

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINAL OFFER RATE REVIEW	)	Docket No. EP 755
	)	
JOINT PETITION FOR RULEMAKING TO ESTABLISH A VOLUNTARY ARBITRATION PROGRAM FOR SMALL RATE DISPUTES	)	Docket No. EP 765 (Not consolidated)
	)	

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COMMENTS OF OLIN CORPORATION

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COMMENTS OF OLIN CORPORATION

Pursuant to the Board’s Supplemental Notice of Proposed Rulemaking (“SNPRM”) in Docket No. EP 755, *Final Offer Rate Review* (STB served Nov. 15, 2021) and its Notice of Proposed Rulemaking (“NPRM”) in Docket No. EP 765, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes* (STB served Nov. 15, 2021), Olin Corporation (“Olin”) presents this single set of Comments for the Board’s consideration.¹

Olin respectfully requests that the Board *adopt* its proposed Final Offer Rate Review (“FORR”) rules in EP 755 and that the Board *decline* to adopt its proposed arbitration program in EP 765. Unfortunately, the Board’s proposed arbitration program contains mechanisms that favor select railroad stakeholders, would effectively insulate railroads from final offer rate review, and would highly discourage shippers from pursuing any rate relief through voluntary arbitration. To the extent the Board were to

¹ The EP 755 and EP 765 proceedings have not been consolidated.

adopt the EP 765 program, Olin requests that the Board decline to afford any rail carrier the privilege of excusing itself from the FORR process simply through its expression of willingness to participate in a confidential Arbitration process of the railroads' own design.

SUMMARY

Olin would have hoped to see the Board adopt the FORR process without inviting this additional round of comments. Carload shippers have waited many years for a feasible, cost-effective means of challenging excessive rates. The FORR process offers that prospect. Nevertheless, Olin prefers a delayed implementation of the FORR process over no implementation at all. Olin appreciates the Board's ongoing initiative to propose and implement that process.

With respect to the railroads' voluntary arbitration process, on the other hand, Olin strongly opposes the existing Board proposal. That proposal threatens to undermine all of the potential value of the FORR process. Essentially, the Board has proposed two separate rulemakings that are fundamentally inconsistent with each other. One STB rulemaking (EP 755, FORR) proposes to afford shippers greater flexibility and ease of access in obtaining the regulatory review of excessive railroad rates through FORR, while the other STB rulemaking (EP 765, Arbitration) proposes to make that flexibility and that ease of access impossible for shippers to obtain. *See* NPRM at 14 ("The Board will propose that any carrier that opts into the voluntary, small rate case arbitration program would be exempt from any final FORR rule adopted in Docket No. EP 755.").

Stated differently, the present Board inquiry invites public comment on a new FORR approach to regulatory oversight that – pursuant to the Board’s own contemplated action – would likely never be available to shippers.

As Olin explained in its August 20, 2020 Reply in EP 765, five railroads developed and proposed the EP 765 Arbitration process in July of 2020 as a shield from the possibility that the STB might adopt FORR as a rate-evaluation tool. *Id.* at 8 (“The Petitioners’ proposal is a diversionary tactic and misguided effort to subvert FORR”). As of the date of the railroads’ Petition, the Board had been considering FORR in EP 755 for more than ten months.² There is no basis for allowing the railroads to undermine the Board’s FORR effort through the EP 765 shield.

Ultimately, as Olin explains below, the scope of the Board’s proposed Section 1108.33 exemption from FORR application is far broader than would be necessary to address the supposed risk that the railroads have identified (*i.e.*, limited appellate rights in arbitration proceedings). The Board can address that concern by: (1) considering restrictions on the use of FORR principles and/or procedures *within the context of EP 765 arbitration proceedings*; while (2) nevertheless allowing shippers to litigate small rate case disputes under FORR outside the context of an EP 765 arbitration.

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 seventy locations worldwide.

² See *Final Offer Rate Review*, Docket No. EP 755 (STB NPRM served Sept. 12, 2019).

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.

Olin ships over 47,000 rail cars of chlor alkali products annually from its various North American manufacturing locations, each of which is captive to a single railroad. Because of Olin's dependency on railroad service, rail transportation is one of the single largest costs of Olin's production and distribution process, and the availability of reasonable regulatory protections and processes is essential for protecting Olin from excessive rates in situations in which effective competition is absent.

Olin has been an active participant in both EP 755 and EP 765. Olin filed Comments in EP 755 on November 12, 2019, and as noted above, Olin filed a Reply in Opposition to the railroads' petition in EP 765 on August 20, 2020.

