

MARKET DOMINANCE STREAMLINED APPROACH

Docket No. EP 756

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Dated: November 12, 2019

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

MARKET DOMINANCE	)	Docket No. EP 756
STREAMLINED APPROACH	)	
	)	

**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 756, *Market Dominance Streamlined Approach* (“*Streamlined Market Dominance*”).

INTRODUCTION AND SUMMARY

Olin supports the Board’s proposed Notice of Proposed Rulemaking (“NPRM”) to adopt a streamlined approach for pleading market dominance in rate reasonableness proceedings to reduce burdens on rate case litigants, with modest revisions. Olin has previously been a participant in STB rate reasonableness proceedings and may be a participant in future proceedings, although it strongly prefers to be able to rely on competitive forces, rather than regulation or the threat thereof, to obtain reasonable rates and terms for railroad transportation. However, as a captive shipper, Olin is largely unable to obtain competitive rates on its own.

Olin strongly supports the Board’s efforts to establish a threshold market dominance test that helps make rate cases less burdensome and costly. Such an initiative is important to further the national transportation policy goals of providing for the expeditious handling and resolution of proceedings, and maintaining reasonable rates where there is an

absence of effective competition. While Olin supports the Board's proposed rule, it respectfully requests that the Board make several clarifications and revisions to the criteria for establishing a "prima facie" showing of market dominance, including: (1) remove the 500 highway miles threshold for chlorine and other hazardous materials products that cannot readily or feasibly be moved by truck and adopt a sliding-scale threshold of up to 250 miles for other products that can move by truck; (2) clarify that "barge competition" means effective competition that can accommodate the involved shipments using an existing barge facility; and (3) clarify that for intermodal truck competition, the "used trucks for 10% or fewer of its movements" threshold is based on volume, not the number of individual shipments, and adopt 20% as a more appropriate threshold for a showing of effective competition. Finally, the Board should eliminate its proposal that shippers that do not succeed with a streamlined market dominance showing may not bring a new case using the non-streamlined approach, which creates unfair and artificial barriers to shippers that seek to pursue their statutory right to reasonable rates in good faith.

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. The establishment of market dominance is a statutory pre-requisite for obtaining rate relief before the Board, and Olin has a direct and substantial interest in ensuring that the standards are made less burdensome and more accessible.

I.

COMMENTS

Under 49 U.S.C. § 10701, the STB has jurisdiction to establish maximum rates only where the involved rail carrier “has market dominance over the transportation to which a particular rate applies.” *Id.* § 10701(d)(1). “Market dominance” is defined at 49 U.S.C. § 10707(a) as “an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies.” *Id.* Under 49 U.S.C. § 10707(d)(1)(A), the STB may not find market dominance if the involved “rail carrier proves that the rate charged results in a revenue-variable cost percentage for such transportation that is less than 180 percent.” *Id.* The statutory market dominance provisions include a quantitative standard (the 180% standard), as well as a separate qualitative standard (absence

of effective competition standard). *E.g., U.S. Magnesium, L.L.C. v. Union Pac. R.R.*, Docket No. 42114 (STB served Jan. 28, 2010) at 4-5.

A. The Board’s NPRM Properly Recognizes the Need for a Streamlined Market Dominance Inquiry

In *Streamlined Market Dominance*, the Board recognizes that the “market dominance inquiry is a costly and time-consuming undertaking, resulting in a significant burden on rate case litigants.” *Id.* at 3. The Board also recognizes that the burden on shippers of defending against even highly dubious claims of effective competition has a chilling effect on the legitimate exercise of the rights of captive shippers to reasonable rates. *Id.* at 4 (“[a]n overly complicated and costly market dominance inquiry can *itself* be a barrier to rate relief, even in cases where there is no effective competitive restraint on rail rates”).

Olin can confirm from its own experience that “[g]iven the hypothetical nature of some competitive options proposed by defendant railroads in past cases, complainants essentially have to predict what a defendant railroad might argue regarding potential, but unused, competitive options—all without knowing precisely what constitutes a prima facie showing of an absence of effective competition.” *Id.* at 3.

