

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINAL OFFER RATE REVIEW

)

)

)

Docket No. EP 755

248942

ENTERED
Office of Proceedings
November 12, 2019
Part of
Public Record

**COMMENTS OF
OLIN CORPORATION**

Frank Chirumbole
Vice President, Integrated Supply Chain
Olin Corporation
16290 Katy Freeway, Suite 600
Houston, Texas 77094

Dated: November 12, 2019

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINAL OFFER RATE REVIEW

)
) Docket No. EP 755
)

**COMMENTS OF
OLIN CORPORATION**

Olin Corporation (“Olin”) hereby submits these Comments in response to the Notice served by the Surface Transportation Board (“Board” or “STB”) on September 12, 2019 in STB Docket No. EP 755, *Final Offer Rate Review* (“FORR”). Olin supports the Board’s proposed Notice of Proposed Rulemaking (“NPRM”) to bring about a new streamlined final offer rate reasonableness methodology to help provide effective backstop regulatory protections for captive shippers, with some modest additional protections.

INTRODUCTION AND SUMMARY

Olin comes to this proceeding with considerable recent experience and understanding of the utter lack of effective rate relief remedies that exist today for carload shippers. After Olin attempted at considerable expense and effort over a period of three years to utilize the Board’s Stand-Alone Cost (“SAC”) procedures to obtain relief from excessive railroad rates on a key traffic lane for its chlorine shipments, the STB found that the involved rates, over four-and-a-half times the variable costs, were reasonable. Olin can attest first-hand that the current rate reasonableness process for carload shippers is broken. Olin commends the Board for recognizing that something more must be done to prevent railroad pricing abuses that are causing considerable economic harm to the public.

Congress has directed that rates on captive traffic “must be reasonable,” yet there still remains no effective rate relief remedy for carload shippers like Olin. The Board’s proposed final offer rate review could provide a meaningful and efficient rate relief mechanism for carload shippers and promote reasonable commercial resolution of disputes.

Olin supports the Board’s proposed final offer rate review rules and concurs that the standards and procedures should be flexible enough to evolve over time. To ensure the new rules are effective and accessible to shippers, Olin respectfully requests that the Board: (1) incorporate appropriate guidance that a railroad must provide common carrier rates for one or more *individual* origins to one or more *individual* destinations in response to a shipper’s request for such rates and protect against unreasonable rate bundling practices; (2) remove the relief caps; (3) protect against railroad “gaming” of the rate review process in the establishment of new rates at high levels; and (4) permit challenges even if a shipper elects not to use the “streamlined” market dominance procedures.

IDENTITY AND INTEREST

Headquartered in Clayton, Missouri, Olin is a publicly traded company listed on the New York Stock Exchange with 6,500 employees at 70 locations worldwide. Olin has three business segments: Winchester Ammunition, a leader in small caliber ammunition production and a supplier to U.S. law enforcement and military; Epoxy, a leading producer of epoxy and industry-leading epoxy technology; and Chlor Alkali Products & Vinyls, a leading producer of bulk chlorine, caustic soda, bleach, and other chemicals in North America. Olin was the first commercial supplier of chlorine in the United States and has been involved in the chlor alkali industry for over a century. It currently ships over 47,000 rail cars annually

with the highest degree of safety records, as Olin has earned the Association of American Railroads' Grand Slam safety award for the past three years. Chlor Alkali Products & Vinyls is Olin's largest business segment, operating at 10 locations throughout the United States and Canada.

Olin ships the majority of its chlor alkali products via rail from its various North American manufacturing locations, each of which is captive to a single railroad. Because of our dependency on railroad service, rail transportation is one of the single largest costs of our production and distribution process, and the availability of reasonable regulatory protections and processes in the absence of market competition is essential for protecting Olin from unreasonable rates. Thus, Olin has a direct and substantial interest in the Board's initiatives to adopt and implement effective and streamlined rate reasonableness rules and standards, especially for manifest shippers such as Olin that currently lack such meaningful regulatory rate protections.