COMMENTS

Olin supports the adoption of the Board's proposed FORR rules and requests that the Board adopt those rules. Doing so will give lower-volume and/or carload shippers the opportunity to obtain regulatory review of railroad rates in a context that lacks the burdens and barriers of the Board's stand-alone cost ("SAC") rate-review process. Olin respectfully submits that it is imperative that the Board refrain from simultaneously barring the availability of those new FORR rules.

A. Final Offer Rate Review Would Ensure that All Shippers Have Access to Board Rate Review

In her dissent in the EP 755 SPRM, former Commissioner Begeman noted that adoption of the Board's FORR proposal would "finally" ensure that all shippers have

access to Board rate review. SPRM at 53. Olin shares these views, and as noted above, Olin requests that the Board adopt its proposed FORR process.

1. Olin's Experience Demonstrates the Need for FORR Procedures

In its November 12, 2019 Comments in EP 755, Olin explained that it has a fairly unique background with respect to the issue of regulatory review for carload and other “non-unit train” shippers, having spent an enormous amount of time and money seeking to obtain relief from rates under the Board’s extremely complex SAC procedures. *See* Olin Comments at 5-7.

As Olin explained, its subsidiary (SunBelt Chlor Alkali Partnership or “SunBelt”) looked to the STB as the last line of defense against Norfolk Southern Railway Company’s (“NS”) monopoly pricing and to SAC as the only viable remedy available to it to challenge NS’s rates. The revenue-to-variable cost ratios associated with the rate under challenge were extremely high, *i.e.*, 459% or more. SunBelt filed its SAC complaint at the Board in July of 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. 42130.

SunBelt challenged NS’s rate on the origin segment of a through route for chlorine moving from SunBelt’s McIntosh, AL production facility to a customer facility located in LaPorte, TX. Under SAC procedures, SunBelt designed a stand-alone railroad that covered 575 route-miles through three states and handled more than 30 million tons annually for a broad range of shippers and commodities.

In order to present that SAC evidence, SunBelt used four in-house witnesses and eighteen expert witnesses. Those witnesses, along with SunBelt counsel, submitted over 1,400 pages of hard-copy evidence in the form of narrative testimony, exhibits, legal argument, and briefing. SunBelt supported its hard-copy evidence with substantial volumes of electronic evidence, train modeling data, and electronic spreadsheets.

Ultimately, the Board's 215-page decision found that NS had market dominance over the involved traffic, but the Board determined that the challenged rates were unreasonably high only in 2021. As a result, the Board declined to prescribe rates or to order damages/reparations. *SunBelt Chlor Alkali P'ship v. Norfolk S. Ry.*, NOR 42130 (STB served June 20, 2014) ("*SunBelt*").

Former Commissioner Begeman issued a spirited dissent in the case, lamenting the subjectivity of the Board's SAC process and the effect that that subjectivity had on the evaluation of SunBelt's complaint. *Id.* at 32 (commenting with regard to 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"); *id.* ("The Board's ability to provide an objective assessment of the rate at issue was greatly hindered . . ."); *id.* ("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."). On the basis of these observations, Commissioner Begeman concluded that she "[stood] ready to work with [her] colleagues and Board stakeholders to improve our rate processes" for carload traffic shippers. *Id.*

Olin is pleased that the Board has worked to improve its rate processes for carload shippers and Olin requests that the Board adopt its FORR proposal without simultaneously undercutting the value of that proposal.

2. Olin's 2019 Modification Requests and the Associated Board Determinations

In its 2019 Comments, Olin proposed four principal modifications to the Board's initial FORR procedures. Olin explained that these modifications were necessary to ensure that the Board's standards would be made reasonably available and would provide effective relief.

First, with regard to potential railroad rate-bundling practices, Olin argued that the Board should clarify 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.” Olin Comments at 14 (emphasis in original). Olin explained that such a clarification was necessary because railroad-imposed bundling arrangements create a significant barrier to access to the Board's rate-relief process and amount to anticipatory retaliation. In its November 15 SNPRM, the Board stated that Olin's concern was outside the scope of the proceeding. *See* SNPRM at 45, 49. Olin understands the Board's response and respectfully requests that the Board remain open to considering such arguments in the context of unreasonable practice disputes, should such litigation become necessary for shippers.

