



STB EX PARTE NO 677 (Sub-No 1)

**COMMON CARRIER OBLIGATIONS OF RAILROADS-TRANSPORTATION OF
HAZARDOUS MATERIALS**

**TESTIMONY BEFORE THE
UNITED STATES SURFACE TRANSPORTATION BOARD**

July 22, 2008

SUBMITTED BY

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**PRESIDENT - CHLOR ALKALI PRODUCTS
VICE PRESIDENT - OLIN CORPORATION**

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Chairman Nottingham, members of the Surface Transportation Board (STB), I'm pleased to be here today on behalf of Olin Corporation ("Olin"), which is headquartered in Clayton, Missouri. I look forward to this opportunity to testify before the STB on the common carrier obligations of railroads to transport hazardous materials. This will be my second opportunity to testify before the STB as I provided testimony on the general implications of the common carrier obligation on April 24, 2008.

As way of background, Olin consists of two businesses:

Winchester Ammunition is North America's leading small caliber ammunition producer with powerful global brand name recognition. Winchester provides quality ammunition to sportsmen and sportswomen around the world. We are also a major supplier to law enforcement and the U.S. military.

And **Chlor Alkali Products**

Today, I am testifying on behalf of Olin's Chlor Alkali Products business, which is one of the leading producers of chlorine and caustic soda in North America. Chlor Alkali Products is headquartered in Cleveland, Tennessee and includes manufacturing sites in New York, Georgia, Tennessee, Alabama, Nevada, Louisiana, California and Washington state, plus facilities in two Canadian provinces, Quebec and New Brunswick.

We have been involved in the U.S. chlor alkali industry for over one hundred years, and we were the first commercial supplier of chlorine in the United States. We continue to grow and service the chlor alkali industry. Besides chlorine and caustic soda, Olin Chlor Alkali Products manufactures and sells many derivatives of the chlorine manufacturing process, such as hydrochloric acid, hydrogen, sodium chlorate, bleach products and potassium hydroxide.

As one of the nation's leading producers of chlorine, the company produces an essential chemical that has played a key role in dramatically reducing infant mortality rates and eliminating water-borne diseases around the world. Moreover, the biggest end use for chlorine is housing and commercial construction, in which chlorine is used to produce products such as vinyl siding, PVC piping, insulation and most paints and fire retardant additives – all products critical to the North American economy.

The importance of the Common Carrier Obligation to the transportation of Toxic inhalation hazards (TIH)

My testimony today will focus on the importance of the common carrier obligation as it relates to the transportation of chlorine, which is a TIH. As was discussed at the STB hearing in April of this year, the common carrier obligation is the statutory duty of railroads to provide transportation or service for shippers under 49 U.S.C. § 11101(a). Olin takes this obligation very seriously since all of our facilities have access to only one rail carrier. Furthermore, 80% of Olin's chlorine is transported by rail to customers who have no other option than to receive it by rail. For a captive shipper, like Olin, regardless of its size or location, the efficient movement of

its traffic – in some cases even the very survival of its business – depends on the common carrier obligation

As a preface to my testimony, Olin unequivocally believes that the railroad carriers would not carry TIH if they were not required by law to do so. To illustrate this, at the STB hearing on April 25th, 2008, Chairman Nottingham asked a panel of representatives of major railroads if they would transport TIH without the common carrier obligation. The sentiment of the witnesses was that they would not carry TIH if they were not required to do so. Without the explicit common carrier obligation protection in Federal statute, it is clear that the railroads would not ship TIH materials which are integral to the functioning of the U S economy.

With this background, I would like to address issues related to the STB notice for this hearing

1. Liability standard against Railroads

Olin does not believe that railroads are held strictly liable for the transportation of TIH materials. Instead, their liability for damages arising from an incident involving the shipment of TIH materials is determined based upon negligence principles. In particular, Olin believes that, in most circumstances, a terrorist act or similar event would be an intervening, superseding cause cutting off a railroad's liability for damages arising from the shipment of TIH materials.

In any event, railroads should continue to be liable for their own actions involving the transportation of TIH materials. Congress never intended for the common carrier obligation to be dependent on whether the railroads can operate without negligence or derailments as it relates to the transportation of TIH. The failure of the railroads to prevent dangerous and avoidable derailments cannot be a reason to deny service to shippers, like Olin, under the common carrier obligation.

