

OLIN CORPORATION,

Complainant,

V.

**UNION PACIFIC RAILROAD
COMPANY,**

Defendant.

Docket No. NOR 42164

Complainant Olin Corporation (“Olin”) hereby files its Reply to the Motion to Dismiss (“Motion”) filed by Defendant Union Pacific Railroad Company (“UP”) on July 29, 2019. The Motion is not grounded in law or regulation, and should be denied.

BACKGROUND

Olin is engaged, *inter alia*, in the business of producing chemicals. Among those chemicals are chlorine and caustic soda, both of which are transported in tank cars. Olin ships and receives loaded rail tank cars on UP, and, because UP does not provide rail tank cars, Olin must provide rail tank cars to UP for its products to move by rail.

The Complaints (as they may have been amended) pending before the Surface Transportation Board (“Board”) in Docket No. NOR 42144, *et al.* (the “*NAFCA* proceeding”) 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 later by certain Individual Complainants, who own or lease rail tank cars. As stated in its Complaint and Motion to Hold Proceeding in Abeyance

filed herein on July 8, 2019, Olin relies herein on the pleadings, evidence, and arguments made in the *NAFCA* proceeding and seeks the relief, if any, to which Olin is entitled, after the Board resolves the matters at issue in the *NAFCA* proceeding.

UP objects that Olin filed its Complaint after the close of the record in the *NAFCA* proceeding, alleging that, by doing so, Olin engaged in “gamesmanship,” to avoid discovery in the *NAFCA* proceeding. On the basis of that unsupported allegation, UP moves to dismiss Olin’s Complaint because Olin did not file its Complaint earlier and have its Complaint consolidated with the other Complaints consolidated in the *NAFCA* proceeding. Inconsistently, UP also argues (Motion at 6-7) that Olin’s Complaint should be dismissed “without prejudice,” to allow Olin to re-file its Complaint at a later date, after resolution of the issues in the *NAFCA* proceeding (but it appears that UP intends that, if Olin does so, it would in fact be prejudiced, by having the date on which reparations runs start later than what otherwise would be the case).

ARGUMENT

UP’s Motion has no basis in law or the Board’s regulations, nor does the Motion cite any authority that supports dismissal.¹ On these grounds, the Board should deny the Motion.

¹ The sole authority cited (Motion at 6-7), aside from the statute of limitations (49 U.S.C. § 11705(c), which of course UP does not claim supports dismissal, is *Mobile Tank Car Services v. Southern Railway*, ICC Docket No. 40134, at 5 (served July 1, 1988). The quotation UP relies on from *Mobile Tank Car Services* (*i.e.*, the Board “exercises discretion in determining whether the equities of restitution warrant reparations, depending on the circumstances of each case”) demonstrates that the Interstate Commerce Commission decision dealt with the merits of whether a complainant is entitled to reparations—not whether Olin’s Complaint should be dismissed. (The Complainant in that proceeding was held entitled to prospective damages, but not retrospective damages, because of equitable considerations not applicable here.) Olin believes it is straightforward that, if UP illegally started charging for transportation to and from tank car maintenance and repair facilities on January 1, 2015, Olin is entitled to a refund of all such charges starting on July 8, 2017 (two years prior to filing of the Complaint), but the Board need not resolve that issue now, until it decides the *NAFCA* proceeding.

There are other reasons as well to deny the Motion. UP acknowledges (Motion at 5-6) that three individual shippers (Arkema, Tesoro, and Valero) filed Complaints of their own, which were eventually consolidated into the *NAFCA* proceeding. UP obtained discovery from those individual shippers (*id.* at 6). UP has not claimed Olin has any unique information different from that UP obtained from the three individual shippers in the *NAFCA* proceeding because Olin's circumstances are identical to those of the thousands of tank car shippers affected (i.e., starting on January 1, 2015, UP charged Olin a tariff for transportation of empty tank cars to and from tank car repair and maintenance facilities).² Discovery with respect to Arkema, Tesoro, and Valero went on for a substantial period of time, delaying the resolution of the Complaints filed by the trade associations on the overriding legal issues while also dissuading other shippers from filing during that time. Finally, the parties were able to file the evidence and argument, and close the record in the *NAFCA* proceeding.

Does UP really believe, or expect the Board to believe, that, if only a fourth (or a fifth, or sixth, etc.) shipper (*e.g.*, Olin) had also filed its individual Complaint concurrent with the first three shippers, and been subjected to discovery as well, the evidentiary record and arguments UP presented in the *NAFCA* proceeding would have been materially different? There is no foundation for this line of reasoning; the circumstances at issue in the *NAFCA* proceeding of each tank car shipper are essentially the same. That is, shippers once received "mileage allowances" from UP for providing their own tank cars. These mileage allowances were not only later eliminated, but also an additional tariff was implemented by UP, imposing charges for the transportation of shippers' empty tank cars to and from railcar repair and maintenance

² Moreover, under the Board's Rules, UP could have sought a subpoena to obtain third-party discovery from Olin in the *NAFCA* proceeding if Olin had unique information useful to UP's presentation of evidence and argument, but UP did not seek such discovery from Olin.

facilities. In sum, UP does not identify anything new that could have obtained from Olin to otherwise make or modify its case in the *NAFCA* proceeding.

