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VIA ELECTRONIC MAIL

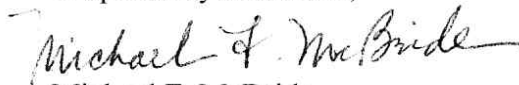
The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, N.W.
Washington, DC 20423-0001

Re: STB Finance Docket No. 35219 -- Union Pacific Railroad Company
Petition for Declaratory Order

Dear Secretary Quinlan:

Enclosed for filing is the Reply by Westlake Chemical Corporation to the Petition for Declaratory Order filed herein by Union Pacific Railroad Company.

Respectfully submitted,



Michael F. McBride
Attorney for Westlake Chemical Corporation

cc: (w/encl.) Tonya W. Conley, Esq. (via e-mail)

SURFACE TRANSPORTATION BOARD

Finance Docket No. 35219

UNION PACIFIC RAILROAD COMPANY-- PETITION FOR A DECLARATORY ORDER

REPLY OF WESTLAKE CHEMICAL CORPORATION IN OPPOSITION TO THE PETITION

Pursuant to the Board's decisions served herein on March 10, 2009 and March 25, 2009, Westlake Chemical Corporation ("Westlake") hereby replies in opposition to the Petition for a Declaratory Order ("Petition") filed herein by Union Pacific Railroad Company ("UP").

Although UP's Petition is ostensibly addressed to certain specific long-distance movements of chlorine for a particular shipper (which has identified itself as US Magnesium LLC in its own Reply in opposition to the Petition), the Petition is in reality an assault on the common carrier obligation of railroads with respect to hazardous materials generally, not just with respect to the specific movements to which the Petition was addressed. The Petition seeks to re-litigate – for the third time in just the last year – issues already thoroughly presented in both Ex Parte No. 677, *Common Carrier Obligation of Railroads*, in April 2008, and in Ex Parte No. 677 (Sub-No. 1), *Common Carrier Obligation of Railroads – Transportation of Hazardous Materials*, in July 2008. Westlake participated actively in the Ex Parte No. 677 and Ex Parte No. 677 (Sub-No.

1) proceedings. For the reasons stated therein, and because UP's Petition would have an extremely deleterious impact on Westlake, the U.S chemical industry, and on the U.S. economy as a whole, Westlake and other companies, associations, and groups have opposed, or will oppose, the Petition.

Interests of Westlake Chemical Corporation in Safe and Adequate Rail Transportation

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 and raw materials (such as chlorine) that are used to manufacture those products. In 2007, Westlake shipped approximately 24,000 rail cars of outbound rail movements and provided the rail cars for all of these movements, including shipments of hazardous materials. Accordingly, it is necessary that the railroads meet the essential transportation service needs of Westlake, including Westlake's need to move hazardous materials by rail.

Railroads have been obliged to carry hazardous materials as common carriers since the time that they came into existence.¹ There is, of course, a simple reason for

¹ The common carrier obligation actually has been a fixture of the English common law for hundreds of years, since it was first applied to so-called "draymen." The same obligation was imposed on railroads when they first came into existence, and the same legal principles as were followed in the English common law were incorporated into the U.S. legal system even before railroads were regulated by statute.

that: railroads are needed to transport hazardous materials, such as chlorine, anhydrous ammonia, and many other materials needed for innumerable industrial applications. For example, chlorine is used not only for water purification, but for the manufacture of pharmaceuticals and many other important applications. Anhydrous ammonia is used not only as a fertilizer in agriculture, but also to provide legally required pollution control at coal-fired power plants. Other hazardous materials similarly are used in myriad ways which are critical to the economy. The railroads are justifiably proud to note that they are, by far, the safest means for transportation of hazardous materials generally, and so testified before this Board. Therefore, railroad transportation is vital to the economy.

Accordingly, for purposes of this proceeding, Westlake and the other companies which together make up the U.S. chemical industry require two things of importance to them and to the Nation: (1) that there is an adequate rail transportation network in the United States, and (2) that railroads continue to be required to carry all commodities, including the various hazardous materials, tendered to them.

