TO BE PLACED ON THE PUBLIC RECORD

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 705
COMPETITION IN THE RAILROAD INDUSTRY

COMMENTS SUBMITTED BY
OLIN CORPORATION

Olin Corporation, through its Chlor Alkali Products Division ("Olin"), submits the following comments in STB Docket No. EP 705, in response to the STB's Notice of a hearing and request for comments regarding "the current state of competition in the railroad industry and possible policy alternatives to facilitate more competition, where appropriate." As demonstrated within these comments, the state of competition in the railroad industry for captive shippers is that there is no competition. This lack of competition has permitted the four dominant Class I railroads to impose onerous terms and excessive rates on captive shippers. The STB should act to remedy this lack of competition by implementing measures under its existing authority that reflect the state of the rail industry today.

Olin respectfully requests the STB to take "official notice" of the Class I railroads' public SEC filing statements from 2003 to present regarding their earnings, returns on equity, and other profit measuring metrics. These statements are made to investors under risk of penalty and litigation, so they are the most accurate. Furthermore, Olin relies upon its experience as a captive shipper through its management and operation of the SunBelt Chlor Alkali Partnership at McIntosh, Alabama. This experience is documented in Exhibit A, which is attached to these comments.

Olin would also like to take this opportunity to formally adopt and incorporate the joint comments made by the "Interested Parties" as defined in the comments of the shippers' trade groups, which include the Chlorine Institute and the American Chemistry Council. Olin further adopts the following articles/studies that have been published:

– Committee on Commerce, Science, and Transportation, *The Current Financial State of the Class I Freight Rail Industry* (Staff Report for Chairman Rockefeller) (Sept. 15, 2010) ("Rockefeller Report")[1];

– Russell W. Pittman[2], *The Economics of Railroad "Captive Shipper" Legislation*, EAG Advocacy Papers 10-1 (Jan. 2010)[3];

– Russell W. Pittman, *Against the Stand-Alone-Cost Test in U.S. Freight Rail Regulation*, EAG Advocacy Papers 10-1CA, Department of Justice, Antitrust Division (Apr. 2010)[4]; and

– ABA Section of Antitrust Law, *Comments on the Railroad Antitrust Enforcement Act* (submitted to Congress Dec. 2008)[5].

I. INTRODUCTION TO OLIN CORPORATION

Olin is one of the leading producers of chlorine and caustic soda in North America. Olin has manufacturing sites at 11 different locations throughout North America, with its Chlor Alkali Products Division headquarters located at Cleveland, Tennessee. Olin was the first commercial supplier of chlorine in the United States and has been involved in the chlor alkali industry in the United States for over 100 years. In addition to manufacturing chlorine and caustic soda, Olin manufactures and sells many useful derivatives of the chlorine manufacturing process, such as hydrochloric acid, hydrogen, sodium chlorate, bleach products and potassium hydroxide. Olin

[1] Accessible at http://commerce.senate.gov/public/?a=Files.Serve&File_id=76823478-a901-4b4d-869b-9301bb43343b.
[2] Director of Economic Research, Economic Analysis Group, Antitrust Division, U.S. Department of Justice.
[3] Accessible at http://www.justice.gov/atr/public/eag/255003.pdf.
[4] Accessible at http://www.justice.gov/atr/public/eag/257888.pdf.
[5] Accessible at http://www.americanbar.org/content/dam/aba/migrated/antitrust/at-comments/2008/12-08/comments_HR1650_S772.authcheckdam.pdf.

continues to grow and service the chlor alkali industry.

II. CHLORINE IS ESSENTIAL TO THE NATION'S HEALTH, ECONOMY AND SECURITY

According to the Chlorine Institute, chlorine products and their derivatives contribute more than $46 billion to the U.S. economy each year through sales of chlorine and other building block chemicals that are used to make thousands of essential products. The chlor alkali industry alone contributes over $7 billion directly to the U.S. economy each year.

Chlorine chemistry is essential to everyday life. The products of chlorine chemistry make possible clean water and safe foods, pharmaceuticals, medical equipment, construction materials, computers, electronics, automobiles, clothing, sports equipment, agriculture, and much more. For the majority of these applications, there are no reasonable substitutes for chlorine.

In addition to its importance to our nation's health and economy, chlorine is vital to U.S. security. The Department of Homeland Security has deemed chlorine to be an essential asset to the "critical infrastructure." Moreover, chlorine is used in materials that promote the national defense, including bullet-proof vests, helmets, and parachutes. Chlorine is helping to protect the men and women in our armed services.

III. FOR CAPTIVE SHIPPERS, THE STATE OF RAILROAD COMPETITION IS THAT THERE IS NO COMPETITION

In 1980, Congress passed the Staggers Rail Act to address the financial decline and physical disrepair of the national railroad system. The Act greatly changed the regulatory landscape by legalizing private transportation contracts, encouraging railroad mergers, and accelerating abandonment of unprofitable rail lines. As a result of this deregulation, the number of Class I railroads has declined from thirty-nine in 1980 to the seven that exist today. Also unlike 1980, today four Class I railroads dominate the long-haul freight market and function as regional duopolies in the eastern and western United States. The change in the rail industry over the past thirty years was recognized in the testimony of Chairman Elliot before the U.S. Senate Committee on Commerce, Science, and Transportation as follows:

> Needless to say, enormous changes have taken place in the industry since passage of the Staggers Act in 1980, as well as ICCTA in 1995. A map of the national rail system reveals significant consolidation of Class I railroads and the development of an expansive short line railroad industry. In addition, railroads have become more productive and shippers' needs and their roles in the shipping process have evolved. The result has been a very different state of economic health in the rail industry than was true in 1980.[6]

The consolidation of rail carriers coupled with antiquated rules has allowed the few remaining railroads to exploit their market dominance and the lack of competition. For example, Norfolk Southern ("NS") continues to exploit its market dominance and lack of competition from western carriers by imposing onerous contract terms and conditions on captive shippers, including Olin. For example, the NS continues to impose rate-based fuel surcharges that significantly over-recover its fuel costs.[7] The NS continues to do so despite the STB's ban on them in 2007 because they are unreasonable.[8] As a result of this market dominance abuse, Olin was forced to become a named plaintiff in a lawsuit against the four largest Class I railroads alleging conspiracy to impose a rate-based fuel surcharge.[9] The plaintiffs in this action, along with Olin, are currently seeking class certification. This lawsuit alleges that the defendant railroads conspired to coordinate their fuel surcharge programs as a means to fix, raise, maintain, and/or stabilize prices of rail freight transportation services sold in the United States.

