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February 16, 2012

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

ENTERED
Office of Proceedings

FEB 16 2012

Part of
Public Record

**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 Occidental Chemical Corporation'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 Occidental Chemical Corporation

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

Occidental Chemical Corporation, a New York Corporation (“OxyChem”), 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 Oxy Vinyls, LP¹ (“OxyVinyls”) and “Occidental Chemicals Company” to provide certain information that NS claims is relevant to the issues in this rate case. There is no corporate entity by the name of Occidental Chemical Company. However, OxyChem presumes that NS intends for the subpoena to issue to OxyChem. Regardless of what NS intended, OxyChem 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, on January 30, 2012. While the Petition states it was

¹. OxyVinyls and OxyChem are two distinct corporate entities. For this reason, among others, OxyVinyls and OxyChem are submitting separate replies to the Petition.

also served on the General Counsel of OxyChem in Dallas, Texas, neither Oxy Vinyls nor OxyChem have any record of receipt of such service.² No party to this proceeding contacted OxyChem subsequent to the filing of the Petition.

As discussed in more detail below, the Board should deny the Petition as it applies to OxyChem. In the first place, OxyChem has no connection to the rail movement whose rates the complainant in this case, Sunbelt Chlor Alkali Partnership, a Delaware general partnership (“Sunbelt” or the “Complainant”), has challenged. OxyChem is not the purchaser of the chlorine produced by Sunbelt, and OxyChem is not the owner or operator of the La Porte, Texas facility to which the chlorine is delivered by the railroad defendants. Accordingly, OxyChem has no direct relationship to any aspect of the rail transportation that is the subject of the complaint.

In addition, the Petition and the proffered subpoena are objectionable on various other grounds; including that (1) the scope of the proffered subpoena grossly exceeds that of the limited discovery requests to Sunbelt that NS represents prompted the filing of the Petition; (2) the document requests contained in the proffered subpoena would impose significant burdens on OxyChem 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.³

² 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.

³ OxyChem 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 OxyChem to formally intervene to lodge its response, OxyChem asserts that it meets the

I. Identity and Description of OxChem

OxyChem is a major North American manufacturer and marketer of chemical products and is the principal operating subsidiary of the chemical division of Occidental Petroleum Corporation. OxyChem owns and operates a facility in La Porte that processes caustic potash ("KOH"). 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. 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.

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.

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 facility owned and operated by OxyVinyls in La Porte that receives the chlorine (the "La Porte VCM⁴ 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

⁴ Vinyl chloride monomer ("VCM"). VCM is a precursor product used in the production of polyvinyl chloride ("PVC"), a resin that is used in most rigid vinyl pipe and siding applications.

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 OxyChem in addition to the information originally sought about the La Porte VCM Facility. Specifically, the proffered subpoena would expand 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,” Proffered subpoena at 1. As thus expanded to cover OxyChem’s facilities, the six requests for “Documentary Evidence”⁵ in proffered subpoena include broad, burdensome requests for undefined “shipment records” from OxyChem’s facilities dating back to 2009, and other requests that broadly seek a variety of other information from OxyChem dating back to 2008. This attempt to use original limited requests to the Complainant as a springboard to impose wide ranging, burdensome inquiries for confidential business records and other information from OxyChem’s plants that are separate from the La Porte VCM Facility is highly improper, and gives rise to relevancy, burden, harassment, and other objections. Since the Petition and the proposed subpoena seek information from OxyChem that goes far beyond the information sought in the initial discovery requests upon which the Petition is based, the Petition should be denied.

⁵ 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.

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 under section 721(c) and the Board's discovery rules in general. A non-inclusive list of OxyChem's objections to the requests⁶ included in the proffered subpoena is as follows:

First, the operations and barge and vessel capabilities of OxyChem's facilities have absolutely no relevance to the issues in this case. The stated purpose of the Petition is to explore the jurisdictional prerequisite for Sunbelt's rate complaint: whether "there are no effective intermodal alternatives to the challenged movement," which is to the La Porte VCM Facility.

Second, responding to all of the requests and their subparts would impose a significant burden on OxyChem. 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 owned or operated by OxyVinyls and OxyChem 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 OxyChem to search its files for such information and collect it, assuming it exists, OxyChem further questions the relevance of 2009 data to this case when the complaint was filed in 2011. As stated above, OxyChem also questions the relevance of information about any "shipping records" to or from any of OxyChem's facilities.

⁶ Should the Board decide to issue a subpoena despite OxyChem's objections, whether as proposed by NS or modified by the Board, OxyChem 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 OxyChem might raise in a motion to quash.

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 vessel shipments or transport commodities from any of OxyChem’s 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 OxyChem’s plants.

Far from being “narrowly tailored,” Petition at 1, these requests would impose a significant burden on OxyChem 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 OxyChem’s 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 outside counsel and consultants of NS and Sunbelt, as well as the Union Pacific Railroad Company. As stated above, OxyChem and Sunbelt are significant competitors and participants in the chemical industry.⁷ While OxyChem is not

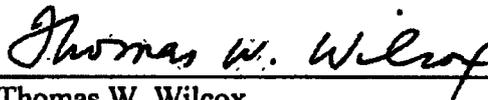
⁷ The Board was recently made aware of the acute sensitivities of competitive issues in the chemical industry in EP 698, *Establishment of the Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee* (served April 15, 2011). In addition, the United States

impugning the ability of the parties' outside counsel and consultants to comply with the protective order, it nevertheless submits that production of the sensitive commercial data sought by the proffered subpoena poses a risk of disclosure, even if inadvertent, that could cause considerable competitive harm to OxyChem. This risk is simply not justified by the purpose for which the information is purportedly being sought. OxyChem 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 OxyChem 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 of the parties.

III. Conclusion

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

Respectfully submitted,



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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.

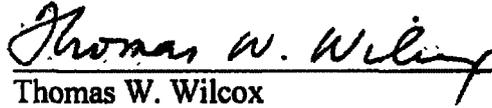
CERTIFICATE OF SERVICE

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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