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February 16, 2012

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Via E-Filing

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423

Re: *Sunbelt Chlor Alkali Partnership v. Norfolk Southern Railway Company  
And Union Pacific Railroad Company - Docket No. NOR 42130*

Dear Ms. Brown:

Please find attached for filing Oxy Vinyls, LP's Reply in Opposition to the Petition for Subpoena filed by Norfolk Southern Railway Company on January 27, 2012 in the above-captioned case.

Regards,

Thomas W. Wilcox  
Attorney for Oxy Vinyls, LP

cc: Counsel for Defendants

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

SUNBELT CHLOR ALKALI PARTNERSHIP	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. NOR 42130
	)	
NORFOLK SOUTHERN RAILWAY COMPANY	)	
	)	
UNION PACIFIC RAILROAD COMPANY	)	
	)	
	)	
Defendants.	)	
	)	

**REPLY IN OPPOSITION TO PETITION FOR SUBPOENA**

Oxy Vinyls, LP, a Delaware limited partnership (“OxyVinyls”) , hereby files this reply in opposition to the Petition for Subpoena (“Petition”) filed by the Norfolk Southern Railway Company (“NS”) on January 27, 2012, asking the Board to exercise its authority under 49 U.S.C. §721(c) to issue a subpoena attached to the Petition directing OxyVinyls and “Occidental Chemicals Company”<sup>1</sup> to provide certain information that NS claims is relevant to the issues in this rate case. OxyVinyls received no advance notice of the Petition and learned of its existence when a copy was received by The Corporation Trust Group, the registered agent for OxyChem,

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<sup>1</sup> In its Petition NS seeks to have the Board issue a single subpoena to OxyVinyls and to “Occidental Chemical Company.” OxyVinyls is unaware of a corporate entity by the name of Occidental Chemical Company; however, if NS means to refer to Occidental Chemical Corporation (“OxyChem”), OxyVinyls and OxyChem are two distinct corporate entities and OxyChem does not have a contractual relationship with the Complainant. For this reason, among others, OxyVinyls and OxyChem are submitting separate filings in response to the Petition.

on January 30, 2012. While the Petition states it was also served on the General Counsel of OxyChem in Dallas, Texas, neither OxyVinyls nor OxyChem have any record of receipt of such service.<sup>2</sup> No party to this proceeding contacted OxyVinyls subsequent to the filing of the Petition.

As discussed in more detail below, the Board should deny the Petition. Both the Petition and the proffered subpoena are objectionable on various grounds, including that (1) the scope of the proffered subpoena grossly exceeds that of the limited discovery requests to the complainant in this case, Sunbelt Chlor Alkali Partnership, a Delaware general partnership (“Sunbelt” or the “Complainant”), that NS represents prompted the filing of its Petition; (2) the document requests contained in the proffered subpoena would impose significant burdens on OxyVinyls and are otherwise highly objectionable under the Board’s discovery rules; and (3) the requests in the proffered subpoena raise significant commercial and competition considerations which greatly surpass the limited purported purpose of the original requests made to Sunbelt, as discussed in greater detail in paragraph II.C. below.<sup>3</sup>

#### **I. Identity and Description of OxVinyls**

OxyVinyls is a Delaware limited partnership that owns and operates (1) a vinyl chloride

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<sup>2</sup> The lack of such service appears to be confirmed by the last page of NS’s January 27, 2012 filing, which is a copy of a Federal Express document indicating service only on The Corporation Trust Group, which is located in Wilmington, Delaware.

<sup>3</sup> OxyVinyls is a stranger to this case, and it has no interest in becoming a party to this case. In prior instances involving petitions for subpoenas, the Board has permitted the target of the subpoena to reply without formally intervening in the case. *See e.g.*, Docket No. 42125, *E.I. DuPont De Nemours & Co. v. Norfolk Southern Railway Co.* (Reply of Sentinel Transportation LLC to Defendant’s Petition for Subpoena, filed November 30, 2011). To the extent the Board requires OxyVinyls to formally intervene to lodge its response, OxyVinyls asserts that it meets the requirements for intervention under 49 C.F.R. §1113.7 and that its intervention is solely for the limited purpose of responding to the Petition.

monomer (“VCM”)<sup>4</sup> production facility (the “La Porte VCM Facility”); (2) a chlorine and caustic soda facility; and (3) a VCM/polyvinyl chloride (“PVC) facility in La Porte, Texas. OxyVinyls has a contract with Sunbelt for the purchase of chlorine, which is a raw material used in the manufacture of VCM. The chlorine purchased from Sunbelt is delivered by rail to the La Porte VCM Facility. OxyVinyls does not pay for or make any arrangements for the transportation of Sunbelt’s chlorine to the La Porte VCM Facility. OxyVinyl’s affiliate, OxyChem, is a major producer of chlorine and its co-product caustic soda, and is a direct competitor of SunBelt and its indirect parent, Olin Corporation.