I. There Is a Substantial Need for the Board to Adopt Alternative Rate Relief Standards That Are Feasible and Provide Meaningful Relief for Captive Carload Shippers

The need for meaningful regulatory rate protections for captive shippers is fundamental and paramount. The Interstate Commerce Commission Termination Act of 1995 (Pub. L. No. 104-88, 109 Stat. 803) created the STB and tasked it with carrying out the national rail transportation policy "to maintain reasonable rates where there is an absence of effective competition." 49 U.S.C. § 10101(6). That obligation is not discretionary. Absent effective competition, rates on market dominant rail traffic "must be reasonable." *Id.* §§ 10701(d)(1), 10702(1); *Market Dominance Determinations – Product and Geographic*

Competition, 4 S.T.B. 269, 281-82 (1999) (“railroad rates are constrained either by market forces or by regulation, and the rates *must be reasonable* regardless of which force constrains them”) (emphasis added). Olin’s captivity at each of its chlor alkali production facilities means it has no effective market competition for its railroad service, and must rely on the Board to fulfill its statutory obligation to establish and maintain meaningful regulatory rate relief protection.

A. The Board’s Existing Rate Reasonableness Standards Provide No Meaningful Rate Relief Protection for Captive Carload Shippers

While Congress has mandated that rates for captive shippers be reasonable, that directive has been completely unrealized for carload shippers such as Olin. In the almost 40 years since the Staggers Rail Act of 1980, no carload shipper has succeeded in a major rate challenge against a railroad, and only a few have succeeded in “small” rate cases.

1. Stand-Alone Cost Ratemaking Provides No Relief for Carload Shippers

The STB’s principal “large” rate case standard, the stand-alone cost test (“SAC”), was adopted in *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985). SAC is the most common, and essentially the only approach used to seek rate relief before the STB and its predecessor in large dollar-value cases over the past three decades. Under SAC, a complaining shipper develops and submits detailed evidence and train modeling regarding the construction and operation of a “hypothetical” least-cost, most-efficient stand-alone railroad (“SARR”) that is deemed to have access to the real-world traffic group served by the defendant carrier. The shipper designs its SARR in order to serve its “issue” traffic plus additional traffic from the defendant carrier’s real-world traffic base. The shipper seeks to

demonstrate that the SARR's revenues from the issue and non-issue traffic more than cover its costs of serving that traffic, including a reasonable return on its investment. If an "over-recovery" of costs is shown, the STB uses a complex, iterative process to calculate the maximum rate that the defendant carrier may charge on the issue traffic.

SAC was designed and works best, if at all, for unit-train shippers, principally coal shippers. While unit train coal shippers with movements in single origin-to-destination pairs have had some modest, mixed success using SAC, carload shippers have failed miserably. No carload shipper has succeeded in a SAC case in the 34 years since SAC was adopted. Unfortunately, Olin has first-hand experience with SAC's futility for captive carload shippers that seek relief.

Facing unreasonable and significantly increasing rail rates for one of its major shipment lanes for chlorine involving Norfolk Southern Railway Company ("NS"), Olin's subsidiary SunBelt Chlor Alkali Partnership ("SunBelt"), looked to the STB as the last line of defense against monopoly pricing, and to SAC as the only viable regulatory remedy available for it to challenge NS's rates. SunBelt filed its SAC complaint at the Board in July 2011 and over the next three years, SunBelt undertook the arduous task of proving its entitlement to relief under the SAC constraint. *SunBelt Chlor Alkali P'ship v. Norfolk S. Ry.*, Docket No. NOR 42130.

SunBelt challenged the rate on the origin segment of a through route for chlorine moving from Sunbelt's production facility at McIntosh, AL to a customer facility at LaPorte, TX. The revenue to variable cost ratios were extremely high, 459% or more. To meet the STB's stringent SAC standards, SunBelt's SARR – the "SunBelt Railroad" –

covered over 575 route miles through three states and served a broad range of shippers and commodities in intermodal unit, manifest, and local trains, handling more than 30 million tons annually.

Sunbelt utilized four in-house witnesses and retained 18 expert witnesses to design and build the hypothetical railroad, model it, and present testimony. These witnesses, along with counsel, submitted over 1,400 pages of hard copy evidence in the form of narrative testimony, exhibits, legal argument, and briefing. This hard-copy evidence was supported by substantial gigabytes of electronic evidence, train modeling, and spreadsheets.

