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Surface Transportation Board

Ex Parte No. 677 (Sub-No. 1)

**Common Carrier Obligation of Railroads for the Transportation of Hazardous
Materials**

**Testimony of Robin A. Burns, Vice President Supply Chain for Occidental
Chemical Corporation**

**By copy of this written submission, I hereby request that I will need fifteen
minutes for my testimony on July 22.**

**My name is Robin Burns and I am the Vice President Supply Chain for
Occidental Chemical Corporation, more commonly known as OxyChem. I am
here today to express OxyChem's position on the common carrier obligation for
the transportation of hazardous materials, including materials considered a
Poisonous Inhalation Hazard or PIH, such as chlorine.**

**As noted during the earlier hearing on common carrier obligations, it is
extremely important that OxyChem have access to an adequate rail transportation
network throughout the United States. Railroads must continue to be required, as
common carriers, to carry hazardous materials that are necessary for many of the
industrial applications essential to our economy. The common carrier doctrine is a
bedrock of remaining rail regulation, and mitigates public discomfort with rail
industry consolidation.**

OxyChem is a leading North American manufacturer of basic chemicals and vinyl resins, including chlorine, caustic soda and polyvinyl chloride (PVC) – the building blocks for a range of products. OxyChem employs 3,100 people at 23 domestic locations spread throughout the central to eastern United States. Our products, which are used in water purification, medical supplies, pharmaceuticals, construction materials and agricultural chemicals, are vital to the economy of the United States.

Our various business units make over 70,000 rail shipments per year; of these, approximately 48,000 involve “so-called” hazardous materials. Of these 48,000 shipments, approximately 20% are chlorine. Due to the locations and needs of our many customers and users across the United States, rail transportation is essential for this critical building block. Pipeline transportation is not feasible for small or geographically distant customers. Generally, trucks are not cost effective and are inherently riskier, considering the number and distance required to handle the volume.

Over the past 4 years, we experienced exorbitant rail rate increases, ranging from as high as 70% for non PIH and non-hazardous commodities, to 238% for our PIH commodities. We believe these rate increases are directly related to the market dominance of the railroads. Analysis of our traffic patterns has revealed that over 70 percent of our origin/destination pairs are served by only one railroad,

which effectively provides the railroad with market power in pricing their service.

One of the reasons given for these extreme rate increases is the liability for the transportation of PIH materials.

We understand that the railroads have suggested that we look to the Price-Anderson Act ("PAA") as a possible model for a risk-shifting mechanism. While a complete discussion of all of the public policy and other considerations underlying the PAA is beyond the scope of this testimony, we think the railroads have misrepresented the substance of the PAA. With respect to the PAA and how it works, OxyChem hereby adopts the testimony of the Edison Electric Institute filed herein. Moreover, the PAA explicitly stands for unified limits that would also apply to shippers and thus, in this instance, would limit the liability of the chemical industry as well as that of the railroads.

Oxy is opposed to any shift in the model of liability allocation to shippers, *unless* that model continues to make railroads responsible for any incidents due to their gross negligence or willful misconduct. Oxy is opposed to supporting a program which provides multiple layers of coverage provided by both the Carriers and Shippers, *unless* the discussions take place with all major shippers and railroads and involve profit limits and material price concessions to offset any agreed shift in liability, recognizing the very high rates currently paid by shippers of PIH chemicals. Oxy would be opposed to a new risk allocation model, *unless*

the railroads (i) accept the preceding conditions, (ii) agree to negotiate long-term multi-year contracts that permit shippers to plan their business and (iii) promote meaningful reform of the current STB rate review mechanism. In our proposed model, which would create a balanced responsibility, the railroads, including the Shortlines, would jointly secure insurance up to a predetermined amount. Shippers would also jointly purchase insurance for the next layer of coverage. Effective immediately, shippers would begin paying a surcharge on a per shipment basis for all PIH moves. Surcharges are to be accumulated into a fund managed by a third party to be used in the event both levels of insurance coverage are exhausted. Congress would be required to limit the liability at the total amount covered by the three levels. In return, we would ask that the STB (directly or through supervision of DOT) limit the rates on PIH moves to an RVCR of 250%.

Summary of Proposed Program

- Does not cover gross negligence or willful misconduct on the part of the railroads.
- Railroads jointly secure insurance coverage up to a predetermined amount
- Shippers jointly secure additional coverage up to a predetermined amount. This policy will only pay out in the event that the Railroads' policy is exhausted

- Shippers pay a surcharge for each PIH move, building a fund to be tapped in the event that both the Railroad and Shipper insurance coverage is exceeded.
- Congress establishes an amount that can be paid out during any single incident limited to the total amount available through the insurance policies and the fund built through surcharges. These limits on liability would apply to claims against both shippers and railroads.
- PIH Rates are fixed at a 250% RVCR.
- Railroads must negotiate in good faith long-term multi-year contracts with shippers of PIH chemicals.
- Railroads must make capital investments to promote safety infrastructure and continue to work with Shippers to implement safety and security improvements.

I'm sure that you will hear objection from the railroads on regulating rates for these moves, but as reported by the AAR, the PIH moves represent .3% of rail carloads. I would hope that the railroads would be willing to do a fair and equitable trade of regulation of .3% of their business in return for a fair liability mitigation in the event of an accident.

As mentioned in earlier testimony, OxyChem is actively engaged in the new tank car design for chlorine. We have made a public commitment to replace our

entire chlorine rail fleet with the new design by 2017. Based on our own commitment and attention to safety in our manufacturing facilities, our commitment to strengthen the car used to transport the material, our partnership with the railroads in emergency response and safe handling, the importance of this product to the safety and health of the United States, we believe that the request to move chlorine is a reasonable request for service and that railroads should continue to be obliged by the common carrier obligation to haul chlorine.

We understand that there are limited costs associated with the transportation of hazardous materials. These may include resources for positive handoff, time required to constructively place the car in a specific spot within the train, and the cost of running a train at a slower speed. However, each of these actions is done for a specific reason to ensure the safe and secure movement of that car. We believe that these costs are already being recouped through the exorbitant rates being charged PIH shippers. If the STB believes that a fair and equitable Revenue to Variable Cost Ratio (RVCR) is 180, then a RVCR of 250 should cover any unique costs associated with a PIH move. However, OxyChem and its customers are currently paying rates for chlorine shipments that have an RVCR in excess of 1000!

If the railroad industry believes that changes to the statutory common carrier obligation are appropriate, it must seek those changes from Congress, not the STB.

Moreover, courts have held that the Board has no authority to regulate the railroads on the grounds of safety and proclaim that the movement of PIH is too dangerous to move. DOT, FRA, PHMSA and TSA (under the umbrella of DHS) are the only agencies with authority to issue safety and security regulations governing the movement of these materials and are actively engaged in looking for ways to continue to improve on the safe and secure movements of these materials. However, OxyChem is willing, as described above, to discuss legislative issues with the railroad industry.

OxyChem is grateful for the opportunity to speak today on the need to maintain the current common carrier obligation. Chlorine and its derivative products are vital to the way we live. It is imperative that the STB continue to enforce the railroads' current common carrier obligation, in order to assure the continued safe transport of PIH products (including chlorine).

Thank you for your consideration.