2. Specific policy solutions to the liability issue related to TIH (including solutions similar to the Price-Anderson Act of 1957)

Olin is aware of various proposals to create a liability cap modeled on ideas similar to the Price-Anderson Act of 1957 ("PAA"). The purpose of the PAA is to limit liability from incidents involving the release of nuclear material, and to ensure the availability of a large pool of funds to provide compensation to individuals who suffer damages from a nuclear or radiological incident in excess of that liability limit. The PAA covers incidents arising from power reactors, processing plants, and from storage and transportation of nuclear fuel and waste. The owners of nuclear power plants contribute to the excess fund.

Olin thinks there is significant merit to an indemnification model, similar to that of the PAA, if such a statutory solution is tied to the following:

A railroads agreeing to a robust reduction in the present rates (private and tariff),

B railroads agreeing to enter into long term written contracts for stability and predictability needed by American consumers of TIH,

C that the benefits of the liability cap extend to the shippers, and

D that there is a newer and simplified tariff rate hearing process

If all of these standards would be met, Olin would be supportive of the PAA model as a starting point for our discussions with the railroads. For example, in any liability coverage, railroads must be primarily liable for the transportation of TIH products. I believe that chemical companies would be willing to pay their share of the secondary liability costs of shipping TIH products. To illustrate this, when I testified at the STB hearing on April 24, 2008, I stated that Olin was willing to share liability for the transportation of TIH if the railroads shared with us how much they pay in liability premium payments. Unfortunately, the major railroad carriers have still not provided us with this information.

When developing any liability model, Olin believes it is vital that all interested parties collaborate and attempt to reach consensus. We believe it is important to recognize that the PAA law is not the only liability model which can be followed by the common carrier railroad industry. For example, Olin would encourage the United States Congress to also examine other liability models such as the ones related to Amtrak and the Terrorism Risk Insurance Act (TRIA). As way of background, TRIA is a Federal program which contains a government backstop for private property/casualty insurance claims if a particular terrorist event would occur.

3. What is the appropriate role for the STB board in developing a liability policy solution?

The common carrier obligation for railroads is the result of Federal statute 49 U.S.C. Section 11101(a). Any effort to create a liability system for the transportation of hazardous materials by rail would have to be done by Congress. The STB certainly can advise the various agencies that oversee rail traffic of its proposals to limit shipper and railroad liability, and provide important testimony to the relevant Congressional Committees. However, any modifications to the common carrier obligation have to be done solely by Congress. As an example, the PAA was enacted into law in 1957. Since that time, PAA has been modified by different Acts of Congress.

Any effort to create a Federal liability system for the rail transportation of TIH materials should be subject to the same legislative process as the consideration of the PAA. If any TIH liability statute would be signed into law, the STB should be delegated the authority to implement this program by proposed and final rulemaking.

4. What is a reasonable request for service involving the movement of TIH?

The common carrier obligation was established by Congress to protect all rail shipments, including chemicals such as chlorine. When examining the common carrier obligation, I believe it is important to review the exact contents of 49 U.S.C. § 11101(a), which is as follows:

“(a) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request.”

As the plain text of this statute illustrates, the common carrier obligation is not conditioned on whether or not a chemical is TIH. In fact, this statute makes no reference as to the particular safety of a commodity which is being transported. Rather, the duty applies to all shipments by rail which is based on a reasonable request. Olin believes it is very reasonable to require railroads to carry substances such as chlorine. Congress did not intend for cost and safety issues for railroads to be a reason to deny service under the common carrier obligation.

Olin believes that it is reasonable to require railroads to transport chemicals like chlorine for two primary reasons: the exemplary safety record of the shipment of chlorine and the extreme importance of chlorine to our nation's health, economy and security.

A. Exemplary safety record of the transportation of chlorine

To illustrate the reasonableness of railroads transporting chlorine shipments, it is very important to focus on the exemplary safety record of these shipments. To illustrate this, according to the Chlorine Institute, of the 1.5 million chlorine tank shipments since 1965, there have been 11 breaches of a tank car, representing only 0.00073 % of all shipments. This safety record demonstrates the reasonableness of transporting chlorine.

