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February 14, 2022
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

RECIPROCAL SWITCHING

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Docket No. EP 711 (Sub-No. 1)

COMMENTS OF OLIN CORPORATION

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

Peter A. Pfohl
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

Dated: February 14, 2022

Attorneys for Olin Corporation

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Pursuant to the Board’s Notice of Public Hearing served on December 28, 2021 in Docket No. EP 711 (Sub-No. 1), *Reciprocal Switching*, Olin Corporation (“Olin”) submits these Comments for the Board’s consideration.

SUMMARY

Olin has long participated in the Board’s proceedings over the past decade culminating in the Board’s Notice of Proposed Rulemaking (“NPRM”) in 2016 to revise its current outdated reciprocal switching rules. These revisions would provide welcome relief and Olin continues to support them.

The STB has the clear statutory authority to afford competitive access relief for shippers, including reciprocal switching, as set forth by Congress under governing statutes. However, it has now been well over three decades since any shipper has obtained any reciprocal switching relief and very few have even tried. Olin strongly supports the Board’s NPRM to open up reciprocal switching by addressing restrictive standards that the Board itself has acknowledged unnecessarily protect railroads from intramodal competition. The Board’s proposed modifications to the reciprocal switching

rules, with modest changes as previously suggested by Olin and other shippers, could at least marginally improve the competitive landscape.

However, if rule changes promoting access are to succeed, there needs to be a market where willing and able players are seeking to effectively, and aggressively, compete. Unfortunately, with markets largely protected from competition, and customers largely without effective regulatory remedies, rail service has suffered and railroad rates continue to rise substantially, year after year. Thus, while Olin supports the Board's NPRM, it has concerns about whether access remedies such as reciprocal switching alone can substantially improve the competitive market for rail service where aggressive competition simply does not exist.

As it moves forward, hopefully expeditiously, to finalize the proposed reciprocal switching rules, Olin respectfully suggests that the Board needs to more closely examine the structural aspects of the consolidated market, including carrier routing restrictions, and consider additional protective competitive conditions and oversight to help ensure that the remedial action being considered will work as intended.

IDENTITY AND INTEREST

Headquartered in Clayton, Missouri, Olin is a publicly traded company listed on the New York Stock Exchange with 8,000 employees in nearly 20 countries around the globe, including more than 20 locations in the United States. 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 46,000 railcars 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 in the absence of effective competition is essential for protecting Olin from excessive rates.

Olin has been an active participant in Docket No. EP 711. Olin filed comments in this proceeding on July 22, 2011, March 1, 2013, May 30, 2013, October 24, 2017, and January 13, 2017.

I. COMMENTS

Olin continues to support the adoption of the Board's proposed revision of its existing reciprocal switching rules.

A. Revisions to the Board's Reciprocal Switching Rules Are Needed

As codified at 49 U.S.C. § 11102, Congress explicitly granted the STB the authority to grant a carrier the right to operate over the line of a destination railroad in a terminal area to deliver freight (*i.e.*, terminal trackage rights). *Id.* at § 11102(a). Under the same statutory section, Congress also granted the STB the authority to require the destination railroad to perform delivery service for shipments received in interchange with another carrier for a specified fee (*i.e.*, reciprocal switching). *Id.* at § 11102(c). Unfortunately, the STB's present rules governing the exercise of its competitive access jurisdiction make clear that the Board will not grant requests for access solely to create or

promote competition, or to help enable a shipper to obtain lower rates. Over three decades ago in the landmark *Midtec* decision,¹ the Interstate Commerce Commission (“ICC”) concluded that the public interest favors protecting railroads from intramodal competition, as such competition may hinder railroad efforts to obtain revenue adequacy. Following *Midtec*, and the ICC’s adoption of its restrictive access rules, no shipper has obtained any access relief under the agency’s oppressive standards and very few have even tried.

Recognizing that the “dearth of cases brought . . . despite continued shipper concerns about competitive options and quality of service, suggests that part 1144 and [*Midtec*] have effectively operated as a bar to relief than as a standard under which relief could be granted,” the Board’s 2016 NPRM proposed to revise its reciprocal switching standards. NPRM at 9. The Board found revisiting these standards was also necessary given the many changes within the railroad industry, including industry consolidation, the strong financial health of the industry, the growth of short line railroads that have “strong ties” to a particular Class I railroad, and reduced chances of “naturally occurring reciprocal switching as carriers seek to optimize their own large networks.” *Id.* Olin shares the concerns of the Board and other shippers, that, in practice, the Board’s

¹ *Midtec Paper Corp. v. Chicago & N. W. Transp. Co.*, 1 I.C.C.2d 362 (1985), as superseded, 3 I.C.C.2d 171 (1986), *aff’d sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988).

decisions and policies have precluded shippers from gaining competitive relief under congressionally-authorized competitive access provisions.

Olin also agrees that the substantial changes within the railroad industry in the last 30 years greatly favor the opening up of reciprocal switching, including:

- Substantial railroad industry consolidation;
- The elimination of functional interchanges and closed routings caused by railroads unwillingness to provide rates and service terms to and from efficient interchanges; and
- The robust financial health of the railroad industry.

It is permissible and reasonable for the Board to conclude that reciprocal switching relief should be more readily available.