The Board's 215-page decision found that NS had market dominance over the involved traffic, but that the challenged rates were not unreasonably high until year 2021, and the Board declined to prescribe rates or order damages and reparations. *SunBelt Chlor Alkali P'ship v. Norfolk S. Ry.*, Docket No. NOR 42130 (STB served June 20, 2014). ("SunBelt"). In a spirited dissent, then Board Member (now Chairman) Begeman lamented about the "hundreds, if not thousands, of calls [that] are made at the Board that lead up to its determination of whether a rate is unreasonable," and the subjective approach utilized by the majority to deny rate relief to SunBelt. *Id.* at 32. She emphasized:

I would expect the Board to objectively consider the shipper's evidence and accept all of the SARR's plausible efficiencies, while rejecting proposals that ignore reality. Unfortunately, that expectation has not been met in this case. The majority has instead employed a much more subjective approach. For example, upon concluding that a particular facility had to be added for the SARR to serve its carload-heavy traffic group, the majority then used that call as the basis for imposing millions of dollars in *unrelated* costs on the SARR. I believe that was a mistake. This decision is also scattered with many conclusions that ignore the real world—realities that even a hypothetical railroad should face—resulting in what I view as

a number of significant inconsistencies. The Board's ability to provide an objective assessment of the rate at issue was greatly hindered as a result.

The shipper, the carrier, and presumably the public expect the Board to settle the parties' dispute. That did not occur here. Instead, the majority invites Sunbelt to expend even more resources on its rate challenge.

Id. Commissioner Begeman concluded, “[n]ow, the Board should ask whether the SAC process can provide a meaningful gauge of rate reasonableness for carload traffic shippers. I stand ready to work with my colleagues and Board stakeholders to improve our rate processes.” *Id.* All three Board Members expressed significant concerns about the substantial scope, complexity, and difficulty of SAC cases, the extreme burdens placed on shippers in bringing and succeeding in such cases, and the need for the Board to evaluate and implement alternative rate reasonableness standards to ensure shippers have a viable method and meaningful opportunity to challenging rates.

2. The Board's “Simplified” Standards Provide No Meaningful Relief for Carload Shippers

The STB has implemented two alternative “simplified” methodologies to the SAC rate reasonableness test. The first, Simplified-SAC,¹ has been pursued only once to date, and that case settled. Shippers have little reason to use Simplified-SAC because it is expensive to pursue and is designed to produce higher maximum rates than the SAC test. Analyses have shown that the potential litigation costs savings of Simplified-SAC compared to SAC are more than offset by the reductions in projected rate relief. While touted as a

¹ *Simplified Standards for Rail Rate Cases*, Docket No. EP 646 (Sub-No. 1) (STB served Sept. 5, 2007) (“*Simplified Standards*”), *aff’d sub nom. CSX Transp., Inc. v. STB*, 568 F.3d 236 (D.C. Cir.), *vacated in part on reh’g*, 584 F.3d 1076 (D.C. Cir. 2009).

“simpler” version of SAC, Simplified-SAC is still complicated to implement, particularly in initial cases. While an accumulation of precedent might reduce the costs and risks of later cases, the railroads have every incentive to make the first “test” cases particularly difficult in order to discourage subsequent ones.

The Board’s second “simplified” methodology is the “Three-Benchmark” approach designed for use in “small” rate cases, where maximum rates are set through statistical data analysis based on general comparative criteria. *Simplified Standards* at 16-22. This approach requires a complainant to engage in discovery and undertake a quantitative analysis of comparable movements by expert witnesses. Rate relief under this standard is currently limited to \$4 million over five years. The approach has been rarely utilized because it is not inexpensive to pursue, generally produces high maximum rates, and offers only limited relief.

