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BEFORE THE SURFACE TRANSPORTATION BOARD

STB EX PARTE 711 (Sub. No. 1)

REPLY COMMENTS SUBMITTED ON BEHALF OF OLIN CORPORATION

I. INTRODUCTION

On July 27, 2016, in Docket No. EP 711 and EP No. 711(Sub. No. 1), the Surface Transportation Board ("Board" or "STB") served its July 25, 2016 Decision (the "Decision") that granted in part a petition for rulemaking filed by the National Industrial Transportation League ("NITL") on July 1, 2011. The NITL Petition requested that the Board initiate a proceeding to facilitate rail-to-rail competition in the United States by adopting new competitive switching regulations that are consistent with 49 U.S.C. § 11102(c). In its Decision, the Board proposed new regulations which would allow a party to seek a reciprocal switching prescription that is either practicable and in the public interest or necessary to provide competitive rail service. The Board requested interested parties' comments on certain aspects of the proposed rules, which will be discussed in greater detail herein.

As proposed, the new rules create two standards under which a shipper can seek competitive access relief. A shipper must show that the arrangement is either "practicable and in

the public interest” or “necessary to provide competitive rail service.”¹ The Board noted that the ICC has previously determined that there is no mechanical test for determining what is practicable and in the public interest, and, as a result, the totality of the circumstances should be considered.

The Board’s proposed regulations established three criteria that shippers must satisfy to demonstrate that reciprocal switching is practicable and in the public interest, including: (1) the facilities of the shipper and/or receiver for whom switching is sought are served by Class I rail carriers; (2) that there is or can be a working interchange with another Class I carrier within a reasonable distance of the facility; and (3) that the potential benefits from the proposed switching arrangements outweigh the potential detriments. Notwithstanding these three showings, the Board will not find a switching arrangement to be practicable and in the public interest if either rail carrier shows that switching is not feasible or unsafe, or that the presence of such switching will unduly hamper the ability of the carrier to serve its shippers. The Board will make its findings on a case-by-case basis after reviewing evidence presented by the shipper and the railroad in an administrative action before the agency.

The second standard under which a party may obtain reciprocal switching is by showing that switching is necessary to provide competitive rail service. Again, three criteria must be satisfied by a shipper: (1) the facilities of the shipper and/or receiver for whom switching is sought are served by Class I rail carriers; (2) intermodal and intramodal competition is not effective with respect to the movements of the shipper and/or receiver for whom switching is sought; and (3) that there is or can be a working interchange with another Class I carrier within a reasonable distance of the facility.

¹ Decision at 1.

Olin's Chlor Alkali Products and Vinyls business segment ("CAP&V") is the leading producer of chlorine and caustic soda in North America and has ten manufacturing sites in North America, one Canadian manufacturing facility, and one German manufacturing facility. Olin has its headquarters in Clayton, Missouri. Olin was the first commercial supplier of chlorine in the United States and has been involved in the chlor alkali industry for over 100 years.

On October 24, 2016, Olin submitted comments encouraging the Board to adopt new switching standards that will streamline proceedings before the Board. While commending the Board's decision to revise reciprocal switching rules, Olin urged the Board to change its proposal to address the following issues: (1) shortlines should be able to benefit from the rule by serving as the interchange carrier; (2) interchanges that require minimal investment to be paid by the shipper or interchange carrier should qualify as a "working interchange"; and (3) the Board should adopt reasonable and straightforward procedures to establish the access fee either when the railroads cannot agree on the fee OR (emphasis added) when the party seeking the switch believes the fee to be unreasonable.

Olin strongly supports initiatives that serve to enhance competition between Class I railroads to aid captive shippers, such as the Board's proposed reciprocal switching rules that arose out the NITL Petition. Olin supports the NITL's efforts in this endeavor, and offers these reply comments for the Board's consideration.

To summarize its reply comments, Olin asserts that:

- (1) new competitive switching rules must allow for simple and straightforward procedures that will resolve requests for reciprocal switching in a timely and cost-effective manner;

- (2) access fees must be reasonable and contain no component of lost contribution claimed by the railroad. Further, there must be a reasonable process for establishing and/or challenging an access or switching fee sought to be imposed upon the shipper;
- (3) the proposed rules should be expanded to permit Class II and Class III railroads to seek reciprocal switching against a Class I carrier; and
- (4) “reasonable distance” to a working interchange should be more narrowly defined and an interchange “can be” deemed working if minimal investment is required.

