

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY
COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE &
QUEBEC RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN
RAILROAD CORPORATION; AND DELAWARE & HUDSON RAILWAY
COMPANY, INC.**

—CONTROL—

**KANSAS CITY SOUTHERN; THE KANSAS CITY SOUTHERN RAILWAY
COMPANY; GATEWAY EASTERN RAILWAY COMPANY; AND
THE TEXAS MEXICAN RAILWAY COMPANY**

**RESPONSE TO COMMENTS, PROTESTS, REQUESTS FOR CONDITIONS,
AND OTHER OPPOSITION 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 Street N.W.
Washington, DC 20036
(202) 347-7170

Dated: July 12, 2022

Attorneys for Olin Corporation

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY
COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE &
QUEBEC RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN
RAILROAD CORPORATION; AND DELAWARE & HUDSON RAILWAY
COMPANY, INC.**

—CONTROL—

**KANSAS CITY SOUTHERN; THE KANSAS CITY SOUTHERN RAILWAY
COMPANY; GATEWAY EASTERN RAILWAY COMPANY; AND
THE TEXAS MEXICAN RAILWAY COMPANY**

**RESPONSE TO COMMENTS, PROTESTS, REQUESTS FOR CONDITIONS,
AND OTHER OPPOSITION OF OLIN CORPORATION**

Pursuant to the Board’s Decision No. 18 served on May 27, 2022 in this proceeding, Olin Corporation (“Olin”), a party of record, submits this Response to Comments, Protests, Requests for Conditions, and other Opposition for the Board’s consideration.

For the reasons set forth below, Olin respectfully requests that, unless appropriately conditioned to address important adverse competitive impacts related to railroad-customer liability that would result from the transaction as addressed by multiple parties to this proceeding, including the United States Department of Agriculture (“USDA”); the American Chemistry Council, The Fertilizer Institute, and the National Industrial Transportation League (collectively “Joint Associations”); the Chlorine Institute (“CI”); the National Association of Wheat Growers (“NAWG”); and Occidental

Chemical Corporation and Oxy Vinyls, LP (together, “Oxy”) (all collectively referred to as “USDA, et al.”), the proposed merger transaction would cause substantial adverse competitive impacts to Olin and its customers, and numerous other shippers and receivers of essential commodities. Accordingly, should the Board determine that the transaction as a whole is otherwise in the public interest, Olin urges the Board to condition approval as proposed by USDA et al. to mitigate the adverse competitive effects as further described herein.

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 is dependent on safe, reliable, efficient, and cost-effective railroad service to sustain its business and meet its customers’ requirements. 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. Olin maintains a large tank car fleet for its service that meets and exceeds all governmental equipment safety compliance rules, and it has continued its program of modernizing its fleet, spending millions of dollars in safety initiatives that go above and beyond the governing safety rules. Olin has also received numerous safe handling awards from railroads for its stellar safety performance.

The proposed merger of Canadian Pacific Railway Company (“CP”) and the Kansas City Southern (“KCS”), including the Kansas City Southern de Mexico (collectively “CP/KCS”), has the ability, without appropriate conditions that have been proposed and are addressed in this Response, to have a major impact on the ability of Olin to be able to serve its customers. Therefore, Olin has a substantial interest in this proceeding and its outcome.

I. RESPONSE TO COMMENTS

A. USDA et al. Comments

In its April 22, 2022 Comments, USDA expresses concerns over CP’s tariffs and rules that attempt to have its provision of rail transportation service of toxic inhalation hazards (“TIH”) subject to certain “indemnification and liability” and insurance provisions set forth in CP Tariff 8. (“CP Liability/Indemnity Tariff” or “Tariff”). As USDA explains, CP’s Tariff purports to shift defense and liability responsibilities for train accidents from CP to its customers even where the customer is not responsible or at fault, and impose onerous and expensive insurance responsibilities on CP’s customers. USDA expresses the concern that “[s]hippers should be responsible only for the conditions they can control. Once a car leaves a shipper’s hands, the railroad bears responsibility for safely stewarding it” – yet CP’s tariff shifts substantial carrier indemnity/liability responsibilities to its customers. USDA Comments (filed Apr. 22, 2022) at 2.

