' common carrier obligation, including capacity service limitations; use of embargoes; imposition of minimum volume and shipper infrastructure requirements; and metering of demand. Westlake's comments address the general areas of: (i) transportation of PIHs, (ii) carrier rates and practices related to movement of other vital chemicals products, and (iii) Westlake's ability to obtain regulatory relief from unreasonable common carrier rates and practices.

A. The Movement by Rail of PIHs

The only PIH Westlake moves by rail is chlorine, and it consists of a relatively small, but very important part of Westlake's rail transportation service requirements. Chlorine is an essential component of Westlake's vinyls business segment. Westlake's vinyls products are some of the most widely used chemicals in the world (e.g., PVC, the world's third most widely used plastic, and various packaging materials)

and these products are further upgraded by Westlake into a wide variety of higher value-added consumer products (e.g., pipe, fence, deck, window, and door components).

It is no secret that the railroads do not want to move PIHs. The Association of American Railroads ("AAR") has issued a position paper stating that "railroads should be able to decide for themselves whether to transport, and at what price they are willing to transport, highly-hazardous materials." AAR, Hazmat Transport by Rail (Feb. 2008) at 1 (http://www.aar.org/GetFile.asp?File_ID=816). Additionally, individual railroads have indicated that it is their intent to, in effect, demarket the movement of PIHs. In this respect, the Federal Railroad Administration reports that "[m]inimally, shipping rates for PIH materials have doubled; however, many shippers report larger increases (including at least one shipper which has had its rates increased over 4.8 times in a two-year period)." Notice of Proposed Rulemaking, Hazardous Materials: Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials, Docket No. FRA-2006-25169, 73 Fed. Reg. 17818, 17831 (Apr. 1, 2008) ("Tank Car NPRM") Further, the railroads appear to be contending now that the Board should not allow shippers to invoke their statutory right to reasonable common carrier rates for chlorine traffic under existing standards.

Westlake is very concerned about unilateral carrier efforts to undermine fundamental common carrier obligations, whether it involve PIHs or other chemical traffic that is essential to Westlake's ability to operate as a business. A railroad has a common carrier obligation to transport all chemicals (PIHs or otherwise) upon reasonable request. Additionally, Congress has established that rates on common carrier market

dominant traffic “must be reasonable” (49 U.S.C. § 10701(d)(1)). Congress has not established that rates on common carrier market dominant traffic “must be reasonable except for the movement of chlorine,” as apparently the railroads would prefer, and there is nothing in the statute or the Board’s rules that exempts from regulation chlorine or other essential chemical products moved by Westlake.

Railroad efforts to avoid their common carrier obligation to transport certain commodities in regular train service have been unsuccessful, and this is a settled matter. For example, commencing in the middle 1970s, the railroads repeatedly attempted by various means to avoid transporting (or to transport only at unreasonable rate levels) radioactive materials. These efforts were challenged by government and private shippers in various proceedings.

In a series of decisions designated Radioactive I through Radioactive IV, the ICC rejected the railroads efforts, among other things, to: (1) remove radioactive materials from its published tariffs (Radioactive I, 357 I.C.C. 458 (1977)); (2) establish “special train service” for such transportation at substantially higher rates (Radioactive II, 359 I.C.C. 70 (1978)); (3) disclaim their common carrier obligation to transport nuclear materials (Radioactive III, 362 I.C.C. 756 (1980)); and establish unreasonable special train charges (or cost additives) for the movement of spent nuclear fuel (Radioactive IV, 364 I.C.C. 951 (1981)).

These and other applicable cases all confirm and support the proposition that, if applicable governmental safety requirements are met (e.g., Department of

Transportation (“DOT”); Department of Homeland Security; etc.), a railroad may not refuse to transport certain commodities as a common carrier on the grounds that the commodities are too hazardous or otherwise. See, e.g., Classification Ratings of Chemicals, Conrail, 3 I.C.C. 2d 331, 335-36 (1986). If the railroads seek stricter safety measures than are required under applicable governmental standards, they have the burden of demonstrating that the “presumptively valid . . . regulations are unsatisfactory or inadequate in their particular circumstances” and that their proposed standards are “necessary and reasonable.” Id. at 336. The railroads have made no such showing with regard to chlorine or other chemical products, and even if they could, the imposition of such additional safety measures would not permit carriers to go the further step of seeking to outright ban the acceptance of such traffic, which would be a violation of their common carrier obligation.