Exacerbating the abuses caused by the consolidation of the railroads is, as the STB notes,

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[6] *Hearing on the Federal Role in National Rail Policy Before the U.S. Senate Committee on Commerce, Science, and Transportation*, (Sept. 15, 2010) (Testimony of Daniel R. Elliot III, Chairman of Surface Transportation Board).
[7] *See e.g. South Mississippi Electric Power Association v. Norfolk Southern Railway Company*, Civil Action No. 2:10-cv-00310-KS-MTP (filed Dec. 29, 2010) (lawsuit brought by an electric power cooperative against the NS for breach of contract, including imposition of a rate-based fuel surcharge).
[8] *Surface Transportation Board Decision, Rail Fuel Surcharges* (STB Ex Parte No. 661, Jan. 26, 2007).
[9] *Rail Freight Fuel Surcharge Antitrust Litigation*, MDL Docket No. 1869, Misc. No. 07-0489 (PLF).

that in many situations there is only one "railroad" serving a destination or origin. The rail network in the United States is a series of connected rails, which are owned by various parties. Practically, what this means is that when only one track reaches a shipper, that track is owned by the railroad that operates it. This is the case with Olin's chlor alkali plants, all of which have only one set of rail tracks leading into them. Although only one set of rail tracks leads to these plants, there is no physical or legal barrier to prevent "competing" railroads from reaching the plants on the existing tracks. Rather, the present-day barrier that prevents competing railroads from utilizing the same existing tracks is caused by the railroads' refusals to share their physical assets with each other for a fair fee. This phenomenon is the result of decades of legal fictions, antitrust immunity, regulatory law, and other factors; none of which today supports such commercial behavior by the railroads. The concept of a "captive" shipper is a legal fiction that can and should be legally abolished at this time by the STB. No justification exists for the present state of non-competition among the Class I railroads. As stated by the ABA Section of Antitrust Law with respect to the lack of competition among railroads:

> Exemptions and immunities should be recognized as decisions to sacrifice competition and consumer welfare, and should accordingly be authorized only when some countervailing value – such as free speech or federalism – outweighs the general presumption in favor of competitive markets.[10]

Based on the foregoing, Olin will focus it comments on what the new rules of railroad competition should be, and how reasonable compensation should be determined when an incumbent railroad allows its tracks and terminals to be utilized by other railroads seeking to bid on shipping to or from a location that can only be reached on one set of tracks.

From its own experience as a captive shipper at its chlor alkali plants, Olin demonstrates in Exhibit A that the state of railroad competition is that there is no competition. This state of no

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[10] ABA Section of Antitrust Law, *Comments on the Railroad Antitrust Enforcement Act*, *supra.*

competition is clearly contrary to the mission of the STB and to U.S. policy for rail shipping. Congress has stated the U.S. policy for rail shipping as follows:

> In regulating the railroad industry, it is the policy of the United States Government . . . to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail . . . [11]

As the STB notes on page 2 of its Notice in EP 705, all shippers "would like to have greater access to competition from other railroads." More accurately stated, captive shippers would like to have <u>any</u> access to railroad competition. The STB should use its present legal authority to address this imbalance. To the extent that justifications may have previously existed for such anti-competitive subsidies, those justifications have been extinguished by the consolidation of the Class I railroads and the huge investment returns on publicly traded rail stocks, which began in 2008 during the Great Recession. As stated in the Rockefeller Report:

> The restructuring of the industry that the Staggers Act set into motion thirty years ago has produced a so-called "rail renaissance." The four Class I railroads that today dominate the U.S. rail shipping market are achieving returns on revenue and operating ratios that rank them among the most profitable businesses in the U.S. economy.[12]

The Rockefeller Report sets forth a carefully researched and fully documented analysis of the current financial state of the four "mega-merger" survivors. The Rockefeller Report debunks the oft repeated public relations onslaught of the Association of American Railroads to the effect that the rail industry continues to struggle and has yet to reach financial viability. In fact, the Report documents the remarkable financial health of the big four railroads and their ability to price at levels that allow for double digit profit margins now and into the future. This different state of economic health in the rail industry warrants different measures than are currently in place to ensure that competition exists to benefit the many industries that rely on rail transportation, and

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[11] 49 U.S.C. § 10101.
[12] Rockefeller Report at 1, *supra*.

to benefit consumers.

IV. OLIN'S COMMENTS ON THE SEVEN TOPICS LISTED IN THE NOTICE

1. The Financial State of the Railroad Industry

The financial state of the rail industry is strong, with expectations for continued growth in profitability. Although the railroads occasionally claim that they are facing economic hardship, the reality of the situation is quite different. As Senator Rockefeller stated:

> When they're [the railroads] talking to the Surface Transportation Board, Mr. Elliott's agency, they act like it's still 1980. They say they're barely making enough money to keep the lights on. But when they're on their quarterly calls with Wall Street investors, it's a very different story. These companies tout their high profit margins and their power to dictate prices to their customers. And at the same time they're telling Congress that they don't have enough money to invest in needed capital projects, they're using billions of dollars of their profits to reward their shareholders with dividends and stock buybacks. This is all happening at a time when shippers all over our country are paying more than their fair share to transport their goods to their customers – paying more because they have no other alternative.[13]

Surely the recent acquisition of the BNSF by Warren Buffet's Berkshire Hathaway proves Senator Rockefeller's keen summation of the issue of the financial stability of the Class I railroads. In his annual letter to shareholders sent in February, 2011, Warren Buffet states:

> The highlight of 2010 was our acquisition of Burlington Northern Santa Fe, a purchase that's working out even better than I expected. It now appears that owning this railroad will increase Berkshire's "normal" earning power by nearly 40% pre-tax and by well over 30% after-tax. Making this purchase increased our share count by 6% and used $22 billion of cash. Since we've quickly replenished the cash, the economics of this transaction have turned out very well.[14]

The strong growth in earnings power of the Class I railroads is also reflected in the UP's recent announcement of a 41% increase in fourth-quarter earnings, and plans to hire thousands of

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[13] *Hearing on the Federal Role in National Rail Policy before the U.S. Senate Committee on Commerce, Science, and Transportation*, (Sept. 15, 2010) (Majority Statement by Senator John D. Rockefeller IV).
[14] 2010 Annual Shareholders Letter at 2, http://www.berkshirehathaway.com/letters/2010ltr.pdf.

workers to keep up with demand.[15] CSX has also experienced strong growth as reported in its annual report, which states that 2010 was its best year ever in operating income, operating ratio and earnings per share.[16] This increase in earnings power occurred even as the rate of growth in the railroads' freight volume slowed and high diesel prices weighed on results.