Additionally, USDA expresses concern that CP's onerous insurance requirements, requiring customers to obtain \$100,000,000 in liability insurance for each occurrence and name CP as an additional insured for the benefit of CP, have customers "seemingly buying insurance for CP." *Id.* USDA concludes that "[u]pon review, USDA agrees with the chemical shippers that the CP's tariff language places a significantly higher burden on TIH shippers than [] does KCS's tariff language." *Id.*

The Joint Associations' comments express similar concerns:

CP Tariff 8, Items 51-56, contain extensive indemnification and insurance requirements for TIH shipments. The bottom line is that CP accepts liability for its own negligent or willful misconduct and assigns the shipper liability for everything else, which includes third party liability and Acts of God. CP is not even required to seek recovery from a responsible third party before seeking indemnity from shippers. TIH shippers must indemnify CP for those liabilities and procure not less than \$100 million of insurance to cover their indemnity obligations. CP imposes this cost upon TIH shippers above and beyond its exceedingly high transportation rates for TIH shipments. In contrast, KCS has much narrower indemnity requirements and no insurance requirement. *See* KCS 9011-G, Item 26 and KCS 9012, Item 260.

Joint Association Comments at 24.¹ Other shipper associations/shippers express the same concerns. *See* NAWG Amended Comments at 2 ("The TIH-related language in CP's TIH tariff is an anticompetitive, industry outlier that is in stark contrast to the language in KCS' tariff, which addresses indemnification and liability for the shipment of TIH

¹ Olin notes that the KCS 9012 tariff actually does have a reasonable insurance requirement consisting of a \$3 million combined single incident limit for property injury and property damage.

materials in a fairer and more reasonable manner for hazardous materials generally.”); Oxy Comments at 1-2 (“While CP accepts liability for its own negligent or willful misconduct, it assigns the shipper liability for everything else, which includes third party liability and Acts of God. Further, CP is not required to seek recovery from a responsible third party before seeking indemnity from shippers. In addition, TIH shippers must indemnify CP for those third-party liabilities and must procure not less than \$100 million of insurance to cover indemnity obligations – a significant level of insurance not imposed by any other Class I carrier for these types of shipments.”).

B. USDA et al. Requests for Conditions

USDA et al. request that, to address the competitive harm of the transaction resulting from the application of CP’s Liability/Indemnity Tariff, CP should be restricted from imposing its Tariff on the proposed combined system, and instead retain and apply only KCS’s tariff provisions from before the merger, which have narrower indemnity requirements and no insurance requirements. *See* USDA Comments at 2; Joint Association Comments at 25; CI Amended Comments at 4; NAWG Amended Comments at 2; Oxy Comments at 2. In addition, USDA has requested that the Board “investigate CP’s tariff language itself,” and “delineate how much liability railroads can shift to shippers while still allowing railroads to meet their common carrier obligation.” USDA Comments at 2.

C. USDA et al. Requests for Conditions Should be Approved

Olin strongly supports the requests for conditions requested by USDA et al. which are necessary to address the competitive and service related harms that would result in the absence of such conditions.

1. The Board is Authorized to Adopt Conditions to Mitigate the Harms that Would Otherwise Result from the Transaction

The Board has broad authority under 49 U.S.C. § 11324 to “impose conditions governing the transaction.” In evaluating the merits of railroad merger transactions the Board evaluates whether the proposed transaction is in the public interest. 49 U.S.C. § 11324(c). In addition to evaluating the competitive impacts of the transaction, the Board also examines whether the transaction as proposed might enable the carriers to reduce service requiring redress. *See, e.g., Union Pac. Corp. – Control and Merger – Southern Pac. Rail Corp.*, 1 S.T.B. 233, 363 (“[t]o determine the public interest, [the STB] balance[s] the benefits of the merger against any competitive harm that cannot be mitigated by conditions”); *id.* at 430 n. 191 (“merger-related competitive harm results when the merging parties gain sufficient market power profitably to raise rates **and/or reduce service**” (emphasis added)). The Board may then impose conditions under 49 U.S.C. § 11324 to ameliorate the competitive and service concerns.

