

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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COMMON CARRIER	)	
OBLIGATION OF RAILROADS –	)	Ex Parte No. 677 (Sub-No. 1)
TRANSPORTATION OF	)	
HAZARDOUS MATERIALS	)	

**COMMENTS OF
WESTLAKE CHEMICAL CORPORATION**

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Westlake Chemical Corporation ("Westlake") submits these comments in response to the Surface Transportation Board's ("STB" or "Board") June 4, 2008 notice ("Notice"). Westlake also incorporates by reference the comments it submitted to the Board on April 17, 2008 in Ex Parte No. 677, Common Carrier Obligation of Railroads ("April 2008 Comments").

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's business mission is to provide quality products and services to commodity chemical, plastics, and related fabricated products markets. In order to fulfill its business mission, Westlake relies 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 rail cars for all these movements. This transportation includes shipments of hazardous materials. Westlake has a significant interest in helping to ensure that the railroads meet the essential transportation service needs of Westlake, including Westlake's need to transport hazardous materials by rail.

I.

COMMENTS

The Board requests comments on specific issues related to the transportation of hazardous materials by rail, particularly the transportation of toxic by inhalation hazardous materials ("TIH"). In its Notice, the Board observes that, "[f]or many hazardous materials, including TIH, rail is the safest and most efficient mode of transportation. But, according to the railroads, the transportation of these materials subjects them to ruinous liability in the event of an accident." Id. at 2. The Board requests comments on "specific potential policy solutions to the liability issue" (e.g., Price-Anderson Act-style liability legislation); "what constitutes a reasonable request for [TIH] service;" and whether there are "unique costs associated with" TIH service. Id.

As Westlake has previously advised the Board, the only TIH Westlake moves by rail is chlorine. See April 2008 Comments at 4-5. 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)

A. Addressing Underlying Railroad Liability Concerns

Westlake agrees with the Board that "rail is the safest and most efficient mode of transportation" (Notice at 2) for TTH movements such as chlorine. There is no practical way to replace the current rail transportation movement of hazardous commodities. The railroad industry agrees.

Banning hazmat shipments in even one city would be problematic, banning them in cities throughout the country would cause immense confusion and economic disruption nationwide – and would virtually shut down hazmat shipments by rail in this country

Moreover, banning hazmat movements by rail would likely lead to many more movements by truck, but there is a much greater chance of release due to an accident when hazmat is carried by truck than when it is carried by rail. Railroads and trucks generate roughly equal hazmat ton-mileage, but trucks have 16 times more hazmat releases than railroads

Domestic Passenger and Freight Rail Security: Hearing Before the Comm. on Commerce, Science, and Transp., 109th Cong. 56 (2005) (statement of Edward R. Hamberger, President/CEO, Ass'n of Am. R Rs) (emphasis added). Banning movements of hazardous materials by rail is utterly unworkable from a security or safety perspective, and would cause enormous nationwide economic disruption.

Handling hazardous commodities requires great care from all participants in the supply chain. That is why Westlake is committed to safety, as is evidenced by a number of safety awards it has achieved (including safe handling awards from Class I railroads). Additionally, Westlake always has been, and continues to be, interested and actively engaged in efforts to cooperatively work with all of its vendors, including the railroads, in ensuring the safe and efficient movement of its business products.

Like many other businesses, the railroads may be subject to potential financial liability in the event of an accident. However, prior to examining whether any particular policy solution is necessary to address any catastrophic liability concerns, it is imperative that the scope and extent of the asserted problem be understood – especially if any such “solution” involves substantial new burdens on railroad customers. Westlake respectfully submits that there is a lack of any specific evidence from the railroads (in the Board’s Ex Parte No. 677 docket or elsewhere) on the nature or extent of the railroad’s asserted “ruinous liability” concerns related to the movement of TTHs.

For example, other than a few general assertions, the railroads have not supported their claims of “ruinous liability” with any studies of accident risk, financial exposure, insurance limitations, etc. Moreover, it is clear that, to date, transportation of TTH and other hazardous commodities has not caused the railroad industry to incur “ruinous liability.” Today, the major railroads are earning record profits, and touting their financial strength, not any “ruinous liability” concerns, to Wall Street.

The railroads also have not presented any supporting evidence or studies demonstrating that the future will likely bring “ruinous liability” if the railroads continue to haul TIH materials. Indeed, all of the evidence is directly to the contrary. The railroads’ principal safety regulator, the Federal Railroad Administration (“FRA”), reports that transportation of hazardous materials is safer than ever today, due to the actions of all stakeholders – federal safety regulators, railroads, and shippers. While acknowledging a few isolated railroad-caused train accidents involving the release of TIH in recent years (e.g., Graniteville, SC), the FRA has concluded that “the vast majority of hazardous material shipments arrive at their destinations safely; few tank cars have leaks or spills of any kind, fewer still are breached in an accident or incident.”¹

Similarly, the Department of Transportation (“DOT”) has informed the Board “the reality is that an absolutely overwhelming proportion of hazardous materials move across the nation by rail in complete safety,” release risks “amount[] to a tiny fraction of one percent,” “[m]ost of the releases [are] small and cause[] no personal injury,” and “the risk of a large release . . . is truly slight even on a national basis.”²

¹ Current Issues in Rail Transp. of Hazardous Materials: Hearing Before the H. Comm. on Transp. and Infrastructure, 109th Cong. 68 (2006) (statement of Joseph H. Boardman, Administrator, FRA) (“2006 FRA Testimony”).

