

**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**

BRIEF OF OLIN CORPORATION

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Dated: October 21, 2022

Attorneys for Olin Corporation

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BRIEF OF OLIN CORPORATION

Pursuant to the Board’s Decision No. 22 served on July 22, 2022 and Decision No. 31 served on October 7, 2022 in this proceeding, Olin Corporation (“Olin”), a party of record, submits this Brief in response to the proposed acquisition and control of Kansas City Southern and its rail affiliates (“KCS”) by Canadian Pacific Railway Limited and its rail affiliates (“CP”) (the “Transaction”). As Olin demonstrated in its July 12, 2022 Reply Comments, the proposed Transaction is inconsistent with the public interest and would cause substantial adverse competitive and reduced service impacts to Olin and its customers, and numerous other shippers of essential commodities absent the imposition of conditions to ameliorate its harmful effects.

SUMMARY

The evidence submitted by Olin in this proceeding establishes that, absent appropriate conditions, the proposed Transaction will significantly harm Olin, its chlorine traffic customers, and the public generally by reducing rail traffic volumes and competition for critical and essential commodities like chlorine, and increasing costs to chlorine customers.

Post-transaction, significant volumes of chlorine Olin ships annually on KCS will be affected by the transaction through the implementation of CP's tariffs and rules that attempt to have its provision of rail transportation service of toxic inhalation hazards ("TIH"), including chlorine, subject to certain "indemnification and liability" and insurance provisions set forth in CP Tariff 8 ("CP Liability/Indemnity Tariff" or "Tariff"). CP's Tariff purports to shift defense and liability responsibilities for train accidents from CP to its TIH customers even where the customer is not responsible or at fault, and impose onerous and expensive insurance responsibilities on CP's customers.

The narrow conditions supported by Olin were proposed 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; the Chlorine Institute; the National Association of Wheat Growers; and Occidental Chemical Corporation and Oxy Vinyls, LP (all collectively referred to as "USDA et al.") who agree with the concerns expressed by Olin concerning the competitive harm of the proposed Transaction resulting from the application of CP's Liability/Indemnity Tariff. These parties have requested that, as a condition on merger

approval, CP be restricted from imposing its Tariff on the proposed combined system, and instead retain and apply only the KCS's tariff provisions from before the merger, which have narrower indemnity requirements and insurance requirements. Such conditions will reasonably mitigate the adverse competitive effects to Olin and its customers, and numerous other shippers and receivers of these 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 requested by USDA et al.

I. ARGUMENT

A. The Applicable Legal Standard

The essential consideration in evaluating the proposed Transaction is whether the proposed transaction is in the public interest.¹ An examination of the public interest considerations involves assessing the competitive impacts of the transaction.² While the STB often examines the direct loss of competitive service options in its merger analysis, because that has been the type of competitive harm directly involved in most transactions, the STB also has recognized that unconditioned mergers can cause other

¹ “The Board shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest.” 49 U.S.C. § 11324(c).

² See, e.g., *Union Pac. Corp. – Control & Merger – S. Pac. Rail Corp.*, 1 S.T.B. 233, 363 (1996) (“*UP/SP*”) (“[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”); *CSX Corp. – Control & Operating Leases/Agreements – Conrail Inc.*, 3 S.T.B. 196, 245 (1998).

significant types of market and service harm requiring redress. *See UP/SP*, 1 S.T.B. 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 (or both) and to do so profitably”); *accord Burlington N. Inc. & Burlington N. R.R. – Control & Merger – Santa Fe Pac. Corp., et al.*, 10 I.C.C.2d 661, 728 (1995).

Even if the Board determines that the overall effect of a proposed merger is in the public interest, the Board still has broad authority to condition the merger in order to maximize its public interest benefits and ameliorate any harmful effects. Under 49 U.S.C. § 11324(c), “[t]he Board may impose conditions governing the transaction,” and the Board has clarified that this provision “gives us broad authority to impose conditions governing railroad consolidations.” *Canadian Nat’l, et al. – Control – Ill. Cent. Corp., et al.*, 4 S.T.B. 122, 141 (1999) (“*CN/IC*”). Such conditions may be imposed if there is a reasonable “nexus between the merger and the alleged harm for which the proposed condition would act as a remedy.” *UP/SP*, 1 S.T.B. at 461.

