

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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RECIPROCAL SWITCHING	)	EP 711 (Sub-No. 1)
	)	
RECIPROCAL SWITCHING FOR	)	EP 711 (Sub-No. 2)
INADEQUATE SERVICE	)	
	)	

**COMMENTS OF
OLIN CORPORATION**

Olin Corporation (“Olin”) submits these comments in response to the Surface Transportation Board’s (“STB” or “Board”) Notice of Proposed Rulemaking (“NPRM”) served in the above-reference proceedings.

SUMMARY

Olin has long participated in the Board’s proceedings over the past decade, first leading to the Board’s Notice of Proposed Rulemaking in 2016 to revise its reciprocal switching rules (“*2016 NPRM*”) and now, with its more limited alternative proposal to authorize as an independent basis the prescription of reciprocal switching agreements in terminal areas upon a showing of inadequate service.

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it has now been almost four decades since any shipper has obtained any reciprocal switching access relief due to outdated and unfair rules requiring shippers to demonstrate the incumbent carrier has engaged in anticompetitive conduct before such relief will be granted. While the governing statutes create no such roadblocks to relief, the Board’s

outdated rules and policies have blocked these congressionally-authorized, pro-competitive remedies from being used.

While Olin is disappointed that the Board's proposed rules are more limited than previously proposed in the *2016 NPRM*, Olin supports the NPRM, with modest revisions discussed below, as having the potential to marginally improve the competitive landscape. At the same time, Olin urges the Board to immediately take the additional simple step of eliminating the extra-statutory anticompetitive conduct test altogether in any case brought under the competitive access rules of 49 U.S.C. § 11102 – a test that the Board itself has acknowledged unnecessarily protects railroads from intramodal competition.

Of course, in order for such access remedies to work, 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. While Olin supports the Board's NPRM, it has concerns about whether access remedies such as reciprocal switching alone, even if expanded beyond the limited improvements the Board has proposed, can substantially improve the dismal competitive market for rail service where aggressive competition simply does not exist. Along with finalizing its proposed reciprocal switching rules, Olin suggests that the Board more closely examine the structural aspects of the consolidated market, including carrier routing restrictions, and consider more intense or additional protective competitive conditions and oversight.

IDENTITY AND INTEREST

Headquartered in Clayton, Missouri, Olin is a publicly traded company listed on the New York Stock Exchange with 8,000 employees at 70 locations worldwide. Among other businesses, Olin is a leading producer of bulk chlorine, caustic soda, bleach, and other chemicals in North America. It currently ships around 40,000 rail cars of chlor alkali annually from its various North American manufacturing locations, each of which is captive to a single railroad.

Rail transportation is one of the single largest costs of our production and distribution process, and the availability of reasonable regulatory protections in the absence of market competition, including the competitive access provisions of 49 U.S.C. § 11102, is essential for protecting Olin from unreasonable rate and service practices. Thus, Olin has a direct and substantial interest in these proceedings and has been an active participant in Docket No. EP 711, having filed comments on July 22, 2011; March 1, 2013; May 30, 2013; October 24, 2017; January 13, 2017; and February 14, 2022.

COMMENTS

Olin supports the prompt adoption of the NPRM, with modest revisions, as a long-overdue, first step to fulfilling the congressionally-authorized competitive access purposes of 49 U.S.C. § 11102.

A. The Addition of Trackage Rights is Necessary to Fulfill the Objectives of the Proposed Rules

The Board's proposed rule authorizes access relief on a demonstrated showing of inadequate service by the incumbent rail carrier. Yet the Board proposes reciprocal switching, entailing continuing switching service by the same incumbent carrier, as the sole

remedy to address the incumbent carrier's service failures. The Board has requested comment on whether terminal trackage rights should also be incorporated into the final rules.

Olin strongly supports the inclusion of the option of obtaining direct service from an alternative carrier through trackage rights. The Board states that it has decided to focus its rules "on addressing inadequate service." However, if the incumbent carrier has already been shown to have failed to adequately serve a location over time, there is little reason to believe that the same carrier's service will suddenly improve upon the prescription of a reciprocal switching, nor would the carrier have any incentive to improve its service and efficiently exchange its former traffic with its direct competitor. Olin respectfully requests that the final rules include the option of the prescription of terminal trackage rights, as an additional, more appropriate remedy to address the service problems the proposed rule is intended to address.