The failure of the railroads to prevent dangerous and avoidable derailments cannot be the basis of a reasonable refusal to deny service to shippers, like Olin, under the common carrier obligation. To illustrate this, the National Transportation Safety Board has found that in the three fatal tank car accidents since 2002 involving TIH (Minot, North Dakota; Macdonia, Texas; and Graniteville, South Carolina), the cause was either maintenance or operational errors on the part of the railroads. However, the railroads insist on passing along the “risk premium” in questionable pricing actions or attempt to renege entirely on their legal obligations based solely on their negligence in failing to keep trains from crashing.

B. Chlorine is essential to the nation's health, economy and security

In light of chlorine's importance to our nation's health, economy and security, it is very reasonable to require railroads to transport this commodity under the common carrier obligation. For example, according to the Chlorine Institute, chlorine products of all kinds and their derivatives are associated with 45% of the nation's Gross Domestic Product. The chlor-alkali industry alone contributes over seven billion dollars directly to the U.S. economy each year.

Chlorine chemistry is essential to everyday life. The products of chlorine chemistry make possible clean water and safe foods, pharmaceuticals, medical equipment, construction materials, computers, electronics, automobiles, clothing, sports equipment, agriculture, and much more. For the majority of these applications, there are no reasonable substitutes for chlorine. With respect to national security, the U.S. Department of Homeland Security has deemed chlorine to be an essential asset to the "critical infrastructure." I absolutely believe that it is reasonable for railroads to transport a commodity which has this designation by the U.S. government.

5. What are the unique costs associated with the transportation of hazardous materials and if any, how do railroads recover these costs?

Olin recognizes that the railroads have maintained that there are increased cost pressures because of liability concerns. With respect to liability, Olin has not been privy to what liability insurance is available to the railroads and at what cost. However, we have seen significant pricing increases as the railroads have tacked on the "risk premium" to cover their alleged increased costs.

During the STB hearing on April 24, 2008, Olin brought to the STB's attention the fact that it had attempted to enter into negotiations with one or more railroad carriers regarding liability cost-sharing. Under our proposal, Olin would be given the opportunity to pay to the carrier any incremental insurance premium that carrier was charged by an insurance carrier for shipping Olin's TIH products. This is the cleanest and simplest way to assist the railroads in dealing with alleged massive increases in insurance premiums which have led to drastic rate increases. During the STB hearing in April, Chairman Nottingham indicated that this idea was worth examining. However, Olin has not been able to have any carrier advise it of what such premiums would be, or how much the rate roll back would be if Olin paid the incremental premium.

It is also important to point out at this same STB hearing, Chairman Nottingham asked the different railroads if they would provide how much their liability insurance costs. I am interested to know whether the railroads have provided this information to the STB. If the railroads have not yet provided this information, Olin would like to formally ask the STB to require the railroads in this proceeding to fully document these "unique" costs which the railroads claim, and then assist the parties in coming up with a mechanism whereby a shipper could pay such premium and then receive a rate roll back to where rates were before the so-called liability insurance premium crisis started a few years ago.

If the chemical companies, like Olin, act in good faith with respect to liability cost-sharing, the railroads must also act in good faith and change their behavior related to freight rates for shippers. The current freight rates that shippers are paying are not fair and equitable. For example, Olin has experienced average annual increases of 20% or more since 2005, and we find that by the end of 2008, our chlorine freight rates will have tripled from the average rates between 2002-2004.

Olin believes, absent pressure from Congress or the STB, that the railroads will not reduce their freight rates even if their liability costs come down. To demonstrate the reasons for this fear, at the STB hearing on April 25th, Chairman Nottingham asked a panel of railroad representatives the following question: if the costs of liability come down for the railroads, will the freight rates come down? The railroad representatives were unwilling to make a commitment about the reduction of rates.

If railroads do not reduce their rates, these massive price increases threaten the ability of chemical shippers to keep their plants profitable and economically viable. Continued price increases would ultimately make the transport of chlorine by rail economically untenable and essentially have the same effect as the railroads refusing to ship chlorine if the common carrier obligation is eliminated.