Safe Transportation Requires Railroads to Carry Hazardous Materials

It is especially significant to this proceeding that, in the 1970s, the Board's predecessor the Interstate Commerce Commission ("ICC") held that railroads are and must remain common carriers of spent nuclear fuel and high-level radioactive waste despite any risks associated with carrying those commodities,² and it found that the rail mode was found to be several times safer than motor carriers to move radioactive and

² *Akron, Canton & Youngstown R.R. v. ICC*, 611 F.2d 1162 (6th Cir. 1979), *cert. denied*, 449 U.S. 830 (1980) ("*Akron, Canton*"), *aff'g U.S. Energy Research & Dev. Admin. v. Akron, Canton & Youngstown R.R., et al.*, 359 I.C.C. 639 (1979).

other hazardous materials.³ Those circumstances are unchanged today, as all parties appear to agree, except that rail transportation is even safer than it was then. At the same time, many hazardous materials such as anhydrous ammonia and chlorine are generally not transported by motor carrier for various economic and safety reasons unless absolutely necessary. In most instances, there is simply no practical alternative to rail transportation of such materials. Therefore, it is not only in the public interest to require railroads to carry chlorine and other hazardous but vital materials for Westlake and the rest of American industry – it is absolutely necessary that they do so.

Westlake was particularly pleased that two rail labor organizations – the Brotherhood of Railroad Signalmen and the Brotherhood of Maintenance of Way Employees Division – also have opposed UP's Petition, even though those organizations represent many of the very people who travel with the hazardous materials that railroads carry, and who, therefore, might have been expected to argue that the railroads should not have to carry hazardous materials.

The Common Carrier Obligation

Railroads are obliged, with only a very few exceptions, to provide transportation for *all* commodities – including all hazardous commodities -- tendered to them in conformance with all applicable governmental regulations.⁴

³ See generally, *Conrail v. ICC*, 646 F.2d 642, 650-53 (D.C. Cir.) (“*Conrail v. ICC*”), cert. denied, 454 U.S. 1047 (1981), *aff'g Trainload Rates on Radioactive Materials, Eastern Railroads*, 362 I.C.C. 756 (1980).

⁴ *Akron, Canton, supra*, 611 F.2d 1166-67; see also *Classification Ratings of Chemicals, Conrail*, April 30, 1986, 3 I.C.C.2d 331, 1986 WL 320853 (I.C.C.). Numerous shipper interests, including Westlake, filed extensive testimony and other submissions on the common carrier obligation of railroads, in Ex Parte No. 677. To avoid repetition, and in the interests of brevity, those submissions (which included an extensive discussion of the law and history of the common carrier obligation) are incorporated herein by reference. We provide only an overview of those legal and policy arguments in this Reply.

The only exceptions are for historical and practical reasons, having nothing to do with safety, for such things as money, gold and silverware, and circuses.⁵ As UP's 2007 Form 10-K states (at 7): "Federal laws require railroads, including us, to transport hazardous materials regardless of risk or potential exposure of loss."⁶

Because rail transportation is generally much safer than truck transportation, it is essential to the public interest that railroads continue to be required to carry all commodities (other than the few exceptions stated *supra*), especially hazardous materials. As the Board is well-aware, railroads are regulated by the STB when acting as common carriers, but not when acting as contract or private carriers. Moreover, STB rate regulation is available only when (a) the railroad is acting as a common carrier, (b) there is no effective transportation competition (*i.e.*, where there is market dominance) and (c) the railroad is charging very high rates. In such circumstances, STB regulation is vital, because the shipper has no option but to transport his or her commodities at the rate set by the railroad or the STB.

While the best solution to resolve railroad-shipper issues is a commercial one (*assuming both parties are being reasonable*), it is vital that the STB remain an effective regulator, to encourage commercial resolutions of rate and service disputes. The only way that the STB can remain an effective regulator is to preserve, and to provide clear guidance and parameters with respect to, the railroads' common carrier obligation,

⁵ *Akron, Canton, supra*, at 1169.