It is almost without dispute that the Class I railroads are not only revenue adequate, but are in the lead of S&P 500 stocks with current profit margins.[17] Olin suggests that of all the issues the STB has set forth for comment, this is the easiest one to resolve, and the STB should focus instead on the competitive remedies to impose and what is fair compensation to the railroads when a competitor makes use of its tracks and terminals.

2. 49 U.S.C. Section 10705 (alternative through routes)

The Staggers Act was enacted with the aim of displacing highly-regulated rates with rates driven by market competition. As already noted in these comments, despite its successes in restoring profitability to the railroads, the Staggers Act has not resulted in improved competition. The lack of competition is alarming considering that the move away from a highly-regulated rail industry was made with the intent that competition would regulate pricing. Although the current state of non-competition among the Class I railroads was not anticipated thirty years ago when the Staggers Act was passed, its provisions can be utilized by the STB to help remedy the problems faced today by captive shippers. Recognizing the unique position of captive shippers, Congress included competitive access provisions to provide "an avenue of relief for shippers where only one railroad provides service."[18] These provisions allow the STB to require terminal

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[15] *Union Pacific's Profit Climbs*, WALL ST. J., Jan. 20, 2011, http://online.wsj.com/article/SB10001424052748704881304576093742318417206.html.
[16] *CSX Highlights Strong Results in 2010 Annual Report, Announces Availability of 2011 Annual Meeting Materials*, http://investors.csx.com/phoenix.zhtml?c=92932&p=irol-news&nyo=0.
[17] Rockefeller Report at 1, *supra*.
[18] H.R. Rep. No. 96-1430, 96th Cong. 2d Sess. 116(1980).

access and reciprocal switching agreements when practicable and in the public's interest.[19]

In addition to the competitive access provisions in the Staggers Act, Section 10705, which predates the Staggers Act, also serves as a source of power for the STB. Section 10705(a)(1) empowers the STB to establish through routes and joint rates. Unlike the competitive access provisions of the Staggers Act that are largely discretionary, the STB is required to take action under Section 10705 when it is in the public's interest.[20] When establishing a through route or joint rate under Section 10705(a)(1), the STB is permitted under Section 10705(a)(2) to prescribe a route that includes a competing railroad's lines when including the competitors lines would create a more efficient or economic transportation.[21] The STB recognized in a recent case that a through route can be prescribed upon a showing that the route is "better" or "more efficient."[22] Although the contract rate in that case was below 125% of variable cost, the STB recognized its duty to interfere when hard bargaining results in an abuse of market power and an insistence on terms that are unreasonable.

Thus, although railroads often argue that they should not be compelled to "short-haul" themselves, Section 10705(a)(2) explicitly provides for such action in appropriate circumstances. In fact, compelling railroads to establish through rates and joint rates is one of the few ways to place a check on the monopolistic power yielded by railroads over captive shippers. These measures become even more critical in instances where the commodity that is shipped cannot be reasonably transported by other modes. Such is the case with chlorine, as illustrated in <u>Exhibit A</u>.

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[19] 49 U.S.C. § 11102(a) and (c).

[20] *See* 49 U.S.C. § 10705 (a)(1) ("The Board may, and <u>shall when it considers it desirable in the public interest</u>, prescribe through routes . . .") (emphasis added).

[21] These are not the only circumstances in which the STB can prescribe a through route that includes a competing railroads lines; *see* § 10705 (a)(2)(A) and (B) for more justifying circumstances.

[22] *Entergy Arkansas, Inc. v. Union Pacific Railroad Co.*, STB Docket No. NOR 42104 (Mar. 15, 2011).

Other statutory provisions that the STB can utilize to implement competitive access measures—including terminal facilities access and reciprocal switching agreements—are discussed more fully below; however, with all of these measures, it should be noted that the only barriers to utilizing them are the self-imposed standards the STB has set for determining when they are in the public interest.[23] These standards were set by the STB near the time the Staggers Act was passed, when the rail industry was still made up of a large number of competing railroads. These standards place a high burden of proof on shippers who are often unable to make the requisite showing to obtain relief. As a result, few shippers are willing to risk the costs involved in bringing a challenge under them. Although these standards may have arguably been appropriate given the state of the rail industry when they were implemented, the current consolidated state of the rail industry and the resulting lack in competition have left them without substance.

The dramatic change in the rail industry warrants an equally dramatic change in the interpretation and application of the competitive access provisions available to the STB. Considering the purpose of the Staggers Act in hand with the current state of the rail industry, the STB should exercise the powers given to it by statute to ensure that the rail industry continues to improve through competition. Not only does the STB have the power to do so, federal precedent establishes that the STB's discretion in applying competitive access provisions is broad.[24] Following its comments on the remaining issues identified by the STB, Olin specifically states the measures in Section V, below, that it believes the STB should implement.

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[23] For example, the ICC decided that it would only find an action to be in the "public interest" when the applicant proved "monopoly abuse," thus turning a rather straight forward proceeding into a mini-antitrust case. *See Midtec Paper Corp. v. Chicago and N.W. Transp. Co.,* ICC No. 39021 at 3 (July 24, 1986).
[24] *Midtec Paper Corp. v. U.S.*, 857 F.2d 1487, 1497 (D.C. Cir. 1988) (". . . we must accept the agency's interpretation so long as it is reasonable- i.e., 'rational and consistent with the statute'" (internal citations omitted)).

3. 49 U.S.C. Section 11102(a) (terminal facilities access)

Terminal access refers to the right of competing railroads to obtain in terminal areas competitive service from incumbent railroads. When a competing railroad uses the terminal of an incumbent railroad, compensation is provided to the incumbent railroad by the competing railroad. The STB's power to require terminal facilities access is found in Section 11102(a), which empowers the STB to "require terminal facilities, including main-line tracks for a reasonable distance outside of a terminal . . . to be used by another rail carrier if the STB finds that use to be practicable and in the public interest without substantially impairing the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business." As discussed above, the only barrier to utilizing this power is the standard of proof required for proving it to be in the public interest.

