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May 12, 2008

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

Re: STB Ex Parte No. 676, Rail Transportation
Contracts Under 49 U.S.C. 10709

Dear Secretary Quinlan:

Enclosed for filing in the above-referenced proceeding are the "Comments of Occidental Chemical Corporation." We understand that this submission is sufficient to satisfy the Board's filing requirements, and that service on a service list is not required. Please advise if any of that is not correct. Thank you for your cooperation.

Very truly yours,

Michael F. McBride

Michael F. McBride
Attorney for Occidental Chemical Corporation

SURFACE TRANSPORTATION BOARD

Ex Parte No. 676

RAIL TRANSPORTATION CONTRACTS UNDER *49 U.S.C. 10709*

COMMENTS OF OCCIDENTAL CHEMICAL CORPORATION

Pursuant to the Decision served March 12, 2008, in this proceeding, Occidental Chemical Corporation ("OxyChem") hereby submits its Comments.

Interest of OxyChem

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 including pharmaceuticals, water purification, detergents, electronics, building materials, and many more. 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 products are crucial to the health and welfare of its citizens.

Safe and reliable transportation of OxyChem's products is critical to its success as a company and essential if it is to meet the needs of its customers and the public, as I explained to the Board in my oral testimony for Ex Parte No. 677, *Common Carrier Obligation of Railroads*, on April 24, 2008.

Typically, the rail transportation provided to OxyChem is provided under contract, but recently OxyChem has requested that a railroad publish a common carriage (*i.e.*, tariff) rate, in order to seek relief from this Board. The railroad industry possesses market power and OxyChem believes that the contract rate offered by the rail carrier is not commercially acceptable. Yet, railroads have either refused to offer common carriage rates to OxyChem until contract negotiations are exhausted, or have stated that, if OxyChem insists on a common carriage rate being quoted, the rail carrier will withdraw all of the contract rates it has offered, *including for movements OxyChem has not requested a common carriage rate.* The Board's proposal, with some suggested additional language OxyChem proposes, will resolve that problem, and allow contract rates where OxyChem and the rail carrier involved may be able to agree, while preserving OxyChem's right to a common carriage rate if it regards the railroad's proposed contract rate as unacceptable.

Likewise, in addition to the railroads' refusal to quote a tariff rate, we have also experienced the railroads' refusal to quote "Rule 11" rates. OxyChem generally wishes to obtain Rule 11 rates in place of "through" rates, so that we have better visibility of individual carrier revenue splits. In addition, we feel we are in a better position negotiating on our own behalf, rather than relying on one railroad to negotiate with another railroad on our behalf. Incredibly, the reason given to us by one of the railroads for it's refusal to quote Rule 11 rates is that it also wants visibility of the entire move, so that it can price their piece of the move based on "market" rail conditions due to the total distance of the move, versus having to quote the shorter move to be competitive with truck. In one instance, we have been told by a railroad that it does not want to provide a Rule 11 rate, but that, if requested, will quote a Rule 11 rate higher than what it

would have offered as its portion of the through rate. Again, this is an example of the market power held by the railroads, and seems inconsistent with their statutory duty.

The Board's Proposal

At page 4 of its Decision served March 12, 2008, the Board stated that:

> "Specifically, we are instituting a separate rulemaking proceeding to consider imposing a requirement that each carrier provide a full disclosure statement when it seeks to enter into a rail transportation contract under section 10709. The statement would explicitly advise the shipper that the carrier intends the document to be a rail transportation contract, and that any transportation under the document would not be subject to regulation by the Board. Moreover, it would advise the shipper that it has a statutory right to request a common carriage rate that the carrier would then have to supply promptly, and such a rate might be open to challenge before the Board. The proposal would also require that, before entering into a rail transportation contract, the carrier provide the shipper an opportunity to sign a written informed consent statement in which the shipper acknowledges, and states its willingness to forgo, its regulatory options."