Olin’s subsidiary SunBelt Chlor Alkali Partnership (“SunBelt”) filed a Stand-Alone Cost complaint at the Board in July 2011. *SunBelt Chlor Alkali P’ship v. Norfolk S. Ry.*, Docket No. NOR 42130 (“*SunBelt*”). Even though a decade of extremely aggressive railroad rate increases more than established that alternative transportation modes are not an effective competitive constraint, and with challenged rates with extremely high revenue-to-variable cost ratios at or above 459%, to protect its interests and guard against potential

railroad reply arguments on market dominance, SunBelt had to file extensive evidence on a lack of intra- and inter-modal competition.

Olin does not ship to its customers any chlorine by truck or barge today. In *SunBelt*, neither the origin production facility nor the destination location had the necessary infrastructure to receive chlorine shipments by any transportation mode other than rail. Nonetheless, SunBelt's Opening Evidence on market dominance sponsored by three witnesses, included dozens of pages examining multiple theoretical alternatives of transportation by barge and truck, or a combination of rail-barge-truck that, even if theoretically possible, would require tens of millions of dollars in new origin and destination infrastructure and facilities.

On Reply, the defendant carrier responded to SunBelt's mountain of evidence establishing market dominance in one sentence: "NS does not dispute that the Board has jurisdiction to consider the reasonableness of the challenged rate under 49 U.S.C 10701(d)(1) and 10707." *SunBelt*, NS Reply Evidence at I-29, II-3 (filed Jan. 7, 2013). While this was an obvious admission to make under the circumstances, Olin still had to go through the arduous and expensive exercise of making a prima facie evidentiary showing under the Board's existing standards. Through its NPRM, the Board wisely seeks to avoid wasteful, unnecessary, and costly burdens by establishing a reasonable list of factors necessary to establish a prima facie showing of an absence of effective competition. A balancing of the interests involved clearly justifies the Board's streamlined approach.

B. The Proposed Prime Facie Factors Should Be Adopted, with Limited Modifications

To reduce the burden on the parties, the NPRM seeks to allow a shipper to make a streamlined prima facie showing of market dominance by addressing six factors: (a) the rate exceeds the jurisdictional threshold; (b) the movement exceeds 500 truck miles between origin and destination; (c) there is no intramodal competition; (d) there is no barge competition; (e) the complainant has shipped no more than 10% of its issue traffic by truck over the past five years; and (f) the complainant has no practical build-out alternative. *Id.* at 6-7. The Board expects that, in most cases, the complainant will demonstrate that it satisfies the factors through submitting a verified statement from an appropriate official attesting to satisfaction of each of the criteria. *Id.* at 7-11. Reply and rebuttal filings are limited to fifty pages, inclusive of exhibits and verified statements. The complainant retains the ultimate burden of proof, with defendants “permitted to refute any of the prima facie factors of the complainant’s case, or otherwise show that effective competition exists for the traffic at issue.” *Id.* at 12.

Olin supports the Board’s proposal, however, it believes that in several instances, the stated criteria for establishing a prima facie showing are far too stringent and should be modified.

1. 500-Highway-Mile Threshold

The proposed showing that the distance between origin and destination exceeds 500 highway miles is unreasonable and arbitrary for the chlor alkali products Olin ships. As referenced, Olin does not transport any chlorine by truck and neither do most chlorine producers except over very short distances in privately-owned equipment. There are

very few commercial motor carriers that handle chlorine. Also, because of the nature of the product, a toxic-by-inhalation hazard (“TIH”), only special bulk trucks can be used, which typically have a capacity of 15-20 tons of chlorine. That means at least five trucks are needed to transport the same volume as one 90-ton railcar. Even if feasible, shifting the transportation of even a modest amount of a TIH material from railcars to massive fleets of trucks traveling the nation’s highways is not in the public interest.

Accordingly, Olin respectfully submits that the 500 highway miles threshold should be removed as arbitrary and unreasonable, at least for chlorine or other hazardous materials that cannot readily or feasibly be moved by truck. Additionally, for other non-TIH products that can move by truck, a sliding-scale threshold of up to 250 miles would be more appropriate. Truck shipments exceeding 250 miles cannot be accomplished in a one-day trip, without an overnight stay, which makes such shipments relatively rare. A sliding scale, up to 250 miles could take into account the nature of the product and the involved packaging and availability of equipment required for trucking.