The benefit of access to terminal facilities reaches beyond competition from existing railroads to encouraging new competition. In addition to trackage rights, railroads need terminal facilities which have expensive handling equipment to place and remove the road trailers/containers to and from the rail cars. Without terminal access, a new entrant would be required to make a sizable and stationary capital investment. As a result, small entrants may be reluctant to enter the market unless they can negotiate with an existing provider for terminal access. Although railroads argue that requiring reciprocal shipping and terminal access would cause a downturn in profits, resulting in a decline in service and in infrastructure, a recent independent report prepared for the STB determined that any effect to railroad profitability would be "small."[25]

For these reasons, the STB should act under its existing statutory authority to allow

[25] Laurits R. Christensen Assocs., Inc., *A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition*, ES–39 tbl. ES–8 (the "Christensen Study").

access to terminal facilities. Further action that the STB can take to remedy the present lack of competition in the rail industry is discussed in Section V, below.

4. 49 U.S.C. Section 11102 (c) (reciprocal switching agreements)

Reciprocal switching arrangements allow railroads serving shippers that are close to another railroad to transport cars of a competing railroad for a fee. Reciprocal shipping arrangements provide shippers with access to railroads that cannot reach their facilities or destinations using the tracks of one railroad. The STB has power under Section 11102(c) to "require rail carriers to enter into reciprocal switching agreements, where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service." Such agreements are needed today to provide competitive service to captive shippers. Reciprocal agreements certainly are practicable as they are already used by railroads in some circumstances. For example the UP/SP granted the BNSF 4,000 miles of trackage rights over its system as part of the UP/SP merger. Mandatory reciprocal shipping is a logical way to deal with the lack of competition caused by monopolistic control over tracks leading to captive shippers.

As has been discussed, the current interpretation of Section 11102 precludes implementing competitive access measures unless it can be shown that the railroad has engaged in anticompetitive conduct. The problem with this standard in today's shipping environment is that it fails to consider the anti-competiveness inherent when only a single track reaches a captive shipper. Only recognizing the need for competitive access when a railroad takes affirmatively anti-competitive action disregards the ability of a railroad to passively benefit from structural obstacles to competition. Unlike when the Staggers Act was passed, the STB now has thirty years of experience to guide its application of the competitive access provisions. Given the inherent anti-competiveness in the rail industry today, the STB is warranted in implementing competitive access measures. Further action that the STB can take to remedy the present lack of competition in the rail industry is discussed in Section V, below.

5. Bottleneck Rates

Bottleneck situations exist when competing railroads are able to ship goods between an origin and an intermediary point, but only one railroad (the bottleneck railroad) has exclusive ability to ship goods from the intermediary point to the destination. A bottleneck situation also exists when competing railroads are able to ship goods between a destination and an intermediary point, but only the bottleneck railroad has the ability to ship goods from the origin to the intermediary point. In bottleneck situations, the bottleneck railroad only has to provide a total rate from origin to destination, and does not have to provide a rate for its exclusive segment of the shipment unless the shipper already has a contract with the competing railroad for the segment of the shipment that it services. The effect of this regulatory scheme is that shippers are unable to obtain quotes from both bottleneck and competing railroads for the portion of the shipment that is serviced by both railroads and, consequently, the shipper is unable to benefit from the competition that would otherwise exist between the bottleneck and competing railroad.

Great Northern v. Sullivan[26] is the basis for the current rule regarding bottleneck rates; however, the facts and surrounding circumstances of that case are vastly different from the modern bottleneck situation. *Great Northern* was decided in the early twentieth century during an era of extensive rail regulation premised on the notion that railroads were natural monopolies or were at risk for excessive competition. The facts in *Great Northern* involved a situation where one railroad operated the exclusive route between an origin and an interchange point, and the other railroad operated the exclusive route between the interchange point and the destination.

[26] *Great Northern v. Sullivan*, 294 U.S. 458 (1935).

There was no possibility for competition from railroads operating other routes because there were no other routes. Given this set of facts and circumstances, the court held that in evaluating a through rate for reasonableness, a proportional rate could not be evaluated independently of the through rate because the proportional rate was only a part of the through rate and the shipper's only interest was in the reasonableness of the rate as a whole.

Although this holding may have made sense in the highly regulated environment that existed 80 years ago, it does not make sense in today's deregulated environment where competition between railroads could lead to lower prices for shippers and, ultimately, consumers. Since *Great Northern*, the complexity and scope of shipments have grown. Today, many shipments are by private contract and thus involve segments outside of the jurisdictional reach of United States' agencies. Advances in the transportation industry have also expanded the methods by which many shipments may be made. As a result, it is becoming increasingly difficult to identify what a total rate should be composed of. Because a total rate may be defined differently or be indefinable, competition between railroads should be allowed and shippers should be permitted to compare rates for segments of shipment between points that more than a single railroad services.

In bottleneck situations, shippers should be allowed to obtain rates from both competing and bottleneck railroads for the segment of a shipment that both railroads have the capacity to service. By allowing this natural competition to take place, shippers' resources would be allocated to the most efficient railroad for each segment of a shipment. By providing a rate for a portion of a shipment that is also serviced by a competing railroad, a bottleneck shipper would be prevented from contributing to inefficiencies which result from the bottleneck railroad hiding a potentially non-competitive rate for a segment of shipment within a single through rate.

Furthermore, railroads should be required to allow competition from other railroads over the same tracks to captive shippers. By allowing competition over the same tracks, railroads would be unable to impose artificially inflated rates and onerous conditions on captive shippers. Not only would such a rule increase competition, it would more accurately reflect the state of the shipping industry today.

6. Access Pricing

Opening real competition between railroads for captive shippers by imposing trackage rights over bottleneck segments will require railroads to provide fair and reasonable access pricing for the trackage rights and terminal access to bottleneck segments; however, any pricing mechanism that is adopted must allow for actual price-reducing competition to take place. Although the pricing mechanism should allow railroads to recover the necessary costs of maintaining their tracks and terminals, it should not allow them to recover the lost revenue that they currently receive from overcharging captive shippers. Although railroads may experience a loss of revenue from their inability to continue charging monopoly rates, the lower rates and increased efficiency would increase demand for rail service, thereby helping to offset any lost revenue. Additionally, setting price by market competition should reflect a true rate rather than one unilaterally imposed by the rail carrier. More importantly, consumers would benefit from lower costs of the products they consume.