⁶ See also, Canadian National's 2007 Annual Report (at 53): (CN, "as a common carrier, ... has a duty to transport" "hazardous materials such as chlorine and anhydrous ammonia, commodities that are essential to the public health and welfare"); CSX's Form 10-K for the period through December 28, 2007 (at 8): "CSXT, as a common carrier by rail, is required by law to transport hazardous materials...."; and Norfolk Southern Railway Company's Form 10-K for fiscal year ending December 31, 2007 (at p. K13, included in NS's 2007 Annual Report):

without diluting the effectiveness of that obligation and without exempting vital commodities that are dependent on the railroad mode from that obligation.

If there is to be any change in the railroads' common carrier obligation (including any cap on liability, as the railroads have proposed, or a refusal to carry certain commodities), neither the Board nor the railroads are empowered to take such actions. Only Congress may do so, because the existing statutes require railroads to carry all hazardous commodities tendered in conformance with all applicable governmental regulations.

Indeed, if the Board were to allow railroads to decide what they are willing to carry, and whether to carry what they are willing to carry under tariff or contract, the Board will have allowed the railroads to avoid Board regulation altogether. Yet, railroads "are held to a higher standard of responsibility than most private enterprises." *General Foods Corp. v. Baker*, 451 F.Supp. 873, 875 (D. Md. 1978), *cited with approval in GS Roofing Products Co. v. STB*, 143 F.3d 387, 391 (8th Cir. 1998). The essence of that "higher standard of responsibility" is that railroads must quote rates for common carrier transportation on reasonable request. 49 U.S.C. § 11101. UP's Petition is contrary to that requirement.

Additional Reasons Why the UP Petition Should Be Denied

Westlake agrees with the Replies of various shipper and rail labor interests already filed herein that UP's Petition seeks to re-litigate issues already litigated, and which are still pending before the Board. Additionally, UP seeks to avoid its statutory common carrier obligation, which the STB has no authority to alter. Those matters have

"NS, as a common carrier by rail, must offer to transport hazardous materials, regardless of risk.").

been thoroughly discussed by other parties, and are being addressed at length by the American Chemistry Council and other associations, so we will not dwell on them here.

Westlake wishes to briefly recite, however, reasons within its particular knowledge and expertise that also should cause the STB to deny the Petition.

First, contrary to UP's claims, there is not sufficient chlorine available in the Gulf area to serve the demands of the destinations discussed in UP's Petition, as The Chlorine Institute demonstrates, and as Westlake knows affirms.

Second, Westlake knows that chlorine moves great distances, and through "high-threat urban areas," on UP, and that it does so safely, on routings other than those discussed in the Petition, as also explained by The Chlorine Institute, US Magnesium, and other parties. Accordingly, UP's real motivation for filing the Petition must not be safety – it can only be economic – or else UP would have sought to be permitted to cease **all** such routings, not just the ones that it seized on for purposes of its Petition. Furthermore, it should have sought that relief at the FRA (which it has not done).⁷

Third, UP seeks to be relieved of the duty to quote common carrier rates to US Magnesium, as US Magnesium recounts, but did not state that it would not move US Magnesium's chlorine under any circumstances, such as in contract transportation.⁸

⁷ According to the Petition, only one rail car of chlorine moved recently on the routings that are discussed therein, and none is moving now. UP admits it quoted rates to US Magnesium for other routings, and declined to quote rates on "only" seven routings. Therefore, it appears that UP selected routings over which no chlorine is now moving, but over which chlorine has moved and presumably will move again (or else US Magnesium would not have requested rates), to permit UP to have what it perceives as the best facts to present in its Petition. But the STB must decide the issue whether railroads must carry hazardous materials based on the **overall** needs of the public, and the country, and not on the basis of a set of facts picked for the litigation benefit of one party.

⁸ According to US Magnesium's March 23, 2009 Reply (at 4) in opposition to the Petition, UP previously carried chlorine for US Magnesium under contract for at least one of the affected routings. Also, US Magnesium stated (*id.* at 5) that UP quoted rates in contract carriage for

Indeed, UP admitted in the Petition that it has moved at least one railcar of chlorine over the routings at issue in the Petition, without stating that it moved that railcar under tariff. At the same time, UP did not seek to have FRA or TSA promulgate a rule prohibiting all rail transportation of chlorine over the routings discussed in the Petition, all of which leads Westlake to conclude that UP is willing to carry chlorine for US Magnesium and other rail shippers under contract. As the Board knows from the testimony of various parties in Ex Parte Nos. 677 and 677 (Sub-No.1), the railroads prefer contract transportation of these materials, so that they can insist that the shipper indemnify them for any liability that they may incur, even if that liability is due to the actions of the railroad.