In cases where the use of truck would require possible terminal storage and transloading, the measured distance for meeting the established prima facie should be lengthened on the sliding scale, to accommodate the expense and difficulties of transloading. As a simpler alternative to the sliding scale approach, the Board should consider allowing the complainant to submit at the outset a partial non-streamlined market dominance presentation for this factor showing why even shipments of less than 250 highway miles cannot readily or feasibly be moved by truck.

2. Absence of Barge Competition

Under the Board's proposal, the absence of barge competition would be established through "an appropriate official attesting that the complainant does not have practical physical access to barge competition." *Id.* at 8. Olin ships no chlorine by barge today. With respect to other chlorine producers, there are only three facilities in the entire United States from which chlorine is shipped by barge. Even if there were "physical access to barge competition" at a production facility at origin, Olin is aware of only one potential customer capable of accepting it at destination.

Additionally, Olin has plants that may theoretically have "physical access" to waterways but would need to build significant costly piping to transport the product from the plant to the docks in order to load barges. Further, constructing a new barge loading facility would cost over \$10 million and require extensive permitting. Moreover, even if there were some theoretical possibility of barge-rail or barge-truck competition, the chlorine barge fleet is entirely privately-owned and is both very small (less than 20 barges exist for service in the United States) and very old, and there are very limited tugboat operators willing to tow chlorine barges. New barges would cost in the vicinity of \$5 million each.

Under the circumstances, Olin respectfully submits that the "physical access to barge competition" threshold is too vague and restrictive. Olin suggests that the Board at least clarify that "barge competition" means effective competition that can accommodate the involved shipments between origin and destination, and restate the criteria to clarify that there must be "physical access to barge competition through an existing barge facility."

Alternatively, the Board should consider allowing the complainant to submit at the outset a

partial non-streamlined market dominance presentation for this factor showing why its potential physical access to barge service would not provide effective competition.

3. Absence of Truck Competition

The Board's proposal that a complaint show that "it has used trucking for 10% or fewer of its movements subject to the rate at issue over a five-year period" (*id.* at 9) is vague, because it does not clarify whether "movements" refers to volume of traffic or equipment counts. To address this issue, Olin respectfully submits that the Board should clarify that when it refers to "used truck for 10% or fewer of its movements," it is referring to total volume moved by each mode. It typically takes 3-4 trucks to hold the same volume of product as a railcar, and using a count of equipment rather than total volume moved by each mode unfairly skews upward the amount of product that is actually subject to potential competition.

Olin also suggests a "use-of-trucking" threshold of 20% or fewer of the volume of movements for the issue traffic as a more appropriate threshold for a showing of effective competition. Additionally, in evaluating trucking competition, the Board should consider allowing the complainant to submit at the outset a partial non-streamlined market dominance presentation showing that the diversions to truck occurred because the railroad provided inadequate service or imposed too high a rate.

Finally, Olin disagrees with the proposed restriction limiting the ability of a complainant who has failed to meet the Board's streamlined market dominance test from bringing a new case "involving the same traffic using the non-streamlined market dominance presentation unless there are changed circumstances or other factors under 49 U.S.C. §

1322(c)).” *Id.* at 11. Respectfully, the Board’s streamlined market dominance proposal is intended to make relief more readily available, and it should not punish shippers who, in good faith, seek to use the new approach to assert their statutory right to obtain reasonable rates. This is especially important because the streamlined prima facie factors apply across the board to all complainants, and do not take into account the diversity of shippers or the specific commodities, shipment types, equipment, business operations, and infrastructure that may be involved in a given case. Just because a complainant cannot meet one or more of the individual thresholds should not mean that there is effective competition and that a railroad’s rates should be immune from prospective challenge.

CONCLUSION

For the reasons set forth above, Olin respectfully submits that the Board adopt its proposed streamlined approach for establishing market dominance, including the reasonable revisions requested herein, to reduce burdens on rate case litigants and make its rate case remedies more accessible to shippers.

Respectfully submitted,

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

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