## II. Argument

The Board’s authority under 49 U.S.C. §721(c) to compel third parties to produce documents and information in railroad rate cases has seldom been exercised. In general, a party requesting a subpoena must show “general relevance and the scope of the evidence sought.” 49 C.F.R. §1113.2(b)(1) and (2). Importantly, however, the Board considers whether the burden imposed on the third party and other objections to the discovery outweigh its value to the requesting party. *Otter Tail Power Co. v. The Burlington Northern and Santa Fe Railway Co.*, STB Docket No. 42071 (served November 15, 2002) at 5; *Wisconsin Power and Light Co. v. Union Pacific Railroad Co.*, STB Docket No. 42051 (served June 21, 2000). An earlier decision issued by the Interstate Commerce Commission denying a subpoena request noted that the Commission “from its early existence” required that a party must establish a “very strong foundation before it will use its subpoena power to compel from a stranger to the litigation . . . actions which may be expensive, oppressive, or burdensome.” *Asphalt Supply & Serv., Inc. v.*

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<sup>4</sup> VCM is a precursor product used in the production of PVC, a resin that is used in most rigid vinyl pipe and siding applications.

*Union Pac. R.R.*, Docket No. 40121 (served March 27, 1987). For the reasons set forth below, NS's Petition falls well short of meeting these standards.

A. The Scope of the Proffered Subpoena Grossly Exceeds that of the Information Originally Sought from Sunbelt

As an initial point, the Board should deny the Petition because the scope of the proffered subpoena grossly exceeds the scope of the discovery NS claims it was unable to obtain from the Complainant. Specifically, NS states that the subpoena is necessary because Sunbelt was allegedly unable to answer to NS's satisfaction certain questions about the physical location of the La Porte VCM Facility and its current ability to utilize barge transportation. Petition at 1-3. These requests narrowly asked (1) whether the facility "is located on the Houston Ship Channel" (Request for Admission 8 and Interrogatory 7); (2) whether the facility "has access to barge transportation" (Request for Admission 9 and Interrogatory 8); and (3) whether the facility "has the capacity to receive chlorine via water transportation" (Request for Admission 10 and Interrogatory 9). Petition Exhibit 2 at 12-14, 17-18. *See also* Interrogatory 34. *Id.* at 32-33. The information sought to be discovered by the requests is consistent with the stated purpose of the discovery: to explore the jurisdictional issue of whether there are "effective intermodal alternatives to the challenged movement." Petition at 1. NS states that the Petition was filed because the Complainant only answered these discovery requests "on information and belief." Petition, *passim*. As a threshold matter, in seeking information about the physical location of the La Porte VCM Facility and the presence of barge facilities or docks, these requests appear to cover information that is publicly available and/or accessible to NS through a reasonable inquiry of public sources. However, NS makes no representations that it attempted to obtain this information prior to filing the Petition, apart from viewing a satellite photograph it located on the Internet. Petition at 2, note 2. Before the Board grants the extraordinary relief of a third-party

subpoena to a stranger to the proceeding, it should require a party to demonstrate that it first made a reasonable effort to obtain the information it seeks.

More significantly, the scope of the information sought by the Petition and the proffered subpoena range far beyond the original requests on which the Petition is based. Specifically, while disingenuously mischaracterizing the subpoena requests as “limited,” the Petition and subpoena in fact grossly expand the original requests to seek discovery of a broad range of totally new and different information from OxyVinyls in the form of six requests for “Documentary Evidence”<sup>5</sup> with multiple subparts. These requests include broad, burdensome requests for undefined “shipment records” from all three La Porte facilities<sup>6</sup> dating back to 2009, and other requests that broadly seek a variety of other information from OxyVinyls dating back to 2008. This attempt to use original limited requests to the Complainant as a springboard to impose wide ranging, burdensome inquiries for OxyVinyls’ confidential business records and other information is highly improper, and gives rise to relevancy, burden, harassment, and other objections. Since the Petition and the proposed subpoena seek information from OxyVinyls that goes far beyond the information sought in the initial discovery requests upon which the Petition is based, the Petition should be denied.

**B. The Proposed Discovery Requests are Objectionable Under the Board’s Discovery Rules**

The Board should also deny the Petition because the proposed requests in the proffered subpoena are objectionable under the Board’s standards for reviewing requests for subpoenas

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<sup>5</sup> The discovery requests on which the Petition is based were Requests for Admissions and Interrogatories. However, the proposed subpoena is comprised entirely of requests for “documents,” which is “used in its broadest sense as defined by 49 C.F.R. 1114.30(a)(1).” Proffered subpoena at 2.

