

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

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**Summary of Ex Parte Meeting Between Olin Corporation and
STB Chairman Ann Begeman**

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

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: Ann Begeman, Chairman
Craig Keats, General Counsel
Bill Brennan, Director of the Office of Economics
Kim Hillenbrand, Transportation Industry Analyst
Chris Diamond, Attorney-Advisor
Adam Kress, Attorney-Advisor
Amanda Gorski, Attorney-Advisor
Valerie Quinn, Attorney-Advisor

Summary of Meeting:

- Olin thanked Chairman Begeman for her 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.
- 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 the Board regularly exercises its authority in accepting one party's evidence and arguments over another's in maximum rate cases.
- Olin explained that the burden of proof of establishing market dominance and rate reasonableness remains on the complainant. It 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.
- 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 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, which suggest 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, especially given recent Congressional pronouncements under 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 as to the specific issues besides rate relief caps that rate arbitration under the Board's rules present, Olin reviewed a number of issues and obstacles the Board and stakeholders would confront in attempting to make arbitration a useful supplement to FORR, including:
 - Olin stressed that under the Board's arbitration rules, the arbitrator is not bound by any procedural rules or regulations; discovery is available only upon the agreement of the parties. Olin noted that FORR addresses all these issues.
 - Olin expressed that under 49 U.S.C. § 11708, the arbitration does not start until after the Board determines market dominance, which would delay proceedings and add another procedural hurdle to the process not presented by FORR.
 - Olin explained that while it generally supports voluntary mediation where mediation might result in private settlement, CN's proposal to mandate pre-dispute mediation could also unnecessarily delay proceedings and add another procedural hurdle to the process not presented by FORR.

- Olin added that although not disqualifying, arbitrators are not experts and do not have the technical expertise offered by the Board. It also stressed that the STB's arbitration roster list is very small, and the availability of truly neutral arbitrators is limited. It added that railroad suggestions that the Board could require the selection of arbitrators from outside the roster conflicts with Section 11708, requiring the Board to use its arbitrator roster. Also, it noted that under rate arbitration, the parties would be required to pay for the arbitrators. Olin expressed that these issues are not present under FORR, because FORR leverages the Board and its staff's expertise and experience in adjudicating cases in making a rate reasonableness determination.
- Olin expressed that CN's suggestion that decisions be confidential conflicts with the Board's rules providing for publication of arbitration decisions, with appropriate redactions of confidential information. Olin added that it also conflicts with the railroads' prior strong opposition to confidentiality in the arbitration process. Olin also noted that the railroads have strongly urged the Board to make arbitration awards public as a means to discourage extreme positions and encourage settlement, to create incentives for arbitrators to render thoughtful, well-reasoned decisions, and to promote transparency of the arbitration process. Olin remarked that the proposed FORR rules expressly promote these goals, by allowing for publication of Board decisions.
- Olin further explained that under the Board's arbitration rules, 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.
- Olin stressed that any further consideration of such new voluntary arbitration rules to supplement FORR could take place in a separate proceeding that 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.