The Board correctly recognizes the lack of meaningful relief afforded to shippers under these alternative standards. “Notwithstanding the Board’s efforts to improve its rate review methodologies and make them more accessible, only a few Three-Benchmark cases have ever been brought to the Board, and no complaint has been litigated to completion under the Simplified-SAC methodology.” *FORR* at 3. The Board also correctly recognizes that “for smaller disputes, the litigation costs required to bring a case under the Board’s existing rate reasonableness methodologies can quickly exceed the value of the case.” *Id.*

Since the Board’s existing standards provide no workable rate relief mechanism for carload shippers such as Olin, Congress’ directive in the Staggers Rail Act of 1980 that “rates must be reasonable” remains completely unfulfilled, as further confirmed by

the fact that no carload shipper has won a single major rate case against a railroad in almost 40 years. Accordingly, there is an urgent need for the Board to adopt rate reasonableness standards that are accessible to carload shippers.

II. FORR Offers Promise for Meaningful Rate Protection for Captive Carload Shippers and Should Be Adopted with Additional Protections

The Board proposes to adopt an alternative rate relief standard using a final offer procedure. The approach follows the recommendations of the U.S. Department of Agriculture, a blue-ribbon committee of the Transportation Research Board, and the Board's own Rate Reform Task Force in its Report issued on April 25, 2019. *FORR* at 1-2, 6-7. The approach is also not novel. It is very similar to that currently used by Canadian regulators in the Canadian Transportation Agency's final offer arbitration rules, and the approach is similar to what the Board already uses as part of its Three-Benchmark methodology. The railroads also use a similar mechanism as part of their car hire dispute resolution process under AAR Circular No. OT-10. Additionally, final offer procedures are used in many commercial disputes, including resolution of substantial wage disputes in Major League Baseball (so-called "baseball arbitration"). *Id.* at 4-7.

The Board proposes to establish a streamlined process that draws from the final offer arbitration process used in Canada, but without an arbitrator as the case would be decided by the Board. Streamlined discovery, evidentiary procedures, and decisional timelines call for a final Board decision in 135 days. *Id.* at 7-16. Market dominance could be determined using the streamlined approach proposed in EP 756, and the parties would submit simultaneous "final offers" rates, with each party having discretion to "choose how to present and support its offer, including the methodology it uses." *Id.* at 10. The Board's

choice between the competing offers “would be based on its consideration of the rail transportation policy in 49 U.S.C. § 10101, the Long-Cannon factors in 49 U.S.C. § 10701(d)(2), and appropriate economic principles.” *Id.* The Board would also consider “appropriate economic principles” and “apply, among other things, the agency’s expertise and general principles developed in its rate case precedent over decades.” *Id.* at 10-11.

Olin is encouraged that the Board’s final offer rate review proposal can provide shippers a more accessible avenue for challenging unreasonable rates at reduced costs through a streamlined evidentiary and review process. In particular, Olin agrees that the rules “may help to encourage private settlements of disputes” since “[a]ny final tender that is skewed too far in one direction might well result in the selection of a more reasonable final tender presented by the opposing party.” *Id.* at 7. Final offer rate review may thus provide captive shippers like Olin with a meaningful counterbalance to the railroads’ pricing power. The mere availability of an effective and relatively expeditious remedy may help parties to avoid formal disputes as railroads will have additional incentives to reach mutually beneficial agreements with captive shippers, rather than dictate onerous rates and other terms. Private commercial resolution through contracts is the goal and preferred outcome for Olin in all of its negotiations with its railroad partners.

A. There Is No Perfect Rate Reasonableness Test, and Even If One Existed That Could Theoretically Provide Relief to Carload Shippers, It Should Not Be the Enemy of the Good

In proposing final offer rate review, the Board is wisely not attempting to develop precise mathematical formulas to establish maximum rates, but is instead taking into account the national rail transportation policy, the Long-Cannon factors, and appropriate

economic principles on a case-by-case basis. “These principle-based, non-prescriptive criteria are intended to allow for innovation with respect to rate review methodologies, and the use and creation of precedent through an adversarial process simultaneously creates incentives for methodological improvements over time (while overall complexity is constrained by procedural limitations and reasonableness is encouraged by a final offer selection structure).” *Id.* at 11-12. The approach is similar to standards previously utilized by the Interstate Commerce Commission and that are inherent in the common law.