Second, Olin argued that there should be no cap on rate relief. The Board denied that requested modification in its SPRM decision (SNPRM at 47), although the Board did indicate (with respect to Olin’s proposal of a two-tiered relief procedure) that, in the future, the Board could assess whether FORR may be appropriate for larger disputes. Olin reiterates its request that the Board remove the relief cap (or that the Board adopt a two-tiered relief procedure) for the reasons set forth in Olin’s 2019 Comments. *See* Comments at 15-16. Olin believes that FORR rate review could provide an important and helpful means of limiting excessive railroad rate demands. As the Board recognizes, shippers must evaluate (in advance) the likely costs and benefits of any recourse to regulatory review. Capping that relief necessarily will impose a limit on the likelihood that any given shipper will seek to avail itself of the FORR process, particularly insofar as the level of litigation costs (and substantive litigation risk) for a new procedure will be uncertain.

Third, Olin discussed the prospect of railroad “gaming” by using inflated initial rates as a means of leveraging the rate cap to prevent (or to limit) actual rate relief. The Board explained that it “would anticipate addressing this conduct in individual cases should it happen, and the Board would retain the ability to revise its processes to counteract any abuses that may arise.” SNPRM at 46. Relatedly, Olin suggested that – if a rate cap does exist – the Board should 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.” Comments at 17. In its SNPRM decision, the Board declined to adopt Olin’s proposal “for all cases in advance,” but

offered that it “may be an appropriate remedy in cases where abuses are shown to have occurred.” SNPRM at 46. Olin thanks the Board for its willingness to consider such a constraint on potential railroad gaming. As for the manner in which this solution would work, any application of the Board’s rate cap necessarily would need to consider the “but for” rate that the carrier would have charged in the absence of the FORR rate relief. Olin simply suggests that the Board utilize the expiring contract rate (or a previously used tariff rate) as that starting point in the rate cap calculation, rather than using a higher, made-for-litigation rate.

Fourth, Olin argued that Final Offer Rate Review should not be limited to “streamlined” market dominance cases. Comments at 18. The Board adopted Olin’s proposal in its SNPRM. *See* SNPRM at 41 (“The Board is persuaded by Olin, the Coalition Associations, and the TRB Professors that complainants should have the option of choosing between streamlined and non-streamlined market dominance in FORR cases.”). Olin thanks the Board for its willingness to accept this modification.

B. The Board’s EP 765 Proposal Threatens to Undermine All of the Value of the FORR Process

The Board has proposed that carriers opting into the Board’s arbitration program will be exempt from any shipper FORR complaints.³ Olin is unaware of a prior situation in the history of the Board in which the agency has proposed a new regulation of any sort, must less an entirely new rate review process for small rate disputes, while simultaneously proposing to make that new regulation unavailable for use. But here, that appears to be exactly what the Board has done. Moreover, the Board has proposed to allow members of the regulated industry to decide whether to preclude regulation under the Board’s new FORR process. Olin respectfully submits that the Board’s proposed approach lacks a sufficient and/or legitimate justification.

1. The Proposed Rate Arbitration is Not a Benefit for Carload Shippers

It is evident that the Board regards arbitration as a potentially beneficial means of allowing the resolution of rate disputes. Olin does not oppose arbitration per se, but submits that the Board exists as an expert governmental agency chiefly in order to resolve disputes between railroads and shippers in a public, on-the-record manner.

³ “§ 1108.33 Exemption from Final Offer Rate Review. Railroads that opt into the arbitration program under § 1108.23(a) will be exempt from having their rates challenged under Final Offer Rate Review (if in effect). The exemption will terminate upon the effective date of the participating carrier no longer participating in the arbitration program under this part, including, due to withdrawal from the arbitration program, as set forth in § 1108.23(c), or termination by the Board of the arbitration program following an assessment under § 1108.32. Upon termination of the exemption, parties are permitted to challenge a carrier’s rate using Final Offer Rate Review (if in effect).” NPRM at 71.

In her concurring comments in EP 765 NPRM, former Commissioner Begeman agreed with Olin that “the Board has an obligation to establish effective rate relief rules for all shippers, and that obligation is not discretionary.” NPRM at 54. The Board has a staff that possesses substantial expertise in reviewing and analyzing complex railroad costing details. The staff has built up that expertise over many years of evaluating complex rate disputes. Olin does not regard arbitration as necessarily quicker, less expensive, more reliable, or more predictable than administrative litigation before the Board. Railroads will have the ability to delay arbitration proceedings and to increase the cost and complexity of those proceedings. Such delays are a common defense tool and there is no reason to believe that the well-funded Class I railroads would decline to use every tactic at their disposal to make EP 765 arbitration difficult, expensive, and unproductive for small shippers.