To ensure competition, a shipper should initially be able to obtain rate quotes from competing railroads for the bottleneck segment. If the shipper accepted the rate of a railroad that was not in control of the bottleneck segment, that railroad would then need to pay the incumbent railroad a fair and reasonable fee for the trackage rights and terminal access. Determining access pricing would not require an entirely new scheme; mechanisms already exist that could be used. For example, one possible mechanism would be to set access pricing based on the contribution to fixed costs common with other traffic that the incumbent now earns on the traffic in question, and the incremental cost to the incumbent of allowing the entrant to operate over the bottleneck segment. With this method, the incumbent railroad's common fixed costs are covered along with any cost the entrant imposes on its system.

A similar method is described in UP's "Petition to Institute Proceeding to Clarify the Fee Adjustment Mechanism for Trackage Rights Imposed as a Condition on the BN/Santa Fe Merger" that was filed on December 23, 2010 in Finance Docket No. 32549. To determine a fee under this method, the parties first agree to an initial rate per gross ton mile to use the trackage rights. Second, the parties' agree to an annual fee adjustment mechanism. Third, because the annual fee adjustment might not accurately reflect the actual changes in the incumbent's operating costs over time, the parties agree to a "truing" provision.

The fact that railroads have experience in determining access pricing demonstrates that there is no obstacle to them doing so for bottleneck segments, aside from their desire to maintain monopolistic control. Regardless of the particular method for access pricing that would be implemented, it is nearly indisputable that opening up competition would allow the market to regulate pricing; thereby increasing efficiency and lowering costs to shippers and consumers.

7. Impact

Adopting changes in the railroad industry to further encourage competition and allow market pricing is consistent with the deregulation that began with the Staggers Act. Despite this, railroads argue that the current pricing and restrictions are necessary to produce sufficient revenue to maintain rail infrastructure and improve safety and efficiency. This argument is unpersuasive when viewed in light of the strong financial growth experienced by the railroads in recent years, as discussed above. Furthermore, this argument is inconsistent with the principals of competition.

The positive effect that competition has on driving growth and innovation, and for eliminating inefficiencies, is indisputable. Increases in innovation and efficiency contribute to increases in demand. Opening railroads to more competition would also help to eliminate entry barriers for potentially new railroads that could bring further gains in efficiency to the industry. Furthermore, ensuring that prices are set by the market would prevent railroads from attempting to price out certain industries, which could lead to a decline in industry in the United States.[27]

Although 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. The reality today is that the consolidated rail industry is earning record profits while failing to provide reliable service to shippers at reasonable rates. Any argument by the railroads for maintaining the status quo should be seen for what it is—economic protectionism. As noted by the ABA Section of Antitrust Law:

> Antitrust exemptions for the railroad industry – and other long-standing exemptions and immunities – do not appear to be justified by any non-competition related value. Instead, they appear to be no more than "naked economic protectionism," adopted in a legal era that considered economic protectionism in certain industries to be socially beneficial – before the consensus antitrust policy that has largely governed antitrust enforcement in recent decades. It is now appropriate to re-evaluate whether statutory immunities and exemptions are consistent with promoting efficiency and consumer welfare.[28]

Rules that allow railroads to avoid competition have the same stifling effect as antitrust exemptions and immunities. Accordingly, the existing barriers to competition in the rail industry should be removed by the STB through new competition rules to encourage continued efficiency

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[27] The railroads, both individually and through their trade association, the Association of American Railroads, have continually insisted that they should be free to effectively drive the chlorine industry out of existence by refusing to carry chlorine and other essential products such as anhydrous ammonia.

[28] ABA Section of Antitrust Law, *Comments on the Railroad Antitrust Enforcement Act*, *supra.*

and fairness in the rail industry.

V. OLIN'S SUGGESTED NEW STB COMPETITION RULES

1. Point To Point Quotes-Challengeable Rates

As discussed above in Section IV. 5., captive shippers in bottleneck situations are unable to challenge rates, and railroads are generally under no obligation to provide rates, for point to point segments that are serviceable by competing railroads when the ultimate origin or destination is only served by a single railroad. This situation poses a barrier to competition from connecting carriers at interchange points. The STB should remedy this barrier to competition by imposing a rule that requires each railroad to quote, upon request, a single line rate applicable from any origin or interchange point served by it to any destination or interchange point served by it without restricting in any way the application of such a single line rate in combination with other rail rates.

Such a rule would allow each shipper to construct combination rates with each railroad it does business with, rather than be subjected to joint rates controlled by the bottleneck railroad. This would not only open up competition to shippers, it would also enable shippers to challenge the reasonableness of point to point rates. Such challenges are currently impossible because railroads are only required to provide rates from origin to destination. By implementing this rule, shippers and consumers would benefit from the efficiency and productivity gains that competition encourages.

2. New Conditions To Three Mergers

During the 1990's, several rail mergers resulted in significant industry consolidation. Three major rail mergers that occurred during this time were Finance Docket No. 32549 ("BNSF Merger"); Finance docket No. 32760 ("UP/SP Merger"); and Finance Docket No. 33388

(CSX/NS/Conrail Merger"). The BNSF Merger was approved in 1996 and the other two mergers were approved in 1998. Shortly after these mergers, in 2001, the STB issued new merger guidelines that raised the threshold for approval of Class I railroad mergers and requiring provisions for enhanced competition.[29] In issuing these rules, the STB cited to concerns that future rail mergers may adversely affect competition in ways the agency cannot easily remedy and that may disrupt service. These concerns foreshadowed the problems caused by the three mergers that were approved before the new guidelines were enacted.

To remedy the problems addressed in these comments, the STB should—pursuant to 49 U.S.C. § 11327 and 49 C.F.R. § 1117.1—reopen the three mergers to impose supplemental orders and conditions warranted by substantially changed circumstances and conditions arising after the close of oversight proceedings in each of the respective dockets.[30] Such supplemental orders and conditions are necessary because of the virtual elimination of any intramodal rail to rail competition among the four surviving rail carriers. An example of the abusive results of this lack of competition is provided in Exhibit A.[31] This lack of competition has resulted from approval of the above-noted merger proceedings notwithstanding the conditions imposed by the STB, and its predecessor, which were designed to protect that competition.