<sup>6</sup> The proffered subpoena expands the initial discovery by defining “La Porte Facilities” as “all facilities owned/and or operated by OxyChem and/or OxyVinyls located at or near La Porte, TX, . . . .” *Id.*

under section 721(c) and the Board's discovery rules in general. A non-inclusive list of OxyVinyls objections to the requests<sup>7</sup> included in the proffered subpoena is as follows:

First, responding to all of the requests and their subparts would impose a significant burden on OxyVinyls. The first two requests seek a wide range of undefined "shipment records" from 2009 to the present for every "barge or vessel" movement from all of the La Porte facilities and every "barge or vessel" delivery to the La Porte facilities, as well as similar "shipping records" for barge terminals and docks within 25 miles of the La Porte facilities. In addition to the considerable burden these requests would impose on OxyVinyls to search its files for such information and collect it, assuming it exists, OxyVinyls questions the relevance of 2009 data to this case when the complaint was filed in 2011. OxyVinyls also questions the relevance of information about any "shipping records" to or from any facilities other than the La Porte VCM Facility that actually receives the chlorine rail shipments at issue in this case. As for the La Porte VCM Facility, OxyVinyls further questions the relevance of barge shipments of "products, commodities or other materials" *from* that facility, when the underlying jurisdictional issue prompting the discovery and the Petition is whether there are intermodal alternatives to railroad for delivering chlorine *to* the La Porte VCM Facility.

Requests 3 and 4 are similarly overbroad, burdensome, and of questionable relevance, in that they seek "all documents" dating back to 2008 "relating to any analyses, studies, or reviews performed by or for you" related to "infrastructure . . . related to" the ability to receive barge or

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<sup>7</sup> Should the Board decide to issue a subpoena despite OxyVinyls' objections, whether as proposed by NS or modified by the Board, OxyVinyls reserves all rights to move to quash the subpoena once it is served. Accordingly, summarizing its objections in this Reply to the Petition does not constitute a waiver of any specific objections OxyVinyls might raise in a motion to quash.

vessel shipments or transport commodities from any of the three La Porte facilities. Proffered subpoena at 3-4.

Finally, requests 5 and 6 impose an extremely broad request, not bound by any restriction on years, for “any” maps diagrams, schematics, etc., concerning any potential plans to construct barge or dock facilities at any of the three facilities.

Far from being “narrowly tailored,” Petition at 1, these requests would impose a significant burden on OxyVinyls which far outweighs the usefulness of the information to NS in exploring its jurisdictional claims, and the requests seek information which does not appear on its face to be relevant to such claims.

C. The Petition Poses Sensitive Commercial and Competition Issues That Dwarf the Stated Need for the Information

Finally, the Petition should be denied because the proffered subpoena calls for the production to NS of highly sensitive commercial information concerning OxyVinyls operations and internal business planning activities. Even if this information was produced as Highly Confidential Information under the protective order in effect in this case, the produced information would still be disclosed to the counsel and consultants of NS and Sunbelt, as well as the Union Pacific Railroad Company. As stated above, while OxyVinyls is the customer of Sunbelt for the chlorine transported by the challenged movements, the corporate affiliates of OxyVinyls and Sunbelt are significant competitors and participants in the chemical industry.<sup>8</sup> While OxyVinyls is not impugning the ability of the parties’ outside counsel and consultants to comply with the protective order, it nevertheless submits that production of the sensitive

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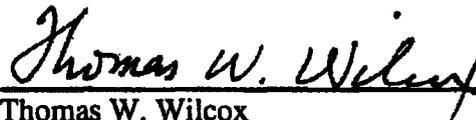
<sup>8</sup> The Board was recently made aware of the acute sensitivities of competitive issues in the chemical industry in EP 698, *Establishment of the Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee* (served April 15, 2011). In addition, the United States Department of Justice has been extremely reluctant to permit the sharing of information between key competitors in this consolidated industry even for public safety reasons.

commercial data sought by the proffered subpoena poses a risk of disclosure, even if inadvertent, that could cause considerable competitive harm to OxyVinyls and OxyChem. This risk is simply not justified by the purpose for which the information is purportedly being sought. OxyVinyls is not the complainant in this case, and it seeks no relief from the railroad defendants. It has sought discovery from no party in this case. It has absolutely no interest in becoming a party to this case. It therefore would be patently unfair under these circumstances for OxyVinyls to be required to produce highly sensitive documents and other material relating to its internal business operations and strategies which could conceivably end up in the record of this case and in the files of the outside counsel and consultants to the parties.

### III. Conclusion

For all the reasons set forth herein above, the Board should deny the Petition.

Respectfully submitted,



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February 16, 2012

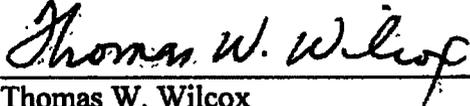
CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2012, I served a copy of the foregoing Reply in Opposition to Petition for Subpoena via regular mail on the addressees listed below:

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