2. USDA et al. Requests for Conditions are Reasonable and Necessary

As noted, if the Board determines on balance that the proposed merger transaction is in the public interest as a whole, it still has broad authority to implement conditions to reduce the unacceptable loss of competition and/or deterioration or loss in

service that may otherwise occur as a result of the transaction. Olin respectfully submits that the requested conditions of USDA et al. should be imposed in this proceeding to accomplish the intended result of preserving adequate rail service, and protecting customers from competitive harm that would otherwise be brought about by the transaction.

Olin agrees with the comments of USDA et al. that the transaction, without these reasonable conditions, would cause competitive harm. Olin does not originate any of its chlorine traffic on either CP or KCS as neither carrier serves its chlorine manufacturing facilities. However, KCS does provide essential connecting and destination line-haul service to reach Olin's chlorine customers via independent "Rule 11" rates, totaling approximately 900-1,000 railcars per year. All of this traffic, as is the case for all tank car shipments on all railroads in North America, is provided in shipper-provided tank cars. This chlorine shipped on the KCS is used to meet our customers' industrial product requirements, used by major chemical companies for the manufacture of various specialty products and for paper manufacturing, water purification, beef and poultry processing, pharmaceuticals, and other essential product applications. Olin's ability to provide service to these customers via KCS has been made possible by KCS's agreement to moderate its terms of service for the shipment of TIH products in a manner that does not unreasonably shift defense and liability responsibilities for any train accidents and threatened tank car discharges from KCS to Olin, or impose onerous insurance requirements on the service.

Like KCS, CP serves as a connecting or destination carrier to a number of potential chlorine customers of Olin, but unlike KCS, CP does not actually transport any chlorine products for Olin today. In its comments, Bayer Cropsience LP (“Bayer”) explains that it would like to purchase chlorine from Olin, however, it is unable to obtain rail delivered chlorine to its Muscatine, Iowa facility served by CP from Olin because Olin is “unwilling to ship chlorine to Bayer’s Muscatine, IA facility because of CP’s Hazmat Tariff language.” Bayer Comments at 2. Bayer correctly notes that, to date, Olin has been unwilling to ship chlorine to Bayer’s Muscatine facility, or to any other shippers located on CP’s rail system, because of CP’s continuing insistence on the traffic being governed by and subject to what Olin believes are unfair, unreasonable, and unlawful liability/indemnity provisions of the CP Liability/Indemnity Tariff.²

CP has repeatedly asserted that it would not participate in the shipment by rail of TIH commodities such as chlorine if it were not required to do so under its common carrier obligation. *See, e.g.* FD 35504, Canadian Pacific Ry. Co. Comments in Support of Petition (filed Jan. 25, 2012) at 3 (“CP would not participate in the movement of TIH if given the choice”).

While CP reaches and serves many potential customers of Olin such as Bayer, it knows that shippers like Olin will not accept CP’s onerous and unfair liability and indemnity terms that seek to immunize itself from liability or otherwise shift

² Olin is aware of the CP/Bayer Settlement Agreement (filed May 25, 2022), however, as discussed *infra*, these terms are inadequate to address the competitive harms of the proposed transaction.

responsibility for CP train accidents from CP to its customers, adversely impacting carrier safety and safety incentives. Thus, through imposition of its Tariff, CP effectively blocks this competitive service. This furthers CP's overall goals and interests in demarketing and limiting TIH traffic on its system. The result is a reduction in rail traffic volumes and competition for critical and essential commodities like chlorine, and increased costs to chlorine customers. Accordingly, through the imposition of its Liability/Indemnity Tariff, for shippers such as Olin, CP has been able to conveniently sidestep its common carrier obligation to transport chlorine and thereby achieve its goals of limiting TIH traffic on its system.