A non-prescriptive, multiple-factor test is also similar to how the Board determines whether a railroad’s practices are reasonable, whether a railroad has responded reasonably to a request for common carrier service, and whether a merger or abandonment should be authorized. The futility of relying on mathematical formulas to set maximum reasonable rates has long been recognized. As Justice Frankfurter aptly stated, “[t]he process of ratemaking is essentially empiric. The stuff of the process is fluid and changing – the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.” *Bd. of Trade of Kansas City, Mo. v. United States*, 314 U.S. 534, 546 (1942).

Additionally, while the railroads sometimes attempt to depict SAC as a precise, “gold standard” for determining maximum reasonable rates, that characterization is grossly inaccurate, especially for carload shippers. While SAC may appear elegant in concept, it has been anything but precise and pristine in application. For example, then Board Member Begeman’s dissent in *SunBelt* noted that an important costing issue was

decided using a “subjective approach” and that major costing determination was “then used . . . as the basis for imposing millions of dollars in *unrelated* costs on the SARR.” *SunBelt* at 32 (Commissioner Begeman, dissenting). As former Board Member Miller correctly noted:

These disputes over minutiae often force the Board to make determinations that, while based on evidence and expertise, seem far removed from the core question at issue – the reasonableness of a rate. That is particularly so when we review the feasibility of a complainant’s evidence in hundreds of categories to determine if it passes muster under the agency’s longstanding *Duke/NS* evidentiary standard. The fact that the ultimate outcome of a SAC case, in which millions of dollars are at stake, hinges on a staggering number of individual determinations is concerning. Even if the economic theory behind the SAC test is fundamentally sound, I think there must be a better way to assess the reasonableness of a railroad’s rate.

Consumers Energy Co. v. CSX Transp., Inc., Docket No. NOR 42142 (STB served Jan. 11, 2018) at 74 (Member Miller, commenting). Then Board Member Begeman also noted “[t]hat the Board was even called upon in this case to resolve arguments over details of the imaginary restrooms needed for the imaginary crew for the imaginary railroad affirms my belief that the Board must establish an alternative to SAC.” *Id.* (Member Begeman, commenting). The D.C. Circuit has itself recognized that “[t]he pursuit of precision in rate proceedings, as in most things in life, must at some point give way to the constraints of time and expense, and it is the agency’s responsibility to mark that point.” *BNSF Ry. v. STB*, 453 F.3d 473, 482 (D.C. Cir. 2006).

Second, and related, the obvious real reason that railroads like SAC so much is because it works, if at all, for only a very small subset of shippers – principally coal shippers moving traffic over high density coal lines in the West. SAC provides no meaningful standard or opportunity for rate relief for carload shippers like Olin, which Olin has learned

first-hand after years of litigation and significant expense as explained above. An alternative like final offer rate review presents a real opportunity for captive shippers to have an accessible and meaningful rate relief standard.

B. Additional Basic Protections Need to Be Made to Make Final Offer Rate Review a Viable Regulatory Rate Relief Alternative

Olin generally supports the Board's final offer rate relief proposal, and concurs that the standards should be flexible enough to evolve over time, particularly to achieve and maintain a proper balance, including to accommodate the need for appropriate discovery, evidentiary filings, and review standards, and between overall complexity and limitations of time and procedure. However, Olin respectfully submits that the Board's final rule should resolve a few important lingering issues to ensure the standards can be made reasonably available and provide effective relief.

1. Obtaining Common Carrier Rates for Individual Traffic Lanes

In *FORR*, the Board did not “take a position—one way or another—on the appropriateness of rate bundling,” but recognized that shippers had raised an important issue. *Id.* at 4 n.7. Rate bundling refers to the practice of many railroads that insist on bundling multiple lanes together into single contract rates, and refusing to provide shippers with common carrier rates for individual lanes that would then be subject to regulatory challenge. Such a practice gives railroads enormous additional commercial leverage since railroads often set tariff rates that exceed contract rates by 30% or more. Confronted with a Hobson's choice between (a) contract rates that are excessive for at least some of its lanes, but cannot be challenged, and (b) tariff rates that can be challenged, but are much higher for all of its

lanes, a shipper will often be forced to accede to the contract rates, and thus be deprived of any opportunity to seek regulatory rate relief for the most problematic lanes.