2. The Proposed Arbitration Process is Compulsory, Not Voluntary

Olin recognizes that some shippers – either now or in the future – may feel differently and may regard voluntary arbitration under the Board’s EP 765 process as a desirable alternative tool for resolving rate disputes. Here, however, the proposed Section 1108.33 FORR exemption undermines any potential suggestion that the adoption of the arbitration procedure would benefit shippers. That arbitration procedure is not truly voluntary or a true alternative and would not serve its intended purpose.

It is manifestly evident that the select railroads’ intention in proposing a new arbitration procedure for small rate disputes was to shield themselves from the then-looming prospect of FORR rate review. In that sense, the use of the term “voluntary”

with regard to the EP 765 process is largely a misnomer. In actual practice, the railroads have volunteered to make EP 765 arbitration “compulsory” for small rate disputes – since FORR rate review no longer would be an available option and since twenty-five years’ worth of history have demonstrated that SAC, Simplified SAC, and Three Benchmark methodology are not feasible approaches for shippers with small rate case disputes.

If the Board were to adopt its EP 765 proposal, then a shipper could “volunteer” to accept arbitration on the railroads’ own terms or instead could “volunteer” to pay whatever rate a given railroad demands. Stated differently, only one side of potential small rate case disputes would actually volunteer under EP 765 arbitration; namely, the railroads. They have volunteered to excuse themselves from any prospect of FORR rate relief. Accordingly, Olin strongly opposes the adoption of any Arbitration procedures that include the proposed Section 1108.33 exemption from regulation under the FORR process.

3. There is No Need to Incentivize the Railroads to Accept Arbitration

In its NPRM in EP 765, the Board rejected shipper concerns regarding the proposed FORR exemption. In so doing, the Board emphasized what it perceived as the great benefits of arbitration and seemed to indicate (as though the Board were engaged in some sort of negotiation with the railroads) that the Board is seeking to “incentivize” the railroads and is willing to give away the FORR process “in exchange” for the railroads’ willingness to accept their own arbitration proposal:

The Board understands the concern of the shippers who argue that allowing railroads to be exempt from FORR would eliminate shippers’ ability to pursue resolution using

FORR, if the Board were to adopt it. However, as explained above, the Board has long favored the resolution of disputes using alternative dispute resolution whenever possible and the RRTF found that arbitration would be an important means of providing shippers with access to potential rate relief, particularly in small cases. *Creating a program in which carriers can obtain an exemption from any process adopted in the FORR docket in exchange for agreeing to arbitrate smaller rate disputes would incentivize railroads to participate*, and, in turn, create a means for shippers to obtain resolution through arbitration.

NPRM at 14 (emphasis added).

Olin regards this STB analysis as inconsistent with the interests of small shippers, and contrary to the STB's statutory duties. As Olin emphasized in its August 20, 2020 Comments in EP 765, shippers have a statutory right to seek rate relief, and the Board has a responsibility to establish effective rate relief rules. Congress 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. There is a demonstrated need for the Board to evaluate and implement new and revised rate reasonableness standards to ensure shippers have a viable method and meaningful opportunity to challenge rates. It should not support or encourage proposed rules that take away those statutory rights and remedies.

The Board should not evaluate potential regulations as though it were engaged in deal-making. There is no basis for regarding the consent of a regulated industry as being necessary in order to allow for the adoption of a new regulation that Congress has required. As to the substance of the proposed exchange, incentivizing railroad consent to the arbitration process (that the railroads themselves proposed) is not so valuable that the

Board should be willing to abandon its effort to provide a regulatory-based rate relief process for small shippers. In other words, Olin does not share the Board's view that trading away the FORR process is appropriate in order to induce the railroads to engage in arbitration. Such an exchange is not in the interest of shippers and contrary to Congress's statutory directives. *See* EP 755 SNPRM at 3-8 and cases cited therein (emphasizing the need to adopt rate review procedures that will allow shippers in smaller disputes to have access to Board regulation). As Commissioner Primus correctly pointed out in his EP 765 concurrence: "FORR is the perfect complement to arbitration and should not be seen as a competing interest, as both offer different methods to solve small rate case disputes."

There is no requirement that an administrative agency ensure that a new rate review process will be popular with the regulated entities. And if the railroads elect to refrain from participating in their own voluntary arbitration system absent the availability of the Section 1108.33 exemption from FORR, that refusal to participate does not represent any sort of failure on the part of the agency – and in Olin's view – would not hinder carload shippers' interests.

