

**Surface Transportation Board
Docket No. EP 755, *Final Offer Rate Review***

Summary of Ex Parte Meeting Between Olin Corporation and STB Board Member Patrick Fuchs 300880

Date and Location of Meeting: July 9, 2020, telephone conference call

ENTERED
Office of Proceedings
July 14, 2020
Part of
Public Record

Names and Titles of Persons Attending:

Olin: Frank Chirumbole, Vice President, Integrated Supply Chain
Mike Meenan, Director of Global Government Affairs
Brian Vain, Director of Logistics, North America
Jeffrey Kilts, Lead Rail Logistics Analyst
Angela M. Castle, Associate General Counsel, Integrated Supply Chain and Operations
Peter Pfohl – Slover & Loftus LLP, outside counsel

STB: Patrick Fuchs, Board Member
Lisa Novins, Attorney-Advisor

Summary of Meeting:

- Olin thanked Board Member Fuchs for his continuing efforts on needed reforms and stressed that obtaining reasonable rail rates was more critical than ever in an extremely challenging business environment.
- Olin explained that FORR is the most important reform the STB can make in the near term; it will help create a more level playing field for negotiations with the railroads.
- Olin also explained that it stands by its comments filed in support of EP 755. It reemphasized the need to address railroad “rate bundling” practices used to effectively block access to the Board’s rate relief processes. The participants discussed the issue of rate bundling in the context of the railroads’ common carrier and reasonable practice obligations.
- Olin emphasized its preference that there be no dollar cap for recovery on individual lanes. It also emphasized that the expedited process is critical to the utility of FORR.
- Olin addressed some of the railroads’ legal arguments in opposition to FORR. It emphasized that the Board has the authority to promulgate FORR; FORR is not mandatory arbitration as the railroads contend as the Board (not an arbitrator) decides a case by applying the standards set forth in the Interstate Commerce Act.
- Olin stressed that applying a principle-based, non-prescriptive criteria on a case-by-case basis is entirely appropriate and consistent with the approach used by the Board in making reasonableness determinations in other types of adjudications.
- Olin expressed that there is nothing in Title 49 that precludes the Board from applying these standards on a case-by-case basis, in a non-prescriptive manner. Indeed, that is the approach the Board follows in many other proceedings where Congress has directed the Board to make reasonableness determinations (e.g., unreasonable practice and unreasonable discrimination proceedings).
- Additionally, Olin expressed that due process and Administrative Procedure Act requirements are met as the parties have an opportunity to reply, and the complainant

would retain the burden to establish market dominance and rate unreasonableness, subject to normal appeals.

- Olin also stressed the selection of one final offer over another is appropriate, and that Board regularly exercises its authority in accepting one party's evidence and arguments over another's in maximum rate cases.
- Olin added that ratemaking is not set and should not be set by mathematical formulas. Olin referenced that there is nothing inherently arbitrary in this selection process, so long as the Board provides an explanation for its decision that comports with the requirements of the Administrative Procedure Act.
- The participants discussed some of the Board's proposed principal-based legal standards to apply under FORR, including how consideration of "appropriate economic principals" might be considered and applied in each case.
- In response to questions about the possibility of enhanced rate arbitration opportunities, Olin emphasized that the Board has a statutory obligation to maintain reasonable rates and standards and provide its own forum for adjudication of cases. Olin said that does not oppose arbitration as a concept, but the Board should not allow the possibility of new rules addressing the arbitration of rates to be used to delay implementation of FORR.
- The participants discussed CN's written comments, suggesting that the Board consider adopting some new arbitration rules. Olin responded that CN's comments were skeletal, containing no proposed standards, principles, or procedures as an alternative to FORR. Also, Olin stressed that any revisions to the existing voluntary arbitration standards would likely be difficult and complex, given 49 U.S.C. § 11708 and the Board's subsequent adoption of conforming rate arbitration rules with which CN's proposal appears to conflict in several instances. Olin remarked that the few arbitration items addressed by CN, including extreme rate relief caps (100 times below the cap mandated by Congress) that would effectively block the availability of arbitration for virtually all stakeholders, reveal that CN's initial proposal is not a meaningful attempt to provide for an effective voluntary arbitral forum to supplement rate review before the Board.
- In response to follow-up Board questions, the participants discussed several issues that the Board and stakeholders would confront in attempting to make arbitration a useful supplement to FORR, including:
 - Olin expressed that under 49 U.S.C. § 11708, the arbitration does not start until after the Board determines market dominance, which would add another procedural hurdle to the process not presented by FORR, and lead to delays. The participants discussed solutions to this issue.
 - The participants discussed whether FORR principles or other principles could be utilized in arbitration, recognizing the broad statutory standards in § 11708.
 - The participants discussed the voluntary nature of arbitration, and whether any stakeholder could be required to use it, through stipulations, opt-ins, or other means, and whether this or the potential for opt-outs might affect and hinder its usefulness.
 - The participants discussed the statutory requirements of § 11708, requiring the Board to use its arbitration roster in the selection of arbitrators, and whether there may be ways to expand that roster to enable the parties to find neutral arbitrators with appropriate expertise and experience to be used in given cases. Olin expressed that these issues are not presented under FORR, because FORR

leverages the Board and its staff's expertise and experience in adjudicating cases in making a rate reasonableness determination.

- o Olin addressed further hurdles to arbitration presented by § 11708 and the Board's arbitration rules, where arbitration is subject to two appeals: (1) to the full Board and (2) to court, presenting further opportunities for delays with an extra layer of appeals than that provided under FORR.
- o Olin explained that CN's suggestion that decisions be confidential conflicts with the Board's rules providing for publication of arbitration decisions. The participants generally discussed the issue of whether arbitration decisions could or should be confidential or public.
- Olin stressed that there were many obstacles to establishing arbitration as an effective supplemental rate relief remedy to FORR before the Board. It added that any further consideration of such new voluntary arbitration rules could take place in a separate proceeding, but that proceeding would likely take considerable time and effort to resolve many complex issues. Olin concluded that it is critical that the Board promptly complete FORR and implement its own workable rate dispute resolution process leveraging its own expertise.