B. The Proposed "Terminal Area" Definition is Unduly Restrictive

The Board proposes to limit the prescription of reciprocal switching to a defined "terminal area" that limits the remedy to locations in "recognized terminal facilities" and that are "integrated into the incumbent rail carrier's terminal-area operation." Olin believes that the Board's "terminal area" definition should be removed. Nowhere in the statute is a "terminal area" or "terminal facility" so defined. Instead, such matters are determined on a case-by-case-basis. Terminal facilities include property that is used to "transfer, collect, or deliver" freight (*CSX Corp. – Control – Chessie System, Inc.*, 363 I.C.C. 521, 585 (1980)), and, when determining whether a particular facility fits within the statutory definition of terminal facility, the Board is directed to construe the definition "liberally" since 49 U.S.C. § 11102 is a "remedial" provision. *Id.*

Additionally, Congress did not limit the Board's authority to order reciprocal switching only to terminal areas, and case law generally has defined reciprocal switching as switching that took place within a "defined [geographic] area." *See, e.g., Absorption of Switching to or from High Point, N.C.*, 319 I.C.C. 522, 525 (1963) ("[r]eciprocal switching . . . effect[s] switching deliveries within a switching district or other defined area"); *Switching & Minimum Carload Charges, Houston, TX*, 351 I.C.C. 146, 173 (1975) (same). The Board's 2016 NPRM proposal, which sought to grant reciprocal switching within a reasonable distance from carrier interchanges, was clearly permissible because it defined the geographic area where switching can occur as an area encompassing a carrier interchange plus a reasonable distance from that interchange. Olin strongly urges the Board to return to that standard to allow the availability of access relief where a facility is a "reasonable distance" from a carrier interchange, to be determined on a case-by-case basis.

C. Necessary Corrections to the Proposed Performance Standards

The Board has proposed three "objective" service performance standards to be used to to invoke the prescription of an access remedy. Olin has concerns that the first proposed service performance criterion, a carrier's failure to meet the estimated time of arrival ("OETA") over a 12-week period, fails to consider that railcars arriving early create similar planning and operational problems for a customer as railcars arriving late, including congestion, demurrage charges, and Risk Management Plan issues. The Board should therefore consider any shipment that arrives outside of a 24-hour window on either side of the OETA as a service failure.

The second proposed service performance standard, transit time, uses a high percentage drop of 20% or 25% for a showing of service deterioration over a 12-week

period. That is too high a hurdle for establishing poor performance, especially given that the railroads have been experiencing some of their worst service performances recently, and therefore the “base” transit times for evaluation purposes have already been skewed downward, substantially. Olin respectfully submits that the percentage drop in transit times should be closer to 10% - 15% in the final rules.

Perhaps more importantly, for all three service performance criteria, including for industry spot and pull (the third proposed service performance standard), the Board’s rules fail to take into consideration that the carrier itself remains in control of establishing the OETA, transit times, and “planned service windows” for each location, and can easily manipulate its performance standard, and ratchet downward or expand estimated OETAs, transit times, and service windows to be able avoid a competitive access prescription. The Board itself appears to recognize that these criteria may “create adverse regulatory incentives.” NPRM at 22. It appears clear that, if left unaddressed, these criteria could lead to a spiraling down of carrier service performance over time.

In addition to addressing these carrier control issues in its final rules, Olin suggests that the Board also provide a catch-all criterion enabling shippers/receivers to provide any additional evidence to show that a shipper’s performance has reasonably deteriorated over a 12-week period and/or that over the period the carrier has not reasonably met its reasonable service requirements.

D. The Anti-Competitive Conduct Test Should be Eliminated in All Competitive Access Cases

As part of its proposal, the Board asks for comments on “whether it should further broaden the application of the public interest prong of § 11102” in light of its

proposed approach in the NPRM. Olin strongly believes that such further action is warranted, and namely, the removal of the “anticompetitive conduct” test should be removed from all competitive access cases brought under § 11102. Such a change is needed given the substantial changes within the railroad industry in the last four decades, 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 growth of shortline railroads that have strong ties to a particular Class I railroad; and
- The robust financial health of the railroad industry.

These changes greatly favor the restoration of competitive access relief without outdated, artificial limitations. In addition, such action is in furtherance of Executive Order 14036, “Promoting Competition in the American Economy.” Executive Order 14036 emphasized that “[r]obust competition is critical to preserving America’s role as the world’s leading economy,” industry consolidation has weakened competition generally, and federal agencies should engage in actions to “reverse these dangerous trends.” Executive Order No. 14036, 86 Fed. Reg. at 36,987-36,988 (July 9, 2021). In that Order, the President specifically pointed to the need to revisit and “strengthen regulations” of the access remedies of 49 U.S.C. § 11102(c). *Id.* at 36,996.

It is permissible and reasonable for the Board to conclude that access relief should be more readily available as Congress intended and as provided under the clear language of the statute. However, the Board should not assume that access or potential access to an alternate carrier – through mandatory switching or otherwise – automatically

will result in competition. Olin's experience, unfortunately, is that it will not, but it does provide for the potential for competition.

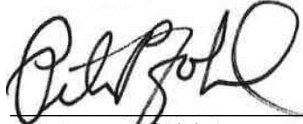
CONCLUSION

For the reasons set forth above, Olin respectfully requests that the Board promptly finalize its proposed rules, with the added revisions set forth herein, 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,

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