In particular, carrier pronouncements of economic demise caused by any pro-competitive remedy that might be considered by the Board must be examined with healthy skepticism, especially in light of the significant rationalization of the railroad system and the protected market that exists today for rail transportation. The railroads financial positions remain robust, by any reasonable measure, and they can certainly “afford” to compete like other industries.

Changes to the reciprocal switching rules should be adopted promptly. It has been a decade since the Board initiated this proceeding, and over five years since it issued its NPRM. Notably, last summer President Biden issued Executive Order 14036 on “Promoting Competition in the American Economy.”² Executive Order 14036

² Exec. Order No. 14036, 86 Fed. Reg. 36,987-999 (July 9, 2021).

emphasized that “[r]obust competition is critical to preserving America’s role as the world’s leading economy,” and because industry consolidation has weakened competition generally, federal agencies should engage in actions to “reverse these dangerous trends.” *Id.* at 36,987-88.

In fact, the President pointed directly to this proceeding, stating that “[t]o further competition in the rail industry and to provide accessible remedies for shippers, the Chair of the [STB] is encouraged to work with the rest of the Board to: consider commencing or continuing a rulemaking to strengthen regulations pertaining to reciprocal switching agreements pursuant to 49 U.S.C. 11102(c) if the Chair determines such rulemaking to be in the public interest or necessary to provide competitive rail service.” *Id.* at 36,996. Olin submits that, in addition to furthering the goals of Executive Order 14036, finalization of the NPRM also furthers United States national rail transportation policy “to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail.” 49 U.S.C. § 10101(1).

Recent and ongoing events thus support revisions to the Board’s reciprocal switching rules which are a long-overdue step in the right direction towards promoting competition.

**B. Addressing the Mature Competitive Landscape and Railroads
Unreasonable Control over Routing and Interchange**

The Board should not assume that access or potential access to an alternate carrier – through mandatory switching or otherwise – will automatically result in competition. Olin’s experience, unfortunately, is that it will not, because railroads in a

mature, consolidated marketplace are often not motivated to compete, and carriers use their control over the routing and interchange to block competition.

For example, while outside of the reciprocal switching limits being considered by the Board in its NPRM, for one or more of Olin's manufacturing facilities, there is the potential for Olin to obtain much more direct routings, potentially saving several hundred route miles, by connecting to second carriers at active interchanges that would provide much more efficient service. However, origin carriers often do not want to "short haul" themselves, and use their control over rates and routes to limit competitive routings. Connecting carriers are reluctant to interfere with the prerogative of the origin carrier in deciding through routes and interchange points. This occurs even with toxic-by-inhalation shipments that are supposed to operate over the most direct, safe, and efficient routing. 49 C.F.R. § 172.820; 49 C.F.R. pt. 172, App. D.

In this respect, while the STB's *Bottleneck*³ principles adopted in the 1990s were portrayed as pro-competitive because they allowed a shipper to get a rate over the bottleneck segment (in some circumstances) if it first obtained a contract for the rest of the movement from one of the competing carriers, this requires rail carriers to actually compete and offer alternative rates and routings. As shippers can attest, in the 25 years since the adoption of the *Bottleneck* principles, Class I railroads generally have not offered a non-bottleneck contract when the bottleneck carrier operates in the same

³ *Cent. Power & Light Co. v. S. Pac. Transp. Co.*, 1 S.T.B. 1059 (1996) ("*Bottleneck*"), *clarified*, 2 S.T.B. 235 (1997), *aff'd sub nom, MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999).

geographic region. The “contract first” doctrine did and does not work in practice because industry practice in a consolidated market shows that the carriers will not offer “contracts first,” even if it means lost business opportunities.

Railroads are required, “under their common carrier obligation, to establish rates and routes to move a shipper’s traffic from origin to destination, 49 U.S.C. 11101(a), and to interchange traffic if doing so is required to complete the transportation, 49 U.S.C. 10742.” *Bottleneck*, 1 S.T.B. at 1063. Those two obligations, however, do not give rise to a routing system under which shippers – rather than rail carriers – dictate how railroads will provide service, where interchange will take place, and whether a potentially connecting carrier will actually aggressively compete for service. Absent a showing of need at the STB under the burdensome and virtually unused competitive access standards at 49 U.S.C. § 10705 – including the demonstration that a railroad has exploited its market power – the shipper may not demand: (1) that the carrier interchange its traffic at a different location than that selected by the carriers; (2) that a given carrier short-haul itself; or (3) that the carrier accept any other routing demands from the shipper.

Olin respectfully submits that in examining reciprocal switching, the Board should be mindful to also examine the structural aspects of the market in determining whether more intense or additional protective competitive conditions and oversight are necessary to ensure that the remedial action being considered will work as intended. Again, particularly in light of the highly concentrated state of the railroad industry, it is unrealistic to assume that a mandatory switching rule will automatically

result in increased competition unless adequate oversight or additional protections are in place to allow the new rules to succeed.

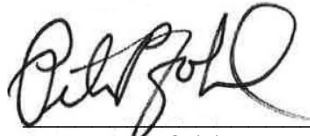
II. CONCLUSION

Olin appreciates the opportunity to provide these further comments, and urges the Board to promptly finalize revised reciprocal switching rules and undertake additional appropriate oversight and review to ensure that the tilted competitive balance of carrier and shipper interests, including over access and routings, is meaningfully addressed.

Respectfully submitted,

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

By:



Peter A. Pfohl
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170
pap@sloverandloftus.com
abk@sloverandloftus.com

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