Application of these standards and guidance to the proposed Transaction requires that the Board give serious consideration to conditions that would protect Olin and other similarly situated shippers from the adverse impacts that it will otherwise experience as consequence of the Applicants’ plans, including a loss and reduction of service. The Board, of course, may deny approval of a merger in its entirety if it believes that the anticompetitive effects of the merger are significant enough, and are not susceptible to remediation through the imposition of conditions. *Santa Fe S. Pac. Corp. – Control – SPT Co.*, 2 I.C.C.2d 709 (1986).

B. Appropriate Conditions are Necessary to Protect Olin and the Public from a Loss of Competition and Reduced Service

1. The Transaction Will Competitively Harm Olin

In its Reply Comments, Olin has demonstrated it will be competitively harmed as a result of the Transaction. As explained, while KCS and CP both independently serve as a connecting or destination carrier to a number of existing or potential chlorine customers of Olin on their separate systems, only KCS provides service to reach Olin's chlorine customers on or across KCS's lines, totaling approximately 900-1,000 railcars per year. Olin Reply Comments at 7. Conversely, CP purposely blocks Olin from engaging in connecting or destination service to potential customers on or across CP's lines through the implementation of its onerous Liability/Indemnity Tariff that seeks to immunize CP from liability or otherwise shift responsibility for CP train accidents from CP to its customers. *Id.* at 8. CP knows that shippers like Olin will not accept CP's onerous and unfair liability and indemnity terms. *Id.* at 8-9. Accordingly, CP successfully uses its Tariff as means to demarket and limit TIH traffic on its system, and to avoid its common carrier service obligations. *Id.*

If CP is allowed to implement its Liability/Indemnity Tariff across the KCS system, Olin and other TIH shippers serving customers on the CP/KCS combined system will be likely to seriously consider restricting the sale of their commodities to both existing and potential new customers, just as they have already done so on CP's system as a result of the implementation of the CP Tariff. *Id.* at 9-10. This would result in a reduction in traffic volumes and competition for chlorine and other essential TIH

commodities, fulfilling CP's goals to restrict TIH volumes on its system, wherever possible. *Id.*

2. USDA et al. Requests for Conditions Reasonably Mitigate the Harms that Would Otherwise Result from the Transaction

As Olin addressed in its Reply Comments, Olin strongly supports the requests for conditions of USDA et al. which are necessary to address the competitive and service related harms that would result in the absence of such conditions. *Id.* at 6-10. As addressed *supra*, in evaluating the proposed Transaction, the Board must examine whether the transaction as proposed might enable the carriers to reduce service requiring redress. *See, e.g., UP/SP*, 1 S.T.B. 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.

In their Response to Comments, Applicants do not dispute that CP will seek to carry over its Liability/Indemnity Tariff to the combined CP/KCS system as part of their merger plans. Applicants assert that it is not “unreasonable to require that shippers indemnify CP for the potential liabilities arising from their shipments,” that “[t]here should be no reasonable objection to shippers internalizing the full measure of the potential costs associated with [the] decision[.]” to ship TIH commodities, and that “[s]hippers remain free to challenge the reasonableness of these provisions” or to otherwise attempt to negotiate the Tariff terms. Reply Verified Statement of John Brooks (“Brooks R.V.S.”) at 27-28; *see also* Expert Reply Statement of W. Robert Majure

(“Majure R.V.S.”) at 120-121 (“I believe that it is plausible that CPKC will attempt to follow a consolidated policy”). Notably, Applicants also do not dispute Olin’s competition and service reduction evidence, and that, if the proposed merger transaction is approved and the CP Liability/Indemnity Tariff is allowed to be implemented across the KCS system, the TIH traffic that Olin ships on the KCS will be reduced or put at significant risk.

