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March 10, 2026
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ELIMINATING REGULATORY	)	
BARRIERS TO COMPETITION:	)	
REVIEW OF PART 1144	)	EP 788
	)	

**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 proceeding.

SUMMARY

Olin has long participated in the Board’s proceedings over the past decade addressing the competitive access rules of 49 U.S.C. § 11102, and more specifically its reciprocal switching rules, in Docket No. EP 711, EP 711 (Sub-No. 1), and EP 711 (Sub-No. 2). Olin strongly supports the Board’s proposal to eliminate the need to show anticompetitive conduct as a pre-condition to relief under Section 11102. Such an extra-statutory showing is unfair and unnecessary, and also should not apply to the through route provisions of 49 U.S.C. § 10705, designed to protect shippers in providing for the prescription of alternative through routes.

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 modest changes to access and routing remedies 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. Olin thus also asks the Board to consider more intense or additional protective competitive conditions and rail rate protections and oversight.

IDENTITY AND INTEREST

Headquartered in Clayton, Missouri, Olin is a publicly traded company listed on the New York Stock Exchange with over 7,800 employees at 70 locations worldwide. Olin has three business segments: Chlor Alkali Products and Vinyls, a leading producer of bulk chlorine, caustic soda, bleach, and other chemicals in North America, Epoxy, a leading producer of epoxy products, and Winchester Ammunition, a leader in small caliber ammunition production and a supplier to U.S. law enforcement and military. Olin currently ships approximately 40,000 railcars 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 Olin's production and distribution process, and the availability of reasonable regulatory protections in the absence of market competition is essential for protecting Olin from unreasonable rate and service practices. Thus, Olin has a direct and substantial interest in this proceeding 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; February 14, 2022, and November 7, 2023.

COMMENTS

Olin supports the prompt adoption of the NPRM, as a long-overdue, first step to fulfilling the congressionally-authorized competitive access purposes of 49 U.S.C. § 11102, and through route provisions of 49 U.S.C. § 10705.

A. The Anti-Competitive Conduct Test Presents Unnecessary and Unfair Road-Blocks to Obtaining Relief

As codified at 49 U.S.C. § 11102, as part of the Transportation Act of 1920, Pub. L. No. 66-152, Congress granted the ICC/STB the authority to grant a carrier the right to operate over the line of an origin/destination railroad in a terminal area and related tracks (*i.e.*, terminal trackage rights). *Id.* at § 11102(a). With the passage of the Staggers Rail Act of 1980 (Pub. L. No. 96-448), under the same statutory section, Congress later granted the STB the authority to require the origin/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 normally will not grant requests for access solely to create or promote competition, or to enable a shipper to obtain lower rates.

In the freight rail context, in the ICC's landmark *Midtec* decision, the agency concluded that the public interest favors protecting railroads from intramodal competition, as such competition may hinder railroad efforts to obtain revenue

adequacy.¹ Following the *Midtec* decision, and the ICC's adoption of its current access rules, no rail freight shipper has obtained any trackage rights or reciprocal switching access relief under the agency's oppressive standards and very few have even tried.

While the exact contours of the anticompetitive conduct test in the context of the Board's through routes precedent under 49 U.S.C. § 10705 are somewhat unclear, the Board has noted that "carriers may generally protect their single-line or existing through routes by declining to establish other possible through routes, unless it can be shown that the alternative routes sought are more efficient, or that the carriers have exploited their market power by providing inadequate service over their existing through routes."

Central Power & Light Co. v. Southern Pac., et al, 1 S.T.B. 1059, 1066 (1996). More recent cases indicate that requiring an anticompetitive conduct threshold showing with respect to through routing may not apply, *e.g.*, *Canexus Chems. Canada L.P. v. BNSF Ry.*, NOR 42131, (STB served Feb. 8, 2012), yet the regulations appear to give potential weight to such a test under 49 C.F.R. §1144.2(a)(1).

The STB has the clear statutory authority to afford competitive access relief for freight rail shippers, including reciprocal switching, as set forth by Congress under governing statutes. However, it has now been four decades since any freight rail shipper has obtained any reciprocal switching access relief due to outdated and unfair rules requiring such shippers to demonstrate the incumbent carrier has engaged in

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

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.