In fact, DOT has recently proposed new rules to improve the safety of railroad tank car transportation of hazardous materials under the auspices of its Pipeline and Hazardous Materials Safety Administration (“PHMSA”) and the Federal Railroad Administration (“FRA”), which are the agencies with specific jurisdiction over railcar safety. See Tank Car NPRM. In an accompanying Regulatory Impact Analysis of the NPRM (issued Mar. 19, 2008) DOT confirms the fact that the railroads have not requested that new regulatory safety requirements be instituted, and it further questions railroad attempts to unilaterally “force” on shippers new, one-sided tank car standards:

[R]ailroads can request PHMSA and FRA to impose new regulatory requirements (such as those proposed in this rulemaking) that would minimize the likelihood of a release of PIH materials in the event of a train collision or derailment, but have chosen not to seek such regulatory relief. Instead the railroads have decided to force anhydrous ammonia and chlorine shippers to purchase new and slightly upgraded tank cars by issuing an interchange rule through the Association of American Railroads (AAR). (Interchange rules establish standards that railroads must meet when they exchange rail cars with other railroads.) AAR Casualty Prevention Circular 1178 (Circular 1178) requires that newly built chlorine and anhydrous ammonia tank cars meet specified tank car standards that exceed current PHMSA standards, and precludes the use of nonconforming cars in interchange after December 31, 2018. The tank car standards are based on a tank car produced by Trinity Industries, Inc. Shippers, rather than railroads, will bear the cost of Circular 1178 since PIH tank cars are owned by shippers and fleet management companies that lease the cars to the shippers. Railroads are considering issuing similar restrictions for the rail movement of other PIH materials. The railroads have temporarily suspended Circular 1178 until [April 30, 2008], to permit PHMSA and FRA to issue a notice of proposed rulemaking that would impose new and enhanced PIH tank car standards.

The Circular 1178 approach chosen by the railroads has two basic problems. First, the AAR proposed tank car standards will not likely prevent PIH tank car releases in even moderate speed train accidents. (As discussed [later], DOT has estimated that the Trinity car would only be about 15 percent as effective as cars built to the standards in this rulemaking in eliminating or mitigating the release of a PIH material during a train collision or derailment.) Second, chlorine and anhydrous ammonia shippers may be required to replace cars required by Circular 1178 before the end of their useful life as new PHMSA tank car standards become effective. Circular 1178 will, therefore, require huge expenditures by the PIH shippers for only modest actual benefits to the railroads or the public at large. Given the failure of the private markets to adequately reduce the risk of

loss of lading in future derailments of tank cars transporting PIH materials, PHMSA and FRA have tentatively concluded that it is appropriate for PHMSA to issue regulations to reduce this risk. The PHMSA regulatory process can achieve a solution that is best suited to maximizing public safety with economically balanced requirements for PIH shippers and railroads that carry these commodities.

Id.-at-8.¹

Westlake agrees with DOT that, in order to maximize public safety with economically balanced requirements for PIH shippers and railroads, there needs to be a collaborative process and a holistic approach to safety. Westlake also agrees with the American Chemistry Council that “[t]he nation needs a safe and reliable system of hazardous materials rail transportation, governed by uniform, national rules. The only way to ensure that this system continually improves is by considering all of the factors that effect rail safety and engaging all of the key stakeholders through a collaborative process.” Hearing on Rail Safety Legislation before the Subcommittee on Railroads, Pipelines, and Hazardous Materials of the Committee on Transportation and Infrastructure, 110th Cong. at 8 (May 8, 2007) (Testimony of the American Chemistry Council).

¹ Accord Tank Car NPRM 73 Fed. Reg. at 17825 (“[t]here is . . . no reasonable basis for the railroads to implement . . . Circular 1178 at this time” and further, the “[r]ailroads are free at any time to seek stricter tank car safety standards through a DOT rulemaking, [however] to date, no rail carrier has petitioned PHMSA to adopt the tank car standards embodied in . . . Circular 1178”). Westlake also notes that the most recent releases of PIH (e.g., Minot, ND, Macdona, TX, Graniteville, SC) were caused by railroad error (e.g., defective rail, crew fatigue, crew operation error) and not defective tank cars, and it is estimated that an upgraded tank car would also have been breached in these incidents.

According to the Chlorine Institute, the chlorine industry contributes over \$7 billion to the North American economy through the provision of thousands of vital products – with approximately 85 percent of long distance chlorine delivery taking place via railroad tank cars provided by railroad customers. There is no way to replace the current rail transportation movement of this essential commodity and alternative methods of transport pose greater danger.

A commitment to safety is good business. Safety is a primary focus for Westlake, as evidenced by a succession of safe handling awards from Class I carriers. Since the 1970s, DOT has issued a number of regulations to improve tank car safety, largely through collaborative approaches. Collaboration between the various stakeholders is a key to continuing to increase operational safety. It is in the public interest for all involved transportation stakeholders to work out the best means of transporting chlorine and other chemical products in the safest manner possible, not for the railroad industry to unilaterally “force” on their customers new standards designed to enhance the railroads’ singular economic interests.