As explained, the service reduction would occur for the same reasons Olin 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. Olin Reply Comments at 9-10. 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. *Id.* As a result, the unconditioned approval of the transaction appears likely to result in a reduction in service and competition for chlorine and other essential TIH commodities, exactly as CP has intended. *Id.*

A key factor in assessing merger transactions is whether the transaction “will affect the ability of these carriers to meet their common carrier obligations and provide essential services,” and, in particular whether the transaction “will be better able to offer improved services to their existing shippers.” *Dakota, Minn. & E. R.R. & Cedar Am. R. Holdings, Inc. – Control – Iowa, Chicago & E. R.R.*, STB FD No. 34178, Decision No. 7 (STB served Feb. 3, 2003) at 15; *CN/IC*, 4 S.T.B. at 140 (“[i]n assessing the probable impacts and determining whether to impose conditions, our concern is the preservation of competition and essential services”). This longstanding, imperative

review criteria is also codified in the Board's "new" merger rules that "[t]he Board will look with disfavor on consolidations under which the controlling entity does not assume full responsibility for carrying out the controlled carrier's common carrier obligation to provide adequate service upon reasonable demand." 49 C.F.R. § 1180.1(a).

As Olin has demonstrated, 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 as planned should this Transaction be approved.

The specific conditions Olin and 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 unduly interfere with the Applicants' management and operation of their railroads in accordance with governing safety laws, 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. Accordingly, the requested conditions of USDA et al. should be adopted 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.

3. The Applicants' Objections to USDA et al. Requests for Conditions Are Without Merit

Applicants offer several objections to the USDA et al. requests for conditions. None of them have merit.

First, Applicants assert that shipper concerns about the implementation of CP's Tariff across the KCS system "are not competitive issues or transaction-related." Applicants' Response to Comments ("Applicants' Resp.") at 291. Specifically, Applicants contend that no competitive harm will befall TIH shippers by the Transaction because "the locations that receive TIH/PIH traffic on KCS are at locations that are singly-served by KCS," and since CP and KCS do not compete for such service, "the terms of our tariffs . . . are not a means to differentiate our services and attract this business." Reply Verified Statement of Michael J. Naatz (Naatz R.V.S.") at 58.³

However, Olin and other shippers are not asserting that CP and KCS directly compete for their TIH service. Applicants manufacture a strawman on a potential loss of horizontal, head-to-head competition that they then attempt to knock-down, but those arguments are off-base and completely miss the point.

Olin and other TIH shippers are not arguing that CP and KCS directly compete for their business by moderating and altering tariff provisions to gain market advantage. Instead, as Olin has explained, the implementation of CP's Liability/

³ Applicant's economic expert asserts that the move to apply the CP Tariff across the KCS system "is not any loss of competition," but rather, a "business decision[] regarding the potential liabilities" and "not an indication of any potential competitive effect of the CPKCS transaction." Majure R.V.S. at 120-21.

Indemnity Tariff across KCS's system will create direct competitive harm. That is because CP 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 responsibility for CP train accidents from CP to its customers. Substantial competitive harm is caused through the reduction in traffic volumes and service for chlorine and other TIH commodities on the combined CP/KCS system post-Transaction. *See, e.g.,* UP/SP, 1 S.T.B. 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))).

Application of the Tariff to the combined CP/KCY system also allows CP to conveniently sidestep its common carrier obligation to transport chlorine and thereby achieve its goals of limiting TIH traffic on its system. *See, e.g.,* Canadian Pacific Ry. Co. Comments, *Union Pac. R.R. – Petition for Declaratory Order*, FD 35504 (filed Jan. 25, 2012) at 3 (“CP would not participate in the movement of TIH if given the choice”); 49 C.F.R. § 1180.1(a) (“[t]he Board will look with disfavor on consolidations under which the controlling entity does not assume full responsibility for carrying out the controlled carrier’s common carrier obligation to provide adequate service upon reasonable demand”). Notably, this evidence of direct competitive harm presented by Olin is unaddressed and undisputed on the record.

