

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Docket No. EP 711

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**PETITION FOR RULEMAKING TO ADOPT REVISED
COMPETITIVE SWITCHING RULES**

REPLY COMMENTS OF OLIN CORPORATION

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Olin Corporation, through its Chlor Alkali Products Division (“Olin”), respectfully submits these brief reply comments in this Docket No. EP 711, established in response to revised competitive switching rules proposed by the National Industrial Transportation League (“NITL”). Olin files this reply to respond to some of the assertions and statements made in this proceeding by other parties, and to ensure that the need for comprehensive reform is not lost as the railroads examine in detail the hypothetical service-level impact of one particular proposal. Olin would also reiterate the difficulty of providing detailed input on proposed rules without knowing whether the use of the proposed rules to obtain a competitive switch on a given movement could adversely impact a shipper’s access to a rate case and Board review of the movement as a whole.

In connection with this proposal and any others that may come out of the comprehensive record compiled in the EP 705 proceedings, Olin urges the Board to act swiftly, as captive shippers and others continue to be disadvantaged under many of the current rules. NITL filed its petition almost two years ago, following hearings held at the conclusion of the EP 705 docket on competition in the industry. It was in the January 11, 2011 decision instituting EP 705—over 28

months ago—that the Board opined that events “suggest that it is time for the Board to consider the issues of competition and access further.”¹ It is now past time for the Board to provide shippers with actual relief from unreasonable rates, to fulfill the purposes of the Staggers Act.

While the Staggers Act has resulted in some positive reform, its ultimate goal of a competitive, viable rail system that provides reliable service at reasonable rates remains unfulfilled, particularly for most captive shippers. As an example, the existing remedies under 49 U.S.C. § 11102(c) have been rendered virtually meaningless by the rules currently governing its application. In their initial comments, the railroads repeatedly emphasize the need to protect the safe, reliable, and efficient services developed in the wake of the Staggers Act.² But in making localized examinations of the impact of one competitive switching proposal on a railroad’s relative ability to provide and preserve safe, reliable, and efficient services, the parties to this matter should not ignore the fact that they have been asked to make this examination because shippers are not being charged reasonable rates.³

Olin’s Initial Comments, the captivity maps attached thereto and the record in EP 705 all show that existing regulatory rules have only partially realized the purpose of the Staggers Act, and that for many captive shippers its goal has not materialized at all; relief for shippers is long overdue. But the goals in revising existing rules will be frustrated if any new rules for competitive switching fail to preserve a shipper’s overall right to a rate case. The purposes of the Staggers Act are frustrated if shippers do not pursue remedies provided under its rules. The same would be true under revised rules if the use of competitive switching rules adversely impact a shipper’s right to bring a rate case.

¹ January 11, 2011 Notice in STB Docket No. EP 705 at p. 3.

² March 1, 2013 Opening Comments of Norfolk Southern Railway Company at p. 6.

³ March 1, 2013 Opening Comments and Evidence of Union Pacific Railroad Company at pp. 2, 6.

When the competitive switching rules are revised, they must specifically provide that where an otherwise captive shipper utilizes the revised rules to obtain two rates from railroads, the existence of the non-litigated rate shall not be considered as “effective competition” for purposes of 49 U.S.C. § 10707; accordingly, the shipper would retain its right under 49 U.S.C. § 10701(d)(1) to challenge the reasonability of any rate offered by either railroad so long as the Board finds that the rate charged results in a R/VC for the transportation to which the rate applies that is equal to or greater than 180%. That is, the conclusive presumption as to the switch movement at issue should have no bearing on the question of market dominance on the origin-to-destination transportation provided by either railroad, nor should any presumption exist where the rate is \geq 240% of variable costs, as either conclusion would “ignore the structure of the current railroad industry and evidence presented to the Board in EP 705.”⁴ In turn, no presumption of effective competition should exist when a captive shipper chooses not to exercise its right to petition for a competitive switch beyond the 30-mile mark proposed by NITL.

Olin respectfully submits that the Board should pursue a comprehensive and expeditious review and reform of the rules as a whole under the existing EP 705 docket, both by exploring means to make the rate complaint process fair, accurate, expeditious, and less costly⁵ but also through comprehensive regulatory reform to increase actual rail-to-rail competition. This aggressive goal is achievable given the time that has passed from the institution of EP 705, as the comments of shippers, railroads and others in EP 705 have been in the public record for over two years. Ample evidence was developed in EP 705 to show that existing rates are not reasonable, and the Staggers Act was not meant to pit reasonable rates and safe, reliable, and efficient services against one another as an either/or proposition; the existence of bumps in various paths

⁴ March 1, 2013 Joint Opening Submission of Interested Agricultural Parties in EP 711 at p. 17.

⁵ March 1, 2013 Opening Comments and Evidence of Kansas City Southern Railway in EP 711 at p. 7.

to reform considered by the Board should not distract from the need for that reform. While it is difficult to comment on any proposed switching rules so long as their effect on a captive shipper's access to a rate case is unclear, Olin respectfully submits that the Board must act swiftly to revise its rules under the Staggers Act to not only enable and preserve safe, efficient, and reliable service, but also to ensure reasonable rates, which directly impacts jobs, the competitiveness of many U.S. businesses versus the world, and the U.S. economy as a whole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 2013, 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/ Gregory M. Leitner
Gregory M. Leitner, Esq.