Railroads can avoid being subject to any perceived perils of FORR regulation by quoting rates that are reasonable. Railroads should not be permitted to excuse themselves from Board regulation simply because a select group of railroads would prefer to be "regulated" in a preferred manner of their own choosing.

4. The Section 1108.33 Exemption is Unnecessarily Overbroad for Addressing the Perceived Risk that the Railroads Have Identified

Finally, it is noteworthy that the Section 1108.33 FORR exemption goes far beyond what would be necessary to address the alleged risk that the railroads would face in their arbitration program. In particular, the railroads allege that the limited grounds for appeal from an arbitration decision make it essential to allow the railroads to opt out of their program “if the rules change midstream”:

Indeed, in agreeing to arbitrate under the Program, parties will be agreeing to limit their ability to appeal an adverse decision. *The grounds for an appeal from arbitration before the Board will be substantially circumscribed and even more limited before any reviewing court. For this reason, it is essential that parties have the right to opt out of the Program if the rules change midstream, whether because the Board changes the arbitration rules, because it adopts a new and untested rate methodology (including Final Offer Rate Review) without exempting carriers participating in the Small Case Arbitration Program from it, or because it makes material changes to an existing methodology. Under the proposed rules, all parties (both shippers and railroads) will have an equal right to opt out of incomplete arbitrations in the event of such intervening events. Petitioners’ consent to voluntarily arbitrate for five years is dependent upon the framework governing arbitral decisions remaining materially the same during that period, and Petitioners need an ability to exit the Program in the event the rules change in the interim.*

Joint Petition for Rulemaking to Establish an Alternative Voluntary Arbitration Program for Small Disputes, EP 765, at 26 (Petition filed July 31, 2020) (emphasis added); *see also* NPRM at 13 (citing Petitioners’ concern about a limited ability to appeal).⁴

⁴ “Petitioners state that, by agreeing to arbitrate under the program, they will be limiting their ability to appeal an adverse decision and, as such, it is essential that they

Significantly, however, the Section 1108.33 exemption that the Board has proposed is vastly overbroad for purposes of addressing that perceived risk.⁵ The railroads' professed concern relates to the narrow scope of review of an adverse arbitration decision, and in particular, a decision issued in a proceeding in which the arbitrators had relied upon new rules – such as FORR. Rather than allowing the railroads to exempt themselves from the FORR process *entirely*, however, the appropriate remedy for addressing the railroads' expressed concern is to address the use of FORR rate evaluation *solely in the context of EP 765 arbitration proceedings*.

There is nothing about the proposed new FORR rate-review process under EP 755 that constitutes arbitration or that otherwise would limit the railroads' appellate rights. *See Final Offer Rate Review*, Docket No. EP 755, at 5 (NPRM served Sept. 12, 2019) (“The Board has held that it may not require arbitration of rate disputes under current law,[] and it is not proposing to do so here; instead, *the Board* would make the determination of rate reasonableness as it does under the Board's current options for challenging the reasonableness of rates.”) (emphasis in original).

Respectfully, even if the railroads' appellate concerns had any merit, the Board's proposed remedy goes beyond what is necessary to address those concerns and is arbitrary. Accordingly, if the Board has continuing concerns in this area, the answer is to

have the right to exit the program if they become subject to what they describe as the ‘untested’ FORR process.” *Id.* (citing Joint Petition at 26).

⁵ “Petitioners do not propose specific language for an exemption from FORR in their Petition. As noted, they instead propose this as a withdrawal option. Accordingly, the Board is proposing its own FORR exemption language.” NPRM at 14 n.27.

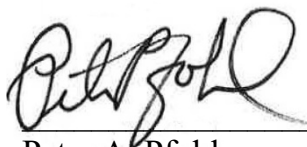
consider restricting the use of FORR ratemaking solely in the context of an EP 765 arbitration, which would address the harms identified by the railroads yet would allow shippers to *litigate* – rather than arbitrate – small rate disputes under FORR.

CONCLUSION

For the foregoing reasons, Olin respectfully requests that the Board adopt its EP 755 proposal and that it decline to adopt its EP 765 proposal. To the extent that the Board elects to adopt the EP 765 proposal, however, Olin requests that the Board eliminate the Section 1108.33 exemption from the FORR process or that the Board modify its proposed Section 1108.33 such that it merely precludes the use of FORR rate review within the context of an EP 765 arbitration proceeding.

Respectfully submitted,

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