Such tying arrangements by railroads not only present serious antitrust law concerns, but also violate fundamental common carrier obligations. Under 49 U.S.C. § 11101(a), common carriers must provide service “on reasonable request.” That carrier obligation is two-fold: first, railroads must provide responsive common carrier rate and service terms on reasonable request; and second, they must provide rail service pursuant to those rates. This common carrier obligation is fundamental. *E.g., GS Roofing Prods. Co. v. STB*, 143 F.3d 387, 391 (8th Cir. 1998) (discussing the “higher standard of responsibility” to which the railroads are held and the special public interest considerations that apply to the provision of rail services because of the carriers’ “quasi-public nature”).

Railroad-imposed bundling arrangements create a significant barrier to access to the Board’s rate relief process and amount to anticipatory retaliation. To address the problem, the Board should clarify as part of its final rules that a railroad is required as part of its common carrier obligation to provide rates and routes to move traffic from one or more *individual* origins to one or more *individual* destinations, if a shipper so specifies in its common carrier rate request. Additionally, the Board should declare that a railroad found to have manipulated its response to a common carrier rate request for commercial advantage purposes through rate bundling or other similar practices will be deemed to have engaged in an unreasonable transportation practice under 49 U.S.C. § 10702(2), by creating an unreasonable barrier to entry to the Board’s regulatory processes. Such a pronouncement is reasonable and consistent with governing common carrier law. *See, e.g., Ethan Allen, Inc. v.*

Maine Cent. R.R., 431 F. Supp. 740, 743 (D. Vt. 1977) (“A railroad may not, for example, justify a refusal to provide service solely on the grounds that to continue to provide the service would be inconvenient or less profitable.”).

2. There Should Be No Cap on Rate Relief

The Board proposes to cap relief at \$4 million over a 2-year period, calculated as the sum of the difference between revenues under the challenged rates and the maximum reasonable rates, whether in the form of reparations, a rate prescription, or a combination of the two. *FORR* at 16-17. Olin respectfully submits that the Board should remove the relief cap altogether in final offer rate review cases. In the past, the Board has found that the Three-Benchmark method should be capped at similar levels, but has removed the previous cap on Simplified-SAC. The Three-Benchmark cap was linked to the estimated litigation cost of pursuing relief under the Simplified-SAC model, and was established under the assumption that the Three-Benchmark approach may be “less precise” than SAC or Simplified SAC. *Rate Regulation Reforms*, Docket No. EP 715 (STB served July 18, 2013) at 22.

However, as the Board recognizes, “because *FORR* does not prescribe a particular methodology—nor a methodology necessarily less precise than any pre-existing procedure—the Board’s prior rationale for capping relief based on the cost of the next more complicated procedure does not necessarily or neatly apply here.” *FORR* at 15. As discussed above, the notion that SAC or Simplified-SAC are more “precise” is illusory in practice, especially for carload shippers, and Olin agrees that the previously used reasoning

for establishing a cap based on the cost of litigating a more “precise procedure” does not apply here.

Additionally, the Board purports to track the final offer arbitration approach practiced in Canada. Canada has both an expedited “summary” procedure for freight charges of \$2 million CAD or less (subject to an inflation adjustment), and a regular process for freight charges of more than \$2 million CAD (subject to an inflation adjustment). *Id.* at 6 n.11. The lower tier utilizes a fast-track, 30-day procedure, where there is no discovery. However, the second-tier process is also expedited: a 60-day procedure, with limited discovery. The Board’s final offer rate review proposal is for a 135-day procedure that more closely fits the regular Canadian procedure, which takes 60 days and has no rate cap. The Canadian model clearly indicates that no rate cap should apply.

Alternatively, the Board has sought comment on the possibility of a two-tier relief procedure in which the second, top tier contains no limit on the size of relief, but where the procedural schedule may be extended somewhat. *Id.* at 16. If the Board is unwilling to lift the cap without a longer procedural schedule, Olin would support such an option compared to a mandatory rate cap.