Comments

OxyChem supports the Board's proposals, with suggested slight modifications to clarify what OxyChem believes is good public policy.

Recent proceedings involving CSX Transportation's motion to dismiss the pending rate complaints filed by Dupont against CSX on the ground that it is allegedly challenging contract rates (*see* Decision served December 20, 2007 in STB Docket Nos. NOR 42099, *et al.*) demonstrate the need for clarity about what is, and what is not, a rail transportation contract within the meaning of 49 U.S.C. §10709. The need for clarity arises because, *inter alia*, contract transportation is not generally subject to the Board's jurisdiction, while common carrier transportation is subject to the Board's jurisdiction. Accordingly, OxyChem supports the Board's first proposal – to "impose a requirement that each carrier provide a full disclosure statement when it seeks to enter into a rail transportation contract under section 10709." Decision served March 12, 2008 at page 4.

The *intention of the parties to a transaction* is highly probative of whether they entered into a contract. The Board's first proposal is that a railroad be obliged to provide a full disclosure statement when it seeks to enter into a rail transportation contract under section 10709. The disclosure would also explicitly advise the shipper that the carrier intends the document to be a rail transportation contract, and that any transportation under the document would not be subject to regulation by the Board. This could be useful to the Board or to another tribunal (such as a court or arbitration panel) in the event a dispute arises about the documents that are generated as a result of the parties' transaction.

However, the disclosure statement may be considered ambiguous in a crucial respect, in that it does not make clear that the railroad must offer each *separate* rate in a tariff if a shipper so requests, without thereby rejecting *other* rates offered under a contract. If the Board does not order a railroad to publish separate tariff rates for each such rate, a railroad may attempt to offer tariff rates on those lanes for which tariff rates have been requested, but make it clear that the shipper must take *all* of the railroad's proposed contract rates, and cannot decline only those it may challenge before the STB. Such *an arrangement* is, by definition, anti-competitive, and is clearly intended to use a railroad's market power to prevent shippers from bringing legitimate disputes to the Board for adjudication. Yet, such a practice is not unusual, as my testimony and that of others in Ex Parte No. 677 demonstrated.

Accordingly, OxyChem recommends that the STB adopt the following disclosure statement:

> "Each carrier [shall] provide a full disclosure statement when it seeks to enter into a rail transportation contract under section 10709. The statement [must] explicitly advise the *shipper that the carrier intends the document to be a rail transportation contract*, and that any transportation under the document would not be subject to regulation by the Board."

"[Each carrier shall] advise the shipper that it has a statutory right to request a common carriage rate [for each separate movement] that the carrier would then have to supply promptly [without tying its provision of a common carriage rate to its offer of one or more contract rate(s) for one or more different movement(s) from the movement for which a common carriage rate is being offered], and such a [common carrier] rate might be open to challenge before the Board. Before entering into a rail transportation contract, the carrier [shall] provide the shipper an opportunity to sign a written informed consent statement in which the shipper acknowledges, and states its willingness to forego, its regulatory options."

If the Board adopts OxyChem's proposed language, the parties' relative bargaining power will be to allow the parties to rely on competition, instead of regulation, to determine rates and other terms applicable to the transportation, which is what Congress intended in the Staggers Rail Act of 1980. The proposed language will also to permit a shipper to seek regulatory relief from the STB where a dominant rail carrier has not offered a rate that reflects a competitive market. At the same time, any shipper who preferred to enter into a contract for *all* of the rates offered by the rail carrier would, of course, remain entitled to do so, without any potential regulation by the STB.

Conclusion

OxyChem appreciates the opportunity to submit comments on this important subject, and urges the Board to adopt its proposed rule, with the changes to the Board's proposed disclosure statement OxyChem proposes herein.

Respectfully submitted,

Robin Burns by AFM

Robin Burns
Vice President – Supply Chain
Occidental Chemical Corporation
May 12, 2008