6. How are different federal agencies addressing the transportation of hazardous materials?

For decades, the U.S. Department of Transportation (DOT) has regulated the safety of hazardous materials in transportation. More recently, the Transportation Security Administration of the U.S. Department of Homeland Security (DHS) initiated rulemaking on the security of certain hazardous materials in transportation. Within DOT, the Pipeline and Hazardous Materials Safety Administration and the Federal Railroad Administration regulate the transportation of hazardous materials by rail. DOT's Hazardous Materials Regulations dictate how shipments of hazardous materials are classified, packaged, marked, placarded, documented, and transported. DOT regulates chlorine as a Division 2.3 gas poisonous by inhalation (PIH) and a Class 8 corrosive material. Specific DOT Hazardous Materials Regulations dealing with transportation of chlorine by rail include 49 C.F.R. Sections 173.10 (Tank car shipments), 173.31 (Use of tank cars), and 173.314 (Compressed gases in tank cars and multi-unit tank cars). Part 174 of 49 C.F.R. contains general rules on transporting hazardous materials by rail, and Part 179 contains specifications for tank cars.

DOT recently issued an Interim Final Rule entitled "Hazardous Materials Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments" 73 Fed. Reg. 20751 (April 16, 2008). The interim final rule imposes additional regulatory obligations on rail carriers transporting PIH materials in bulk quantities (*i.e.*, 119 gallons or more). The new obligations include: (i) compiling shipping data and analyzing the safety and security risks for each route used, (ii) identifying and assessing practicable alternative routes, and (iii) reviewing and selecting annually the safest and most secure practicable route for each commodity. DOT also recently issued a Notice of Proposed Rulemaking entitled "Hazardous Materials Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials" 73 Fed. Reg. 17817 (April 1, 2008). The proposed rule is intended to improve the crashworthiness of tank cars designed to transport PIH materials. This tank car rulemaking alone, according to DOT estimates, would double the average impact speed required to puncture a TIH railcar, thereby significantly reducing risk concerns expressed by the railroads.

In addition to these DOT rulemakings, DHS issued a Notice of Proposed Rulemaking entitled "Rail Transportation Security" 71 Fed. Reg. 76852 (December 21, 2006). Under DHS' proposal, designated shippers, recipients, and rail carriers of prescribed quantities of PIH

materials would have to (i) provide secure chain of custody and control, with particular emphasis on densely populated areas, (ii) designate Rail Security Coordinators as principal points of contact, (iii) report "incidents and other matters of security concern," and (iv) determine and report physical location and shipping information of rail cars to DHS within one (1) hour, if requested

Conclusion

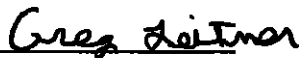
Olin commends the STB's examination of the importance of the common carrier obligation as it relates to TIH materials. Olin continues to rely on the common carrier obligation of the railroads to maintain our ability to ship product to our customers at a reasonable rate and with reasonable service. If the common carrier obligations for TIH materials are weakened or eliminated and the railroads decline to carry product from our manufacturing facilities to our customers, manufacturing operations would cease both at Olin and for many of our customers.

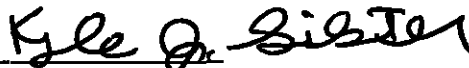
Because of the importance of this railroad obligation to transport TIH materials, Olin is willing to share with its railroad carriers the costs of any incremental insurance premium that the carrier was charged by an insurance carrier for shipping Olin's TIH products if, among other things, the railroads specifically identify the costs of any such incremental insurance premium and Olin receives the benefits previously described in this proposal, i.e., rate roll backs and long-term contracts. It is our hope that the railroads will match our good faith effort by becoming more transparent and release their liability insurance premiums. Without knowing this information, it is impossible to make positive steps forward in addressing the liability costs of transporting TIH.

Olin looks forward to becoming a constructive part of any public policy discussions on liability cost sharing. We feel that the PAA model is instructive as a starting point for these discussions. However, any approach that Congress considers must weigh the costs and benefits of the different liability alternatives in seeking a best way to move forward for both the shippers and the railroads.

Thank you again for the opportunity to testify before the STB. If you have any questions regarding my testimony, I would be happy to answer them.

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