3. If There Is a Rate Cap, the Board Must Not Allow Railroads to “Game” the Process by Establishing High Initial Rates

Olin appreciates the Board recognizing that when shippers “shift from contract rates to tariff rates before bringing a rate case, . . . tariff rates may be higher than prior contract rates,” and therefore, “[t]hat factor gives complainants a strong interest in having a rate case decided quickly, from start to finish.” *FORR* at 4. The Board addresses this problem by establishing a streamlined rate review process under final offer rate review,

which is very helpful. However, the focus on procedure ignores the larger substantive problem that results from the establishment of new railroad rates.

As discussed *supra*, Olin opposes the proposed cap on rate relief under final offer rate review. However, assuming *arguendo* that there is a cap, its existence creates a gaming opportunity for the railroads. Specifically, a railroad can “game” the cap by setting high initial rates, such that, even if the prescribed rates are established at reasonable levels, the shipper will soon run up against the relief caps and quickly be stuck with an inflated rate, even if it obtains the maximum available relief. The same problem arose in SAC cases and led the Board to switch from allocating relief on a percentage-reduction basis to its Maximum Markup Methodology. *Major Issues in Rail Rate Cases*, Docket No. EP 657 (Sub-No. 1) (STB served Oct. 30, 2006) (“*Major Issues*”).

The ability of a regulated railroad to act with impunity in setting a high starting point for prescribed rates and reparations relief under a process with relief caps defeats the effectiveness of the rate review methodology. If the Board ultimately chooses to include a rate relief cap for final offer rate review, Olin respectfully submits that additional mechanisms are necessary to ensure that rate relief protections cannot be manipulated.

To address the problem, Olin respectfully requests that the Board declare as part of its final rules that it will use the expired contract or previously used tariff rates as the starting point for applying the cap on reparations and the prospective rate prescribed. Otherwise, the railroads will have an open invitation to manipulate the STB’s maximum ratemaking process, which will also translate into abusive leverage in the negotiations that precede any rate litigation. Again, the Board took effective action against this problem in

Major Issues, and it should take similar protective measures here by adopting Olin’s proposed remedy or a similar one.

4. Final Offer Rate Review Should Not Be Limited to “Streamlined” Market Dominance Cases

The Board has proposed “that the FORR procedure may only be used if the complainant also elects to use the streamlined market dominance approach proposed in Docket No. EP 756” *FORR* at 9. Olin opposes this proposal. Olin’s separate comments in EP 756 respond to the Board’s request for comments on whether complainants should have the option to use a non-streamlined market dominance process in FORR cases. In summary, Olin respectfully submits that the Board’s proposed restriction creates an artificial barrier to access to the Board’s processes that is arbitrary and unnecessary.

Under the procedures established by the Board, a complainant can file its market dominance evidence simultaneously with its final offer. Whether that submission be under the “streamlined” approach, or a non-streamlined approach, as the Board notes, the 50-page limit and the expedited timelines of the process “would serve to control unnecessary submissions.” *Id.* at 10 n.20. As further noted by the Board, it can review the matter further after experience, and “[s]hould the Board adopt this proposal, and if expedited timelines prove insufficient to control the scope of the issues presented, the Board may consider page limits either by rule or in individual proceedings at a later time.” *Id.* Olin respectfully submits that the Board should err on the side of stakeholder access to its final offer rate review processes, and not create unnecessary barriers wherever possible. Any need for restrictions should be determined based on actual experience, not mere speculation.

CONCLUSION

For the reasons set forth above, Olin respectfully submits that the Board should adopt its proposed final offer rate review methodology, including the reasonable modifications set forth herein, to help ensure that shippers have a reasonable opportunity to challenge unreasonable rates, and that the statutory directive that railroad rates on captive traffic “must be reasonable” is realized.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Frank Chirumbole", is written over a light gray rectangular background.

Frank Chirumbole
Vice President, Integrated Supply Chain
Olin Corporation
16290 Katy Freeway, Suite 600
Houston, Texas 77094

Dated: November 12, 2019