As previously discussed, the deregulation of the railroad industry has resulted in a consolidation of the Class I long-haul market into four dominant rail carriers that function as regional duopolies in the eastern and western United States. The surviving four rail carriers

[29] Ex. Parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures (decision served June 11, 2001).
[30] In its Decision in F.D. 33388 (Sub-No.91) the STB noted that conclusion of the formal oversight proceedings in that Docket "does not preclude any party from invoking our jurisdiction to address any transaction related concerns." Similarly, in its Petition to Institute a Proceeding to Clarify the Fee Adjustment Mechanism for Trackage Rights Imposed as a Condition on the BN/Santa Fe Merger filed December 23, 2010, the Union Pacific stated: "The Board plainly has continuing authority to address any merger-related concerns arising out of conditions imposed on mergers. See 49 U.S.C. § 11327" (Citation omitted).
[31] Exhibit A documents Olin's experience in operating and managing the SunBelt facility, which began in 1997—the year between approval of the three major rail mergers that are discussed above. As noted in Exhibit A, the tariff rate for the SunBelt movement at issue has increased 817% from the original contract rate in 1997.

account for more than 90 percent of the rail revenues collected in the United States every year, and the absence of intramodal rail to rail competition has dramatically increased the level of those revenues and threatens the economic well-being of entire segments of the U.S. economy. The STB should recognize these facts and act accordingly.

To the extent that any reduction in rail competition is the result of collusion, the courts under the applicable antirust laws have sole jurisdiction. On the other hand, to the extent that a reduction in rail competition is the result of conscious parallelism, the STB has continuing jurisdiction under 49 U.S.C. § 11327 to remedy such anti-competitive conduct. In the context of the merger proceedings here involved, and the promises and representations made by the remaining rail carriers in those proceedings, conscious parallelism among the four dominant North American railroads is an unreasonable practice under 49 U.S.C. § 10702, and subject to the imposition of remedial conditions under 49 U.S.C. § 11327.

In its Final Report to the STB, Laurits R. Christensen Associates, Inc. arrives at several disturbing conclusions regarding the state of intramodal rail competition following the "mega-mergers". Among them is that the current duopoly market structures in the west with the BNSF and UP and in the east with the NS and CSX suggest conditions favorable for conscious parallelism.[32] These are precisely the anti-competitive consequences that many, including the Department of Justice, predicted during the merger proceedings here at issue. The relatively short-lived period of apparent railroad rivalry following the mergers and during the merger oversight proceedings has been replaced by a dramatic reduction in competition and a corresponding dramatic increase in rail rates.

The three mergers at issue were all justified and approved on the supposition that the remaining rail carriers would be strong "competitors" and prepared to introduce additional

[32] Christensen Study, *supra*.

competition into the relevant rail transportation markets. While the resulting combined railroads have undoubtedly become stronger economic entities, they have manifestly failed to introduce more rail to rail competition. In fact, the reverse is true. The duopoly systems in the west and east have simply declined to compete. In these circumstances, and given the justifications presented for approval of the mergers, the merged carriers present conduct in engaging in conscious parallelism must be viewed as an unreasonable practice in violation of 49 U.S.C. § 10702.

Therefore, Olin believes the STB should impose the following new conditions: (1) requiring that each railroad quote, upon request, a single line rate applicable from any origin or interchange point served by it to any destination or interchange point served by it without restricting in any way the application of such a single line rate in combination with other rail rates; (2) prohibiting any railroad from discussing, agreeing upon or sharing information with respect to any single line rate with any person, including any other railroad or railroad agency or association, other than the shipper involved in that specific single line movement; and (3) prohibiting any discussions between or among railroads regarding rates other than those individual rate discussions regarding joint line rates between or among participating interline partners.

Olin respectfully submits, therefore, that the STB should issue as a condition of each merger that each of the big four railroads be required, upon request, to quote a single line rate applicable from any origin or interchange point served by it to any destination or interchange point served by it without restricting in any way the application of such a single line rate in combination with other rail rates. This condition would allow each shipper to construct combination rates with each carrier with which it does business rather than being subjected to joint rates controlled by bottleneck carriers and with no effective STB rate jurisdiction.

Olin also respectfully submits that the STB should issue as a condition of each merger that each of the big four railroads be prohibited from discussing, agreeing upon or sharing information with respect to any single line rate with any person, including any other railroad or railroad agency or association not responsible for billing and collection of charges, other than the shipper involved in that specific single line movement. This condition, coupled with the condition above, would allow each shipper to negotiate with each railroad without that railroad communicating with its competitors regarding those negotiations or rates.

Olin also respectfully submits that the STB should issue as a condition of each merger that each of the big four railroads be prohibited from discussing, agreeing or sharing information regarding rates other than those individual rate discussions regarding joint line rates between or among railroads actually participating in such joint line movements. This condition would prohibit carriers from communicating with one another about rates in which they do not actually have an interest as a method for sharing information regarding future rate actions and facilitating conscious parallelism.

3. Ceiling On Large Rate Cases

One simple solution to the exorbitant rates faced by captive shippers is to impose an R/VC ceiling. The idea for an R/VC ceiling is supported by Mr. Pittman, who states:

> Surely a simpler, more straightforward, and above all cheaper way could be chosen to protect "captive" shippers. As I suggest in the companion paper to this one (Pittman, forthcoming), one possibility would be a ceiling on the price-to-variable-cost ratio - corresponding to the floor on this ratio below which the STB lacks jurisdiction to challenge rates - that would, like the stand-alone-cost test, act as a constraint on the degree to which Ramsey pricing is permitted.[33]

[33] Pittman, "Against the Stand-Alone-Cost Test in U.S. Freight Rail Regulation," *supra*.

Although existing statutes impose a jurisdictional floor on the STB's ability to intervene in the rate set by a railroad, there is no ceiling on the rate that a railroad can set. Currently, the STB can only intervene when the rate at issue exceeds 180 percent of the variable cost of carrying the traffic. This requirement recognizes that the railroad should not be allowed to recover greatly above its variable costs.

The reality of the present situation, as illustrated in Exhibit A, is that captive shippers are often subjected to rates that greatly exceed the variable costs incurred by railroads. Aside from increasing costs to shippers and consumers, these excessive rates hide inefficiencies that could be corrected through competition by allowing railroads to "subsidize" tracks that face competition by increasing rates on bottleneck segments. Railroads are able to set these exorbitant rates because they enjoy monopolistic control over the bottleneck segments. Although shippers can challenge these rates, it is a costly, time-consuming process. As noted in Exhibit A, Olin estimates that a challenge to the SunBelt route would cost up to $12 million including legal fees and the incremental freight cost. To prevent railroads from imposing unjustifiable rates by leveraging their exclusive control, an R/VC ceiling should be imposed by the STB. Such a rule would not only protect shippers and consumers from the costs of unreasonable rates, it would also streamline the regulatory process, thereby enhancing certainty and efficiency.