² See Brief of the United States Department of Transportation, Canadian Pacific Ry. Co., et al – Control – Dakota, Minnesota & Eastern R.R. Corp., et al., STB Finance Docket No. 35081 (DOT-5) (filed July 2, 2008) at 5.

In support of its conclusions that rail transportation of hazardous materials is very safe, FRA has cited the railroads' impressive safety record in transporting chlorine by rail.

Considering just chlorine, for example, since 1965 (the earliest data available) there have been at least 2.2 million tank car shipments of chlorine-only 788 of which were involved in accidents (0.036 percent of all the shipments). Of those accidents, there were 11 instances of a catastrophic loss (i.e., a loss of all, or nearly all) of the chlorine lading (0.0005 percent of all the shipments). Of the 11 catastrophic losses, four resulted in fatalities (0.00018 percent of all the shipments).

For all hazardous materials, in the 12 years from 1994 through 2005, hazardous materials released in railroad accidents resulted in a total of 14 fatalities. In the same period, hazardous materials released in highway accidents resulted in a total of 116 fatalities. While even one death is too many, these statistics show that train accidents involving a release of hazardous material that causes death are infrequent and rare.

It is also important to quantify the risk of any hazardous material release – whether fatal or not – because of a railroad accident. In the year 2004, for example, there were approximately 1.7 million shipments of hazardous materials by rail, and there were 29 train accidents in which a hazardous material was released. In these accidents, a total of 47 hazardous material cars released some amount of product. The risk of a release was a tiny fraction of a percent (47/1,700,000, or 0.0028 percent).

2006 FRA Testimony, 109th Cong 68-69. More generally, FRA has found:

Rail transportation and handling of any hazardous material, especially TIH materials, are dangerous when not properly done. Congress recognized this very danger long ago and has regulated these activities. Over the years, a body of statutory law and detailed administrative regulation has been developed to address the risks associated with the transportation and handling of hazardous materials. FRA and DOT as a whole continually seek ways to further mitigate these risks, such as through efforts to enhance the security of TIH shipments. The effectiveness of this regulatory regime is evidenced by the remarkably low number of incidents in light of the high volume and length of haul of TIH materials transported by rail.

Domestic Passenger and Freight Rail Security: Hearing Before the Comm. on Commerce, Science, and Transp., 109th Cong. 100 (2005) (FRA response to written questions). The facts, as determined by the expert safety regulators FRA and DOT, confirm that railroads have moved, and should continue to move, hazardous materials in a safe manner that minimizes the risks of accidents.

Moreover, in those rare instances where accidents involving hazardous materials take place, the law accords railroads with substantial insulation from liability. Generally speaking, railroads are not liable for accidents involving discharge of hazardous materials when they are operating in accordance with governing federal safety standards and their own internal safety standards. See 49 U.S.C. §§ 20106, 5125, CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 673-76 (1993). In re: Derailment Cases, 416

F.3d 787, 795 (8th Cir. 2005). And, in those even rarer instances where railroads have been found liable for damages caused by accidents involving hazardous materials, the railroads have been able to satisfy judgments in the same manner as other businesses without incurring any “ruinous liability.”

In sum, the railroads have submitted no evidence demonstrating that their claims of “ruinous liability” have any basis in fact. While anyone can conjure up speculative “what if” scenarios, the fact of the matter is that transportation of hazardous commodities has not, and should not, expose railroads to “ruinous liability” if the railroads continue to adhere to federal safety statutes and rules, and continue to work with all stakeholders to insure the safe handling and transport of these materials

B. Potential Policy Solutions to the Liability Issue

There is no record of a “problem” on which to seek a “policy solution” (e.g., the Price-Anderson Act) to address railroad liability concerns. As such, implementing policy solutions is premature at this time. Also, Westlake understands that the Price-Anderson Act was unique legislation, enacted in 1957 at the inception of the nuclear power industry as a necessary means to encourage nuclear power development while protecting the public through ensuring prompt and equitable compensation in the event of an accident. In contrast, the movement of hazardous materials by rail is not at its inception stage, and, as explained, the movement of these materials has long been regulated primarily through FRA’s and DOT’s promulgation and enforcement of various regulations to manage and mitigate the risks posed.

