

248129

OLIN CORPORATION,

v.

Defendant.

MOTION TO HOLD PROCEEDING IN ABEYANCE

Background

1

daily life functions, ranging from computers to medicine to parts used in all modes of transportation.

UP is a common carrier railroad engaged in the transportation of freight in interstate commerce. UP is subject to the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10101, *et seq.*, and to the jurisdiction of the Board. UP regularly and extensively provides rail transportation to Olin in rail tank cars that Olin provides to UP for UP to meet its common carrier obligations to move commodities offered for transportation by Olin.

The Complaints (as they may have been amended) pending before the Board in Docket No. NOR 42144, *et al.* were brought by various trade associations Complainants on behalf of their member companies (including Olin, which is a member of the Chlorine Institute and the American Chemistry Council) who own or lease rail tank cars, and by the Individual Complainants, who own or lease rail tank cars. In this proceeding, in which Olin only seeks the reparations, if any, to which it may be entitled as a result of the pending proceedings in Docket No. NOR 42144, *et al.*, and does not seek to re-litigate any matters that are at issue in those consolidated proceedings, Olin relies herein on the pleadings, evidence and arguments filed therein¹ and seeks relief in the form of reparations, if any, to which Olin is entitled, after the Board resolves the matters at issue in Docket No. NOR 42144, *et al.* Olin filed this separate Complaint for reparations because it did not participate as an individual Complainant in Docket No. NOR 42144, *et al.* to seek a ruling from the Board as to the reparations, if any, to which it is entitled.

¹ In accordance with the procedural schedule as ordered by the Board therein, all evidence and argument was submitted in Docket NOR No. 42144, *et al.* by May 31, 2019, and the record in those proceedings was closed as of that date.

Olin is filing this Complaint now, instead of after the resolution of Docket No. NOR 42144, *et al.*, in order to toll the running of the statute of limitations.²

Even though Olin's tank car shipments are transported by UP using tank cars provided to it by Olin for this transportation, Olin is not compensated by UP for those tank-car shipments. The lack of compensation paid by UP to Olin for UP's use of Olin's tank cars is exacerbated by UP's recent adoption of Tariff UP 6004, Item 55-C, effective January 1, 2015 (attached as Exhibit A to the Complaint filed herein), which shifts the cost of transporting empty tank cars to and from repair facilities from UP to Olin.³ UP previously provided this transportation service without charge, just as it does for rail cars that UP itself leases or owns. However, UP has not implemented measures to ensure that the parties providing it with tank cars are compensated for this additional expense associated with UP's use of their tank cars.

With respect to the reparations relief Olin seeks in the accompanying Complaint filed herein, Olin herein relies on the Board's ultimate determination of the lawfulness of UP's charges for transporting empty tank cars to and from railcar repair facilities in Docket No. NOR 42144, *et al.*, subject to any judicial review thereof, and does not seek to re-litigate herein any determination by the Board on the lawfulness of UP's charges for

² Under 49 U.S.C. § 11705(c), a complainant before the Board may seek reparations relief for a two-year period prior to the date of filing the complaint, in addition to the period during which the complaint is pending and until the effective date of the Board's decision on the merits.

³ UP Tariff 6004, Item 55-C, effective January 1, 2015, applies per-car and mileage-based charges to all empty rail tank car moves by UP to and from repair facilities except: (1) empty movements immediately preceded by loaded line-haul revenue movements on UP; (2) if UP's Mechanical Department removes a defective car from service and waybills the defective car under AAR Interchange Rule 1; or (3) if UP damaged the car. The tariff defines "Repair Facilities" as "any facility that cleans, lines, relines, maintains, modifies repairs, or retrofits tank cars."

transporting empty tank cars to and from railcar repair facilities in Docket No. NOR 42144, *et al.*, as the same may be finally determined by the Board or by a court on review of the Board's ultimate determinations.

REQUEST FOR RELIEF

In accordance with 49 U.S.C. § 11705(c), Olin, through its accompanying Complaint, seeks reparations for the periods (1) July 8, 2017 through July 7, 2019 and (2) also, from July 8, 2019 to the effective date of the Board's ultimate decision herein, in reliance on the Board's determinations of the lawfulness of UP's practices in Docket No. 42144, *et al.*, subject to judicial review thereof. In seeking relief herein, Olin does not seek to re-litigate herein any issue that is resolved by the Board in Docket No. NOR 42144, *et al.* (including any judicial review thereof); rather, Olin merely seeks the reparations, if any, to which it is entitled, once the Board has resolved the matters at issue in Docket No. NOR 42144, *et al.*

Therefore, if the Board determines that the shippers and shipper associations (including those litigating on behalf of Olin) should prevail on Count 1 of the First Amended Complaint filed in Docket No. NOR No. 42144, *et al.* with respect to the lawfulness of the transportation charges imposed by UP on movements of empty tank cars to and from tank-car repair facilities, Olin would then seek herein to have the Board determine the precise amount of reparations relief to which it is entitled from UP.

On the other hand, if the STB should determine that the shippers and shipper associations seeking relief in Docket NOR No. 42144, *et al.* are not entitled to reparations relief therein, and that determination is upheld on judicial review, if

any, Olin would not continue to seek relief herein, but would seek to have its Complaint dismissed.

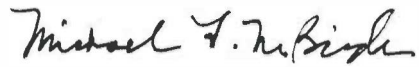
Therefore, to conserve the resources of the parties and the Board, it only makes sense, for the sake of efficiency and in the interests of justice, to hold this proceeding in abeyance, pending the outcome of Docket NOR No. 42144, *et al.* UP will not be prejudiced by granting this Motion, because UP has fully defended itself in Docket No. 42144, *et al.* and can fully defend itself herein, if necessary, including seeking appropriate supportive information from Olin for its reparations claim, once the proceedings in Docket NOR No. 42144, *et al.* have concluded. In the same vein, Olin will be fully protected, because its trade associations have fully litigated the matters at issue in Docket No. NOR 42144, *et al.* and Olin can fully prosecute its claim for reparations, including seeking necessary discovery, if any, after those proceedings in Docket No. NOR 42144, *et al.* have concluded.

Moreover, once all of the matters in Docket No. NOR 42144, *et al.* are resolved, and the only remaining dispute between Olin and UP with respect to the matters at issue in Docket No. NOR 42144, *et al.* and herein is the amount of reparations, if any, to which Olin is entitled for transportation charges of Olin's tank cars to and from tank-car repair facilities, the parties may be able to agree on the amount of reparations, if any, to which Olin is entitled from UP, without the necessity of (a) incurring additional litigation costs or (b) requiring the Board to adjudicate any disputes about such reparations.

For all of these reasons, Olin hereby moves for an order holding this proceeding in abeyance, for all purposes, pending the resolution of the matters at

issue in Docket No. NOR 42144, *et al.*

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael F. McBride".

Michael F. McBride
Keturah A. Brown
Van Ness Feldman, LLP
1050 Thomas Jefferson Street, N.W.
Suite 700
Washington, DC 20007-3877
(202)298-1800
mfm@vnf.com
kab@vnf.com

Attorneys for Olin Corporation

July 8, 2019