In conclusion, as demonstrated in these comments and Exhibit A, the state of railroad competition for captive shippers is that there is no competition. This state of no competition is the result of the consolidation of the rail industry that has allowed the remaining four Class I railroads to exercise monopolistic control over captive shippers. The STB should address this lack of competition, and the vastly changed state of the rail industry, by exercising its existing authority to implement the measures discussed herein. Such measures would not only benefit shippers and consumers, they would also ensure that a competitive and viable rail industry continues to exist.

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<u>**EXHIBIT A**</u>

Olin is the largest merchant shipper of chlorine in North America. As discussed in the body of Olin's comments in STB EP 705, chlorine is an essential product that contributes more than $46 billion to the U.S. economy each year. Olin operates two chlor alkali plants at McIntosh, Alabama, both of which can only be reached on tracks controlled by the Norfolk Southern railroad ("NS"). Due to the nature and quantity of the chemicals it produces, it is not feasible for Olin to ship by truck from its McIntosh plants. For these reasons, Olin is a captive shipper bound by whatever terms the NS imposes on it for shipping.

One of the plants that Olin operates at McIntosh, Alabama is the SunBelt Chlor Alkali Partnership facility ("SunBelt"). Olin has managed the production and logistics of SunBelt under contract since August 23, 1996. Because Olin's experiences in managing and operating SunBelt provide the clearest example of the challenges facing captive shippers from the lack of competition in today's rail industry, Olin will focus on its experiences with SunBelt in this Exhibit.

SunBelt is contractually obligated until December 31, 2094 to deliver 250,000 tons of chlorine (approximately 2,777 rail tank cars) per year to its only chlorine customer at LaPorte, Texas (the Texas customer has a contractual right to request delivery to alternative destinations). This customer uses chlorine to fabricate PVC, a plastic that is important to many industries because it is inexpensive, durable, and easy to assemble. Olin, on behalf of SunBelt, negotiates freight rates for this chlorine volume with the NS, the originating carrier in McIntosh.

This lane is the largest volume chlorine lane that Olin negotiates in North America, and Olin estimates that the current annual freight cost exceeds $30 million. It would seem obvious that such a valuable lane would have railroads competing for its volume; yet, the opposite is true. Because of the NS' exclusive control over the tracks leading to the McIntosh plant, and because of the existing policies and paper barriers that allow for a total lack of competition, SunBelt has no alternative other than to ship on the NS at rates dictated by the NS.

The NS' exclusive control and the lack of competition have resulted in sharp increases in shipping costs to SunBelt. The original rate that the NS provided to SunBelt was $1,440/car, which Olin relied upon when it invested significant resources to build the SunBelt facility. Since December, 2002, the chlorine line-haul rate for this lane has increased approximately 600%. The tariff rate for this movement remains even higher—the 2011 tariff rate is $11,763/car (571% R/VC), an increase of 817% over the original contract rate.

SunBelt has attempted to achieve a reasonable freight rate for this lane through competition past the bottleneck lane, but to date, it has been compelled to enter into adhesive, unfavorable contracts for this volume as western rail competition has inexplicably failed to materialize. Because the NS' published tariffs have been even higher than the private contracts it offers, SunBelt has been compelled to enter into adhesive contracts.

Further, the NS continues to exploit its market dominance, and lack of competition from western carriers, when in recent but unsuccessful negotiations, it attempted to impose new onerous terms and conditions on SunBelt. These included new indemnity terms on SunBelt that would practically make it an insurer for the NS, as well as new take or pay volume provisions that would potentially require SunBelt to pay for shipments that it never makes. Accepting a take or pay volume provision as the NS is trying to impose would effectively allow the NS to dictate production requirements for SunBelt without regard to customer demand.

As noted on page 4 of Olin's comments, the NS generally continues to impose rate-based fuel surcharges that significantly over-recover its fuel costs. This is despite the lawsuit against the four largest Class I railroads alleging conspiracy to impose a rate-based fuel surcharge.[34] This is also in spite of the STB's ban on such fuel surcharges in 2007 because they are unreasonable.[35]

Although competitive access exists in Mobile, Alabama (a mere 40 miles from where Olin's McIntosh plants are located), the NS has systematically denied Olin and SunBelt access to this rail competition. The NS has repeatedly refused to provide SunBelt with a reasonable chlorine rate offer from McIntosh to Mobile without restrictions. The current public tariff restricts traffic by prohibiting delivery anywhere other than to DeLisle, Mississippi or LaPlace, Louisiana. Because SunBelt's sole customer is located in LaPorte, Texas, SunBelt is restricted from using this tariff.

The intent of the NS in imposing these restrictions is to block SunBelt's access to a competitive carrier in Mobile, and possibly to send signals to the western carriers. As a result, no western carrier has requested access to the NS' tracks into McIntosh despite the huge revenue available to a carrier for the LaPorte move. Likewise, no western carrier has requested the NS to issue a non-restricted tariff to Mobile so that CSX, Union Pacific ("UP") or Burlington Northern Santa Fe ("BNSF") could compete for this move to LaPorte, Texas.

Although CSX operates a line from Mobile to New Orleans that would provide a better, direct and more efficient route for SunBelt's shipments to LaPorte, access to this potential option is blocked by the NS' ability to refuse to "short-haul" itself by routing traffic over CSX lines. Below is a map illustrating the route that is currently used to serve SunBelt (Route 1), as well as the alternative routes that SunBelt is precluded from using (Route 2 and Route 3):