Contrary to Applicants’ assertions, the proposed Transaction has substantial adverse competitive impacts on shippers that must be addressed.

Second, Applicants suggest that USDA and TIH shippers are unfairly attempting to “roll-back” or block application of the CP Tariff to the KCS system. Applicants’ Resp. at 293. Applicants assert that its Tariff was reasonably implemented to address “CP’s very bad experience with a derailment in 2002 near Minot, ND,” and that its provisions are merely designed to ensure that shippers fairly “share” in liability responsibility. Brooks R.V.S. at 25, 27.

However, CP misrepresents the train accident leading to its Tariff. The Minot accident involved a breach of TIH tank cars and release of the commodity – resulting in the unfortunate death and injury of numerous people and substantial property damages. A number of lawsuits, including negligence actions, were brought, including against the involved railroad, commodity producer, shipper, and tankcar owner. The National Transportation Safety Board (“NTSB”) conducted an investigation and issued a Railroad Accident Report, concluding that the probable cause of the accident was a break in the rail at a joint caused by an ineffective CP inspection and maintenance program. *Derailment of Canadian Pacific Railway Freight Train 292-16 and Subsequent Release of Anhydrous Ammonia Near Minot, North Dakota*, January 18, 2002 at 69 (the “probable cause of the derailment . . . was an ineffective Canadian Pacific Railway inspection and maintenance program that did not identify and replace cracked joint bars before they completely fractured and led to the breaking of the rail at the joint”). Still, CP moved to dismiss claims and denied all liability or fault.

CP’s response to the Minot accident and the NTSB’s finding of probable cause by CP was to implement its Tariff seeking shippers to be responsible for fully

indemnifying and defending CP in any such litigation, even in the face of governmental findings of railroad fault, except where that shipper could establish CP's negligence or willful misconduct, which CP would presumably deny as it did in the Minot case. Under CP's Tariff, Shippers are thus subject to possible endless, disruptive, and expensive litigation for actions even where they had no responsibility or fault. CP faces no unfair liability under state or federal laws. If shippers are actually at fault, they are and will be subject to claims, lawsuits, and liability in accordance with longstanding applicable liability law.

CP proclaims that, where a TIH shipper chooses to use CP's service, in the event of a catastrophic release on the system, "[t]here should be no reasonable objection to shippers internalizing the full measure of the potential costs associated with [the] decision." Brooks R.V.S. at 27. Such a remarkably broad and unqualified assertion by CP's senior management of CP's intent with its one-sided Tariff only serves to verify and validate the significant concerns of USDA and TIH shippers.

Applicants are also simply wrong when they assert that USDA and TIH shippers are unfairly attempting to "freeze" unfair liability tariff terms. In fact, even Applicants admit that "KCS does not hold shippers harmless for liability that may arise from their shipments" Applicants' Resp. at 297 n.585. It is not TIH shippers, but rather CP that is attempting to "freeze" in place its Liability/Indemnity Tariff.

Additionally, it is not USDA or TIH shippers that are attempting to "roll back" any established terms but rather CP that is seeking to overturn governing law across KCS's system to its liking through its unilaterally imposed Tariff. By intent and

design, CP's Tariff seeks to alter and revise various controlling federal and state statutory law and common law, including statutory fault statutes, by immunizing itself from liability or otherwise shifting responsibility for train accidents from the carrier to its customers, even where the shipper is not at fault, and even where the commodity is in the carrier's exclusive custody, care, and control. Shippers do not seek to change or override the existing system of governing state and federal laws, CP does. There certainly is no need for CP to attempt to override or alter existing law in the states it operates and across KCS's system post-Transaction through application of its unilaterally established Tariff.