As discussed above, Olin currently ships between 900-1,000 tank cars a year on the KCS. For Olin, if the proposed merger transaction is approved and the CP Liability/Indemnity Tariff is allowed to be implemented across the KCS system, as CP apparently plans to do, Olin will need to seriously consider restricting the sale of its product to these existing customers and to any potential new customers. It will do so for the same reasons it has decided to restrict the sale of chlorine to any potential customer on CP's system: i.e., its refusal to accept CP's onerous and unfair Tariff terms. If the transaction is approved without adequate conditions, many other chlorine and other TIH commodity producers/shippers serving customers on the combined system may similarly respond. As a result, the unconditioned approval of the transaction appears likely to result in a reduction in traffic volumes and competition for chlorine and other essential TIH commodities, exactly as CP has intended. These are commodities that are essential to the general public which relies on the products derived from Olin's chlor alkali

business and many other essential TIH commodities produced by other shippers. Those commodities and products are critical to public health, safety, and well-being, and to our national economy.

3. CP's Partial Settlement Is Insufficient to Address the Competitive Harms of the Transaction

Olin is aware that CP has entered into a Settlement Agreement with Bayer that partially restricts the application of portions of CP's Liability/Indemnity Tariff to Bayer's Kansas City facilities for a period of three (3) years. *See* CP-Bayer Joint Notice of Settlement Agreement (filed May 25, 2022). However, that Settlement Agreement is wholly insufficient to address the competitive harms that would result from the proposed merger transaction. First, it only applies to Bayer's one location in Kansas City. Second, it is unduly restricted in duration (only three years) and in scope (i.e., does not address insurance requirements). Third, it is extremely vague (i.e., it states only that CP agrees not to make its Tariff "more onerous" than KCS's Tariff). As such, even if the Board were to consider imposing as a condition on the approval of the transaction the CP-Bayer Settlement Agreement across the Board to all shippers and receivers on or using the KCS system, it would still be insufficient to ameliorate the competitive harms.

* * *

In summary, CP has used its Liability/Indemnity Tariff to successfully demarket TIH traffic, end run its common carrier service obligations, and reduce its service in a manner that has reduced traffic and directly harmed competition. CP should

not be allowed to cause further competitive harm through application of its Tariff across the KCS system should this transaction be approved.

The specific conditions USDA et al. are seeking in this proceeding to restrict application of the CP tariff are narrowly tailored to address the potential competitive and service harms, while not impacting in any meaningful way the transaction or any of the potential benefits of the transaction that might be brought about. They fully satisfy the Board's enunciated standard for such remedial measures, and are consistent with prior merger conditions granted by the agency to ameliorate competitive harms. They are feasible and do not interfere with the Applicants' management and operation of their railroads, and they produce net public benefits by mitigating the merger's negative effects on Olin and other TIH shippers' ability to engage in their businesses and serve the public. In the absence of conditions such as these, for the reasons set forth herein, rather than furthering the public interest, the proposed acquisition may accomplish just the opposite.

II. CONCLUSION

For the reasons set forth in this Response, Olin commends for the Board's consideration the conditions described above.

Respectfully submitted,

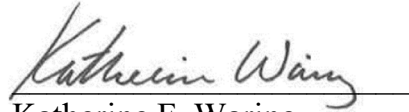
Mark McCullough
Vice President, Integrated Supply Chain
Olin Corporation
16290 Katy Freeway, Suite 600
Houston, Texas 77094

Peter A. Pfohl /s/
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street N.W.
Washington, DC 20036
(202) 347-7170
Attorneys for Olin Corporation

Dated: July 12, 2022

CERTIFICATE OF SERVICE

I hereby certify that this 12th day of July, 2022, I caused a copy of the foregoing document to be served by U.S. First Class Mail or by more expeditious means on all parties of record.

A handwritten signature in cursive script, reading "Katherine Waring", written over a horizontal line.

Katherine F. Waring

An Attorney for Olin Corporation