Furthermore, any policy solutions to railroad liability concerns with regard to the transportation of hazardous materials falls outside of the STB's jurisdiction, and would need to be decided by Congress, with the involvement and primary input from the relevant railroad safety agencies (e.g., DOT, FRA, the Department of Homeland Security ("DHS"), and the Pipeline and Hazardous Materials Safety Administration ("PHMSA")).³

C. Reasonable Requests for Service/Unique Costs

The law is clear that a railroad has a common carrier obligation to transport all chemicals (including THs) upon reasonable request. See April 2008 Comments at 5-7, citing cases including Classification Ratings of Chemicals, Conrail, 3 I.C.C. 2d 331, 336-38 (1986) ("Classification Ratings"). The law is also clear that a shipper's request for transportation of a hazardous commodity is reasonable if the request complies with all applicable governmental safety requirements promulgated by agencies with primary jurisdiction over railroad safety. See id. at 335-36 (1986); Akron, Canton & Youngstown R.R. Co. v. ICC, 611 F.2d 1162, 1169 (6th Cir. 1979); Consol. Rail Corp. v. ICC, 646 F.2d 642, 650 (D.C. Cir. 1981); Pejepscot Industrial Park, Inc. d/b/a Grimmel

³ See, e.g., Tyrrell v. Norfolk S. Ry. Co., 248 F.3d 517, 523 (6th Cir. 2001) ("Congress vested the FRA with primary authority over national rail safety policy"); Boston and Maine Corp. v. STB, 364 F.3d 318, 321 (D.C. Cir. 2004) ("primary jurisdiction over railroad safety belongs to the [FRA], not the STB"); Granite State Concrete Co., Inc. and Milford-Bennington R.R. Co., Inc. v. Boston and Maine Corp. and Springfield Terminal Ry. Co., STB Docket No. 42083 (STB served Sept. 24, 2004) at 3 ("[t]he [FRA] has primary responsibility over rail safety matters, and therefore, it is not the Board's role to be the final arbiter of safety issues").

Indus. – Petition for Declaratory Order, STB Finance Docket No. 33989 (STB served May 15, 2003) at 13. (“Pejepscot”).⁴

The STB clearly has the power to enforce the statutory common carrier obligation. See 49 U.S.C. § 11101(b) (rail carriers to provide common carrier service on reasonable request). However, the agency does not have the authority to eliminate the Congressionally-mandated common carrier obligation by permitting railroads to refrain from transporting hazardous materials or by permitting railroads to impose unreasonable limitations on their carriage of these materials (e.g., by imposing unreasonably high rates or charges) ⁵ Not only would such actions on the part of the Board be unlawful, they would most likely cripple the nation’s economy since, as discussed above, rail

⁴ Railroads may seek to impose stricter safety measures than are required under applicable governmental standards, but in such instances they have the burden of demonstrating the “presumptively valid . . . regulations are unsatisfactory or inadequate in their particular circumstances” and that their proposed standards are “necessary and reasonable.” Classification Ratings, 3 I.C.C.2d at 335-36. The railroads have made no such showing concerning the transportation of chlorine or other chemical products (or sought stricter safety standards through a DOT rulemaking), 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.

⁵ The common carrier obligation places a heightened responsibility on railroads to meet the service needs of the public See, e.g., G.S. Roofing Products Co. v. STB, 143 F.3d 387, 391 (8th Cir. 1998) (railroads have a “higher standard of responsibility” to serve shippers because of the carriers’ “quasi-public nature”). Carriers “cannot lawfully make fulfilling their statutory obligations contingent upon whether they think it is ‘worth it’ to do so.” Pejepscot at 12-13. Rather, “[t]he only appropriate mechanisms a railroad may employ to excuse itself, permanently or temporarily, from its common carrier obligations on a line of railroad are abandonment or embargo” Id.

transportation of hazardous materials is a critically important component in the nation's economic supply chain.

Also, Westlake is unaware of any "unique costs associated with the transportation of hazardous materials" (Notice at 2) not already included in the Board's Uniform Rail Costing System and the railroads have not presented any evidence of such costs

D. The Suggested Role of the Board

As discussed in its April 2008 Comments, Westlake is very concerned about rail service, and rail pricing policies, that would adversely impact its ability to obtain efficient and cost-effective rail transportation service. Westlake also emphasizes that while there has been no showing that railroad liability for the transportation of hazardous materials has increased, and incidents of tank car releases have actually decreased, railroad rates on TIHs and poisonous inhalation hazards ("PIH") have substantially increased. See, e.g., 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) ("[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))."

Westlake encourages the STB to be proactive in requiring railroads to provide needed transportation service at reasonable prices. In this respect, Westlake is

pleased that the Board in the DuPont rate cases rejected the defendant rail carrier's arguments that challenges to the movements of certain of the involved hazardous materials should be exempt from review under the Board's rate reasonableness standards. See E. I. DuPont De Nemours and Co. v. CSX Transportation, Inc., STB Docket No 42100 (STB served Dec 20, 2007) at 6. The ability of shippers to seek rate reasonableness relief from the Board from such unreasonable pricing should not be undermined

Westlake respectfully submits that the Board's resources should be directed toward addressing the competitive and pricing problems facing railroad customers, with railroad safety oversight remaining under the main providence of the DOT, FRA, DHS, and PHMSA, which have primary jurisdiction over railroad safety. 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, requirements, or obligations designed to enhance the railroads' singular economic interests.

CONCLUSION

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

Respectfully submitted,

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