Respectfully, it is not CP's proper place to attempt to unilaterally alter, revise, or circumvent otherwise applicable state and federal law, including longstanding safety and safety incentives that have been carefully considered by policymakers and that are embedded in the prevention-oriented statutory and common law regimes governing liabilities for injuries. The Board has long held that "tariff provisions which purport to state the law, fix limitations of the carriers' liability, or define the legal obligations of the parties are . . . generally objectionable." *See, e.g., Perishable Freight Investigation*, 56 I.C.C. 449, 483 (1920); *Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, FD 35557, at 29-30 (STB served Dec.13, 2013) ("overbroad and ambiguous" tariff language pertaining to shipper liability is unreasonable). Also, as addressed *supra*, the common carrier obligation is impinged upon through CP's attempted imposition of its onerous liability and indemnity rules across the KCS system post-Transaction that would not further safe transportation service of TIH commodities, and in fact may further the opposite behavior.

Third, Applicants assert that their partial settlement 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, is sufficient to address the competitive harms of the Transaction. Brooks R.V.S. at 28. However, for the reasons Olin stated in its Reply Comments, that settlement agreement is wholly insufficient to address the competitive harms that would result from the proposed merger transaction. Olin Reply Comments at 10. First, it only applies to Bayer's one location in Kansas City. *Id.* Second, it is unduly restricted in duration (only three years) and in scope (i.e., does not address insurance requirements). *Id.* Third, it is extremely vague (i.e., it states only that CP agrees not to make its Tariff "more onerous" than KCS's Tariff). *Id.*

Moreover, even if the STB were to consider expanding as a condition the CP-Bayer Settlement Agreement across-the-board generally to all shippers and receivers on or using the KCS system, it would still be insufficient to reasonably ameliorate the Transaction's competitive harm. Applicants proposed three-year hold condition only delays Tariff implementation, and as such, does not adequately address the Transaction's impacts. Applicants blithely contend that this condition provides customers with reasonable advance notice to be able to "adjust their shipping patterns." Applicants Resp. at 293. However, this is of no comfort because, as discussed *supra*, KCS has confirmed that all locations on KCS's lines that receive TIH traffic are solely served by KCS (Naatz R.V.S. at 58) and these customers have no other intra- or intermodal competitive alternatives for moving commodities like chlorine. Accordingly, contrary to Applicants' assertions, these KCS customers will not be able to "adjust their shipping patterns"

during any Tariff phase in period as Applicants contend; instead, they face the complete termination of continuing rail service as a result of the Transaction for the reasons addressed herein.

Finally, Applicants contend that they are “prepared to reach agreement to address legitimate concerns” about the imposition of the CP Tariff on the KCS system (Brooks R.V.S. at 28-29) and that shippers are still able to “challenge the reasonableness of those terms before the Board or to negotiate these provisions with CPKC.” Applicants Resp. at 296. However, despite multiple efforts by Olin to engage in good faith negotiations, CP has been unwilling to meaningfully discuss reasonable alternatives to its strict CP Liability/Indemnity Tariff terms to date.

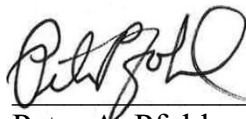
Also, as CP knows, very few shippers, including Olin, have been willing to seek to challenge CP’s terms through the arduous and expensive STB complaint procedures. CP knows this, and also knows that shippers like Olin likely will not accept CP’s onerous and unfair liability and indemnity terms, and instead, will likely simply choose to stop shipping any TIH commodities on the former KCS system following the implementation of its Liability/Indemnity Tariff. The unfortunate result is a reduction in rail traffic volumes and service, and an increase in costs to the public for critical and essential commodities, which is harmful to the public interest.

II. CONCLUSION

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 through the reduction in traffic volumes and service for chlorine and other TIH commodities that are critical to public health, safety, and well-being, and to our national economy. For the reasons set forth in this Brief, and Olin's Reply Comments, Olin commends for the Board's consideration the conditions described above.

Respectfully submitted,



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Dated: October 21, 2022

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Certificate of Service

I certify that I have this 21st day of October, 2022, served copies of the foregoing document on all parties of record in this proceeding, and on the parties listed below by first-class mail, postage pre-paid, or by email:

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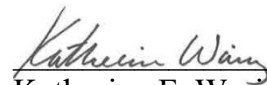
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