Meanwhile, the Board's through route provisions of 49 U.S.C. § 10705 are designed to protect shippers in providing for the prescription of alternative through routes, but the Board's competitive access rules (at 49 C.F.R. § 1144), have also largely blocked shippers from using the statute to obtain relief. Olin also believes that the Board should not require a showing of anticompetitive conduct as a pre-condition to relief under Section 10705.

Olin strongly agrees that the anticompetitive conduct standard in part 1144 are an outdated impediment to relief and should be reversed. As the Board references in the NPRM, such a response is also in furtherance of the U.S. Department of Justice's Anticompetitive Regulations Task Force established in response to Executive Order No. 14192, directing federal agencies to "alleviate unnecessary regulatory burdens place on the American people." 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.

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

As part of its proposal, the Board acknowledges that "[a]t all times, parties are free to argue that the anticompetitive conduct standard may not apply to proceedings to establish terminal trackage rights under 49 U.S.C. § 11102(a)." NPRM at 15 n.24. In light of its

proposed approach in the NPRM, Olin strongly believes that further action is warranted, and namely, the removal of the “anticompetitive conduct” test should be formally removed from all competitive access cases brought under § 11102. Such a change is needed for the same reasons cited by the Board for removing the anticompetitive conduct test with respect to reciprocal switching as needed “in order to better effectuate Congressional intent” and to let go of a hurdle that has created “an unnecessarily high barrier to statutory relief.” NPRM at 11-12. It is also necessary to remove the test in all access cases 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.

2. The Referenced “Reciprocal Switching” Definition is Unduly Restrictive

The NPRM, at footnote 5 states that “[t]he term “reciprocal switching” refers to transfers between rail carriers that take place within the terminal area in which the shipment originates or ends and that are incidental to a line haul.” As such, the Board appears to presuppose that the prescription of reciprocal switching is limited to a defined “terminal area,” including main-line tracks for a reasonable distance outside of a terminal, as such

terms may apply in the context of trackage rights under 49 U.S.C. § 11102(a). Olin believes such references to “terminal area” should be removed in the context of reciprocal switching.

Congress did not limit the Board’s authority to order reciprocal switching only to terminal areas. Nowhere in 49 U.S.C. § 11102(c) is the remedy so restricted. 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 may grant reciprocal switching within a reasonable distance from carrier interchanges. Olin strongly urges the Board to return to that standard, to be determined on a case-by-case basis, and to remove any unnecessary, extra-statutory restrictions on the availability of reciprocal switching under 49 U.S.C. § 11102(c).

C. Addressing Related Competitive Issues

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. Olin has seen rail rates continually escalate at levels far above inflation with negligible improvements in performance and customer service. Unfortunately, the incentives created by the highly concentrated railroad marketplace and the current state of rail regulation encourage monopolistic behavior that has ramifications for Olin and its customers working in competitive markets.

For example, where Olin has one or more destination customers with access to two railroads, the originating carrier will often insist on artificial competitive restrictions on those lanes, e.g., volume restrictions, that effectively preclude Olin from routing to competitive interchange points to be able to use available competitive routings. Such railroad-imposed, anti-competitive arrangements create artificial, significant barriers to competition. Olin urges the Board not to assume that access or potential access to an alternate carrier – through mandatory switching, furthering access to more efficient through routes, or otherwise – automatically will result in competition. Olin’s experience, unfortunately, is that it will not, although it does provide for the potential for competition.

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 and volume restrictions, bundling arrangements, and consider more intense or additional protective competitive conditions and oversight. Olin also supports efforts to develop simple, practical, and effective constraints on unreasonable railroad pricing.

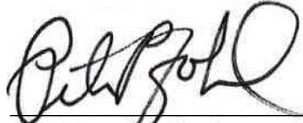
CONCLUSION

For the reasons set forth above, Olin respectfully requests that the Board promptly finalize its proposed rules, with the additional revisions set forth above, 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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Dated: March 10, 2026

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