II. THE BOARD’S PROPOSED COMPETITIVE SWITCHING RULES ARE PRO-COMPETITION, NOT RE-REGULATION

The railroad industry asserts that “forced” switching is a means to restructure the rail industry, and that the Board’s proposal disregards congressional intent and violates statutory limits on the agency’s authority.² Olin disagrees, and submits that the reciprocal switching rules are a pro-competitive benefit for captive shippers. By adding a provision regarding reciprocal switching to the legislation that resulted in the Staggers Act, it is evident that the Congressional intent was to foster competition through reciprocal switching arrangements. Congressional intent is clearly demonstrated by a review of the committee reports. Specifically, the Senate Report noted, “[i]n areas where reciprocal switching is feasible, it provides an avenue of relief for shippers served by only one railroad where service is inadequate.”³ The House Report further noted, “[t]he Committee intends for the Commission to permit and encourage reciprocal switching as a way to encourage greater competition.”⁴ Finally, the Staggers Act Conference

² See, Opening Comments and Evidence of Union Pacific Railroad Company at p. 2.

³ S.Rep. No. 96-470, at 42.

⁴ H.R. Rep. No. 96-1035, at 67.

Committee Report specifically stated that the reciprocal switching provisions in the Act were “included to foster greater competition.”⁵

The ability to order reciprocal switching under specific circumstances, and to promulgate rules governing reciprocal switching, are squarely within the authority of the Board. The railroads’ assertions that reciprocal switching agreements violate the limits on the Board’s authority are disingenuous and should be disregarded.

The Board is correct that current reciprocal switching regulations are in desperate need of reform because current rules and relevant precedent effectively act as a bar to relief, rather than as a standard under which relief can be granted,⁶ and therefore competition is not enhanced or encouraged. Revisions to competitive switching rules will facilitate greater rail-to-rail competition and reflect the changes in the railroad industry that have occurred since the current competitive switching rules were promulgated in 1985, and will more closely approximate the climate of competition envisioned by Congress.

Since the rules were initially created, the Board noted that there have been numerous significant changes in the railroad industry since the 1980s, including, but not limited to, the improved economic health of the railroad industry and the increased consolidation in the Class I railroad sector.⁷ In short, the Board concluded that the agency’s current regulations and precedent make “less sense in today’s regulatory and economic environment.”⁸

Olin concurs with this assessment. The regulatory and economic environment is vastly different than it was when the current reciprocal switching rules were first promulgated. In

⁵ H.R. Rep. No. 96-1430, at 80.

⁶ Decision at 9.

⁷ Id.

⁸ Id.

1981, there were thirty-nine Class I railroads. Presently, there are seven Class I railroads, but only four dominate the long-haul freight market as largely unchecked monopolies. These four Class I railroads are effectively two distinct duopolies, as two serve the eastern United States, and two serve the western United States. Reciprocal switching reform is critical under these circumstances, where the principles and goals of the Staggers Act are no longer being achieved by current rules.

III. THE COMPETITIVE SWITCHING PROCESS SHOULD BE SIMPLE AND STREAMLINED IN ORDER TO BE EFFECTUAL

In the thirty-one years since the Board's adoption of the current competitive switching regulations, very few requests for reciprocal switching have been brought before the Board. In none of those cases has the Board ever granted a request for reciprocal switching. The Board's public interest standard proposes numerous factors that the Board may consider in weighing the potential benefits and detriments associated with a request for competitive access, which may give rise to a protracted, costly case. Revising the reciprocal switching rules, without also establishing a simple, cost-effective process for seeking and obtaining relief via those rules, would be counterproductive and ineffectual.

A simple, streamlined process for a shipper seeking access would also be consistent with the Board's stated desire to have a reciprocal switching standard that makes the remedy more equally available to all shippers.⁹ In Section 1145.2(b)(3) of its proposed rules, the Board has indicated that any proceeding brought pursuant to Section 1145.2 "will be conducted and concluded by the Board on an expedited basis." Olin agrees that any proceeding regarding reciprocal switching should proceed expeditiously, and urges the Board, in its final rules, to establish clear, concise procedures and timelines for the prompt resolution of any given case. As

⁹ Decision at 15.

an example, the Shipper Coalition in its October 26, 2016 Comments provided a detailed and comprehensive illustration of procedures that would minimize the length, cost, and complexity of a reciprocal switching case.¹⁰ Likewise, the proposed conclusive presumption regarding market dominance NITL set forth in their July 2011 petition for rulemaking would also serve to expedite a reciprocal switching case and make the process more effectual. Specifically, the NITL proposed that a shipper would be conclusively presumed to lack effective intermodal or intramodal competition where either (a) the rate for the movement for which switching is sought has a R/VC ratio of 240% or more; or (b) where the incumbent serving the shipper's facilities for which switching is sought has handled 75% or more of the transported volumes at issue.¹¹

IV. THE PROCESS TO DETERMINE SWITCHING FEES SHOULD BE REASONABLE AND CLEARLY ESTABLISHED

The proposed rule does not establish a mechanism for setting the switching fee that one railroad would pay to the other for switching services. The Board noted that § 11102(c) requires the rail carriers entering reciprocal switching arrangements to establish the conditions and compensation applicable to a switching arrangement. In the event that the Board is asked to determine access pricing, if rail carriers are unable to agree or if the party seeking the switch believes the proposed access fee to be unreasonable, the Board proposed two access pricing methodologies. Under the first alternative, the Board proposed to determine access pricing based upon a specified set of factors, including the geography where the proposed switch would occur, the distance between the shipper and the proposed interchange, the cost of the service, the capacity of the interchange facility, and other case-specific factors. Under alternative two, the

¹⁰ See, October 26, 2016 Comments, at pp. 25-31.