Beyond what has already been stated about UP's Motion, the Motion makes trivial, nonsensical arguments. UP is dissatisfied with the timing of the filing of Olin's Complaint, arguing that Olin should have filed (1) earlier, when other shippers and trade associations filed their Complaints or (2) later, after the Board resolves the matters at issue in the *NAFCA* proceeding. Aside from the absurdity of arguing that the filing of the Complaint was both too early and too late, UP does not have a right to control the timing of the filing of Olin's Complaint. UP was not prejudiced by Olin filing its Complaint when it did, and Olin did not file when it did to prejudice UP. If Olin had waited until after the Board resolved the merits in the *NAFCA* proceeding, UP would not have had the opportunity to take discovery against Olin before filing its evidence and argument in the *NAFCA* proceeding, which is the prejudice UP alleges.

Olin had every right to file its Complaint, and to file it when it did; ironically, had Olin filed earlier, UP would have been harmed by being subject to greater reparations than is now the case, because of the two-year statute of limitations in 49 U.S.C. § 11705(c). UP seeks to force Olin to re-file its Complaint later, presumably to reduce UP's exposure to reparations,³ but UP does not have a right to control that timing.

Olin did not engage in gamesmanship, but filed its Complaint when it did for several reasons: (1) Olin was aware that the filing of Complaints by Arkema, Tesoro, and Valero, after

³ Although UP states (Motion at 6) that Olin's Complaint could be dismissed "without prejudice," it would appear that UP actually intends that, if Olin's Complaint is dismissed, and need to be re-filed at a later date, Olin in fact would be prejudiced, because the two-year reparations period would run from two years prior to the subsequent filing date. So, UP is incorrect—dismissal would not be "without prejudice" to Olin.

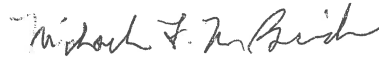
the filing of the Complaints of the trade associations significantly delayed completion of those consolidated proceedings, and Olin did not want to further contribute any delays; (2) after discussion with counsel, Olin concluded that it was content with the state of the record in the *NAFCA* proceeding to decide the issues relevant here; (3) accordingly, Olin does not seek to re-litigate herein any determination by the Board on the lawfulness of UP's charges for transporting empty tank cars to and from railcar repair facilities in the *NAFCA* proceeding, as the same may be finally determined by the Board or a court on review of the Board's ultimate determinations; and (4) Olin considered its options after the record had closed in the *NAFCA* proceeding and concluded that its best course of action, which would protect Olin's interests in seeking reparations but would not cause any disruption to the Board's ability to reach as timely a decision as possible in the *NAFCA* proceeding, was to file its separate Complaint now. Doing so would toll the running of the statute of limitations while awaiting the Board's decision in the *NAFCA* proceeding before determining how to proceed, if it all, with its Complaint.

There simply is no reason for every shipper who might or would be affected by the *NAFCA* proceeding (including Olin) to file an individual complaint before the evidentiary record was complete in the *NAFCA* proceeding. This is because the issues are generally the same for each shipper, except the amount of reparations to which they may be entitled. UP clearly is concerned that other shippers, besides Olin, who were harmed by UP's charges for transportation of empty tank cars to and from tank car repair and maintenance facilities, will now file similar complaints. Such is the risk incurred by UP when it unilaterally imposed an across-the-board Tariff beginning on January 1, 2015.

CONCLUSION

UP's Motion has no basis in law or under the Board's regulations. UP argues inconsistently that Olin should have filed (1) earlier, in the *NAFCA* proceeding, or (2) later. UP claims to seek dismissal "without prejudice" in the interim (even though there would appear to be prejudice to Olin, because UP did not propose that Olin's right to reparations would run from the date Olin's reparations would now run under 49 U.S.C. § 11705(c). (If UP does intend that Olin could re-file its Complaint after the *NAFCA* proceeding is concluded, with reparations running from when UP concedes that they now would run on Olin's pending Complaint, there would be no point to granting UP's Motion.) Accordingly, UP's Motion should be denied, because there is no basis in law or in the Board's regulations for that Motion, and because Olin had a right to decide when to file its Complaint, not UP.⁴

Respectfully submitted,



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August 14, 2019

Attorneys for Olin Corporation

⁴ UP also raised the technical argument that service was not properly completed on Ms. Rhonda Ferguson, Vice President and General Counsel of UP, because she was served by first-class mail on July 8, 2019 but not also by facsimile or by overnight delivery on that date. UP conveniently ignores that service was also made voluntarily on Mr. Rosenthal, its counsel herein and in Docket No. 42144, *et al.* by email, on July 8, 2019, and he presumably ensured that Ms. Ferguson received the Complaint and Motion to Hold Proceeding in Abeyance at that time. UP does not claim that Ms. Ferguson did not promptly receive the Complaint and Motion to Hold Proceeding in Abeyance after their filing on July 8, 2019, or that UP suffered any prejudice as a result of the service that was made on July 8, 2019. In any event, Olin also served Ms. Ferguson by facsimile on July 29, 2019.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2019, I have served a copy of the foregoing *Reply in Opposition to Motion to Dismiss* via electronic mail and regular mail to counsel for Defendant at the following address:

Michael L. Rosenthal, Esq.
Covington & Burling
850 10th Street, NW
Washington, DC 20001

And by regular mail to:

Rhonda S. Ferguson, Esq.
Vice President and General Counsel
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