B. Addressing Carrier Practices Related to the Movement of Chemical Products

As stated, the vast majority of Westlake’s rail transportation requirements involve the movement of non-PIH chemicals. With regard to this traffic, Westlake is also concerned that the railroads may seek to engage in practices that will discourage the movement of the traffic by rail or otherwise inhibit the ability of Westlake to secure efficient and cost effective rail transportation service. Any unilateral carrier practices to

discourage certain hauls, shift essential distribution patterns, contribute to capacity constraints on vital shipping routes, dramatically raise rates, etc. could have a very serious impact on Westlake's operations and its ability to succeed as a business.

Westlake relies on its rail service providers to provide it with essential transportation services. There is a significant public interest in the need for reliable, and cost-effective rail service for the chemical products that Westlake produces, many of which are essential products to the Nation and/or support essential services. As the ICC succinctly put it:

[T]he dependence of our nation's economy on rail transportation of essential raw materials makes the network of rail lines an important national resource and the smooth provision of uninterrupted service over those lines [is] a matter of national importance. The nation has an interest in the availability and operation of these lines that transcends the interests of the particular company that owns or operates the lines (or even the shippers that currently utilize them).

Study of Interstate Commerce Commission Regulatory Responsibilities Pursuant to

Section 210(a) of the Trucking Industry Regulatory Reform Act of 1994, 1994 WL

639996 (Oct. 25, 1994) at *73. Westlake strongly concurs with this statement. Westlake further concurs with another statement of the ICC concerning the need to protect railroad consumers from unreasonable railroad practices:

Just as there are a number of instances in which there may not be sufficient marketplace discipline to protect against railroad abuses in setting rates, similarly, market forces may not always be strong enough to protect shippers against unreasonable railroad practices. Unreasonable practices can result in abusive treatment of shippers. Federal oversight of railroad practices is therefore necessary and should be

retained in order to protect the public interest. If injured shippers could not seek independent review and redress – from a regulatory body that is familiar with the rail industry and is capable of addressing industry practices in a consistent manner throughout the nation and with a view toward balancing varying interests – their ability to compete in domestic and/or international markets could be seriously jeopardized. Such results would contravene the goals of our national transportation policy.

Id. at *21.

Westlake encourages the STB to be proactive in upholding the railroad common carrier obligation and prohibiting practices that could be used to undermine the common carrier obligation.

C. Addressing Carrier Rate Setting Practices

Westlake is concerned about the high level of rail rate increases being imposed on it in recent years.² It is Westlake's experience that, even where potential competition exists, the railroad competitive market is far from vigorous. Westlake urges the Board to be vigilant in ensuring that carrier practices are not used to inhibit Westlake's ability to obtain reasonably priced rail transportation service.

For example, as the Board is aware, railroads in recent years have been favoring certain "hybrid" public pricing rates and presenting these rates on a take-it or leave-it basis to their customers. Westlake is pleased that the Board in the pending Dupont case rejected the railroad defendant's claims that the challenged hybrid rates designated as "confidential" were immune from rate reasonableness scrutiny as private

² Westlake is not alone in its concerns, and it appears that significant rate hikes for

rail transportation contracts, and not common carrier rates subject to the Board's rate reasonableness jurisdiction. See E I Dupont De Nemours and Co. v. CSX Transportation, Inc., STB Docket No. 42100 (STB served Dec. 20, 2007) at 4-6. Westlake is also pleased that the Board rejected the defendant rail carrier's further arguments that challenges to the movements of hazardous materials should be exempt from review under the Board's rate reasonableness standards. Id. at 6. These Board determinations were the correct interpretation of the law.

The issue of hybrid pricing is also being examined by the Board in its proceedings denominated Interpretation of the Term "Contract" in 49 U.S.C. 10709, STB Ex Parte No. 669 and Rail Transportation Contracts Under 49 U.S.C. 10709, STB Ex Parte No. 676. In these proceedings, the Board has recognized the regulatory uncertainty that is created by such hybrid pricing instruments and has expressed concerns about such pricing instruments "increasing the possibility of collusive behavior in a highly concentrated industry." Id. (STB served Mar. 12, 2008). The Board has also stated that "we remain concerned about hybrid pricing arrangements . . . and we remain open to individual complaints regarding the reasonableness of a particular pricing practice." Id. at 5. Westlake agrees that these hybrid pricing arrangements are forms of carrier practices that should be closely examined by the Board, and the ability of shippers to seek rate reasonableness relief from the Board from such pricing should not be undermined.

chemical shipments are being made across the board by railroads.

II.

CONCLUSION

Westlake appreciates the opportunity to present these Comments for the Board's consideration.

Respectfully submitted,

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