¹¹ NITL Petition for Rulemaking to Adopt Revised Competitive Switching Rules, Docket No. EP-711, at pp 35-36, filed July 7, 2011.

Board seeks comment regarding whether a variation of the Board's SSW Compensation methodology could be adapted to establish reasonable switching fees.

Under the first alternative, the Board specifically invited parties to comment on whether the list of case-specific factors should include any portion of the incumbent rail carrier's lost contribution or opportunity costs, as suggested by Union Pacific. Union Pacific argues that reasonable access pricing must replicate market outcomes, which, it argues, would necessarily include compensation to the railroad for the serving railroad's actual costs of providing switching service, including costs for any new investment, as well as the railroad's lost contribution to fixed costs from the switched traffic.¹²

The Board should reject Union Pacific's assertion that reasonable access pricing should include a component for the lost contribution to fixed costs. Including lost contribution costs would arguably sabotage any competitive benefit a captive shipper would gain by pursuing reciprocal switching, thereby defeating the pro-competitive objectives. Rather than adopting Union Pacific's claim for lost contribution costs, the Board should devise a clear process for determining a reasonable access fee to fairly compensate the incumbent railroad without extinguishing the competitive benefit to shippers arising from reciprocal switching.

V. CLASS II AND CLASS III CARRIERS SHOULD BE CONSIDERED POTENTIAL COMPETITORS

Under both prongs of the Board's proposed rules competitive switching is limited only to cases where both the incumbent carrier and the accessing carrier are both Class I railroads. The Board specifically invited comments on this issue in order to consider whether the Board should, now or in the future, extend the rules to include smaller carriers. Olin urges the Board to expand the proposed rules to permit Class II and Class III railroads to seek reciprocal switching against a

¹² Opening Comments and Evidence of Union Pacific Railroad Company, at pp. 51-52.

Class I carrier. As the Board noted, the record contains little information on the potential effects on the industry that would result from making Class II and/or Class III rail carriers subject to reciprocal switching prescriptions.¹³ Given the substantial number of factors the Board may consider in deciding whether to order reciprocal switching, Olin asserts that the potential effects on the industry may be more readily assessed as more requests for competitive switching are filed with the Board. Broadening the proposed regulation at this time would offer the Board the opportunity to assess potential impacts upon the industry from the outset.

VI. “REASONABLE DISTANCE” TO A WORKING INTERCHANGE SHOULD BE MORE CLEARLY DEFINED AND AN INTERCHANGE “CAN BE” DEEMED WORKING IF MINIMAL INVESTMENT IS REQUIRED

Under both prongs of the proposed regulations, the party seeking switching must show that “there is or can be a working interchange between the Class I carrier servicing the party seeking switching and another Class I rail carrier within a reasonable distance of the facilities of the party seeking switching.”¹⁴ The Board determined that there “is” a working interchange if one already exists and is currently engaged in switching operations. The Board noted that it would determine that there “can be” a working interchange only if the infrastructure currently exists to support switching, without the need for construction, regardless of whether switching operations are taking place or have taken place using that infrastructure.¹⁵ The Board specifically requested comments on this matter. Olin proposes that the Board revise the proposed rule to allow the Board to determine that an interchange can be deemed “working” if the facility requires minimal investment or minimal construction to be paid by the shipper or interchange carrier.

¹³ Decision at 20.

¹⁴ Decision at 21.

¹⁵ Decision at 21.

Further, the Board invited comments regarding defining the term “reasonable distance” in an effort to provide guidelines to parties seeking switching arrangements under the proposed regulations. The NITL’s initial proposal included a conclusive presumption that there is a working interchange within a reasonable distance if either: (1) a shipper’s facility is within the boundaries of a terminal of a Class I carrier in which cars are regularly switched, or (2) there is an interchange at which cars are regularly switched within 30 miles of the shipper’s facilities.¹⁶

Olin supports the NITL’s statement that an interchange at which cars are regularly switched within 30 miles of the shipper’s facilities constitutes a “reasonable distance.” Nonetheless, Olin also asserts that alternative distances may also be proven to be reasonable, based on the particular facts at issue. As such, Olin supports assessing what is a “reasonable distance” on a case-by-case basis.

Respectfully submitted on behalf of the Olin Corporation by:

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¹⁶ NITL Petition for Rulemaking to Adopt Revised Competitive Switching Rules, Docket No. EP-711, at pp 35-36, filed July 7, 2011.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 2017, I caused a copy of the foregoing document to be served by first class mail, postage prepaid, on all Parties of record in this proceeding.

/s/ Anne E. Callenbach
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