The railroads' preference for contract transportation is not a reason to grant the Petition, and it demonstrates that UP's real motivation in filing the Petition is to obtain commercial advantage. US Magnesium's filing confirms that motivation. The Board should not be party to such an evasion of its authority over common carriage. Rather, if UP wishes to impose restrictions on these routings for any reason, assuming *arguendo* that the issues raised would be within the STB's statutory authority (which does not extend to matters of safety unless perhaps a railroad can show that the regulations of the relevant agencies are inadequate despite having attempted to persuade those agencies of its views⁹), UP must publish common carrier tariff rates, so that US Magnesium can challenge any restrictions contained therein, if need be, before the Board. The common carrier obligation is imposed by statute so that the government

other origin-destination pairs for US Magnesium. Westlake is not privy to those matters, but the Board must conclude that the essential facts are in dispute, in light of US Magnesium's Reply, so that it could not grant the Petition based on the factual allegations in the Reply.

can act in the overall best interests of the country when deciding what obligations to impose on the railroads. *E.g., Akron, Canton, supra*, 611 F.2d at 1167-68.

Finally, neither UP nor any other railroad should be permitted to make industrial policy for the country. If UP's Petition were granted, the railroads would be allowed to decide where chemical customers buy their chemicals, and where chemical producers may sell their chemicals, based on what the railroads perceive as in their best interests, because most such chemicals must move by rail. If there were no "barriers to entry" in the rail industry, that position would not be of concern, because a shipper could always give its business to another rail carrier if it did not like the terms offered (just as a shipper can do with motor carriers). But, because most chemical shippers, including Westlake, are captive to a single railroad at most origins, destinations, or both, chemical shippers such as Westlake have no choice but to ship their products using the only railroad that serves their facilities.

The STB was created to protect shippers such as US Magnesium, Westlake, and the others who have filed herein or who have participated in Ex Parte No. 677 and Ex Parte No. 677 (Sub-No.1), from the actions of monopoly carriers such as UP. Accordingly, Westlake implores the STB to adhere to the established common carrier principles that have been applied to railroads for as long as railroads have existed. This Nation simply cannot afford to do without common carrier transportation by railroad of hazardous materials. If Westlake could not compel the railroads which serve its facilities to transport by common carriage the materials Westlake manufactures or uses,

⁹ *Consolidated Rail Corp. v. United States, supra*, 646 F.2d at 650 (in general, the STB should defer to the other agencies with safety-related authority).

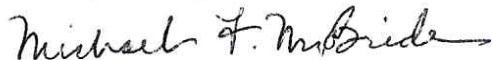
Westlake would not be able to continue to do business. The Board should not be party to such an outcome.

Conclusion

UP's Petition should be denied, for the reasons stated herein and in the Replies of The Chlorine Institute, US Magnesium Company, the rail labor organizations which have opposed the Petition, the National Association of Chemical Dealers, and in the joint Reply of the various trade associations (American Chemistry Council, et al.) being filed simultaneously with this Reply.

If UP or any other railroad seeks a change in the common carrier obligation, that change must be sought from Congress, because the obligation is imposed by statute. Issues relating to the safety or security of any particular shipment, commodity, or type of equipment, have long been held to be the exclusive province of the Federal Railroad Administration, the Transportation Security Administration, or (in the special case of nuclear materials, the Nuclear Regulatory Commission), not the STB. Accordingly, the STB may not grant the Petition, despite UP's allegations that it is not safe to move the chlorine at issue in common carriage.

Respectfully submitted,



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April 10, 2009

**UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35219

**UNION PACIFIC RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER**

CERTIFICATE OF SERVICE

I hereby certify that I have served, this 13th day of April 2009, a copy of the
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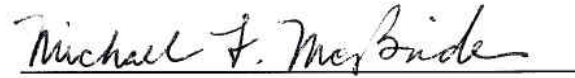
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