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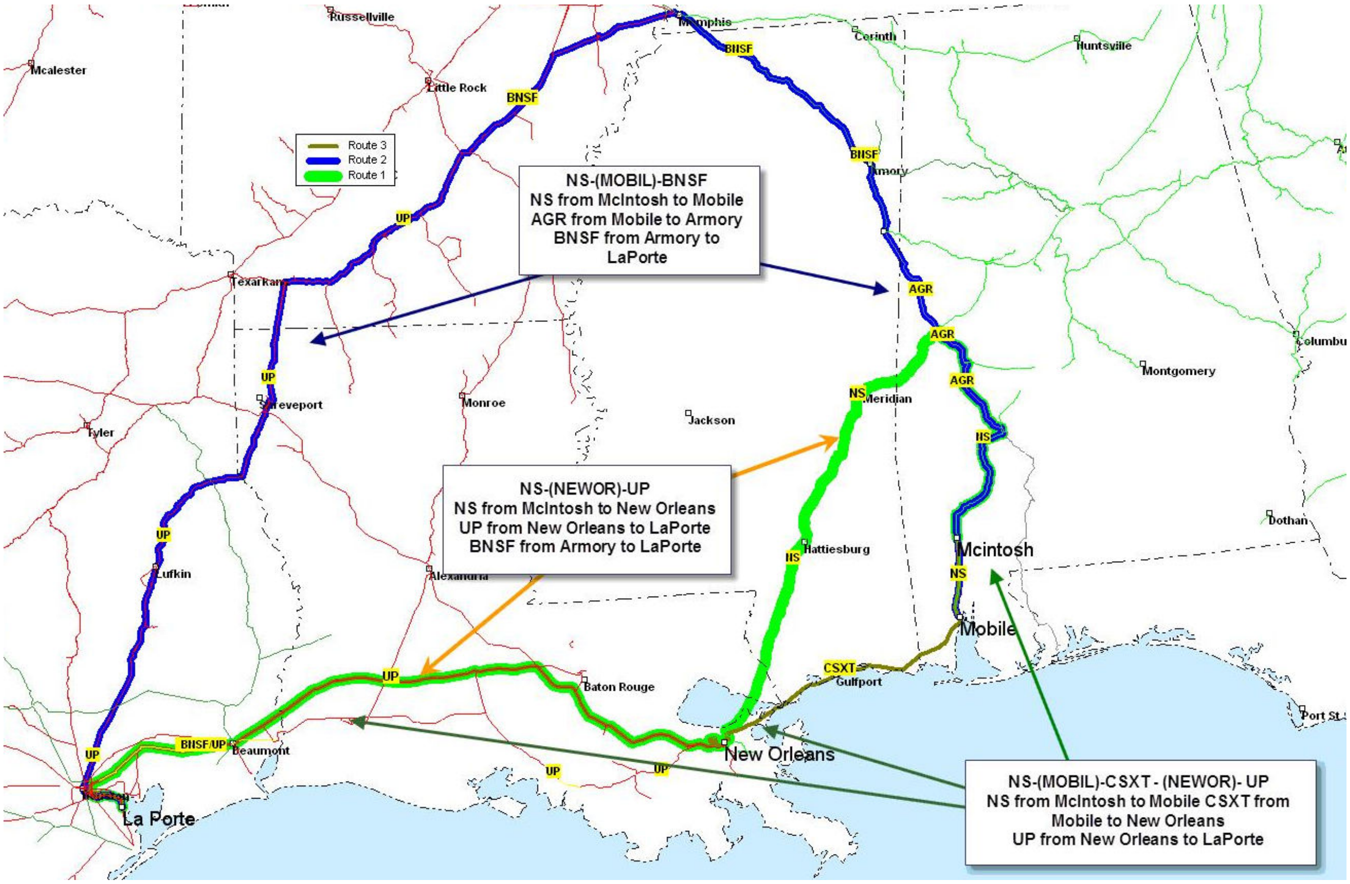
[34] *Rail Freight Fuel Surcharge Antitrust Litigation*, MDL Docket No. 1869, Misc. No. 07-0489 (PLF), (D.D.C., consolidated Nov. 7, 2008).

[35] *Surface Transportation Board Decision, Rail Fuel Surcharges* (STB Ex Parte No. 661, Jan. 26, 2007).



As can be seen from this map, Olin and SunBelt's McIntosh facility can only be reached on the NS' lines. The NS carries SunBelt's shipments north from McIntosh and then backtracks south to New Orleans. Despite the close proximity of Mobile, just south of McIntosh, the NS is permitted under existing policy to refuse to "short-haul" itself; thereby preventing SunBelt from using Route 3 on the map, above. Consequently, SunBelt's shipments must travel a significantly greater distance, resulting in increased costs to SunBelt and its customers.

Another example of the NS' systemic denial of competition is provided by its response to the change in the NS tariff situation that occurred in August, 2010. In August, 2010, the NS published a public tariff chlorine rate from McIntosh to Mobile, presumably as a result of an unreasonable rate claim filed with the STB by DuPont (which eventually ended up in a STB

SAC rate challenge brought by DuPont against the NS).[36] It is important to note that in the DuPont rate case, all the lanes at issue showing the origination as McIntosh, Alabama are in fact the exact same bottleneck lane SunBelt faces with the NS. In other words, the molecules subject to the DuPont rate case are manufactured by Olin at McIntosh and sold FOB McIntosh to DuPont. Thus, DuPont must negotiate the bottleneck lane with the NS, just as Olin and SunBelt do. These are the same tracks subject to this Exhibit A note.

The August, 2010 tariff rate was initially published at $1,700 per car. Once SunBelt learned of this public rate, it immediately began shipping a small percentage of its chlorine volume, as allowed under its contract with the NS, at this tariff to Mobile and interchanged with the BNSF at a public tariff of $4,354 with delivery at LaPorte, for a total rate of $6,054. This total rate was substantially lower than the NS/SunBelt private contract rate. Furthermore, the NS tariff rate did not include a rate-based fuel surcharge because of the STB prohibition.

Once the NS discovered that SunBelt was availing itself of this publicly available, lower cost alternative to SunBelt's only chlorine customer in LaPorte, Texas, the NS quickly modified the chlorine tariff to require delivery only into DeLisle, MS or LaPlace, LA (both DuPont facilities). The effect of these restrictions was to eliminate this rate for SunBelt and any competition. The BNSF public tariff rate of $4,354 per car from Mobile (40 miles from the SunBelt plant) to LaPorte routes the rail cars from Mobile north, right past the SunBelt facility, and on to LaPorte. Were SunBelt able to ship directly from McIntosh to LaPorte via Mobile on the BNSF, the rate would logically be lower than $4,354 per car—less than half of the current NS tariff to LaPorte of $11,763.

In January, 2011, the NS yet again modified the McIntosh to Mobile tariff. The NS increased the tariff from $1,700 to $2,900, but apparently forgot to include the destination

[36] *DuPont v. NS*, STB Docket No. NOR 42125 (Oct. 7, 2010).

restrictions, meaning SunBelt once again had a potential option. Once SunBelt learned of this tariff change, it began shipping chlorine volume (a small volume as restricted by the NS' adhesive contract) on this lane to interchange with the BNSF at Mobile to deliver into LaPorte. The combined tariff freight rate for the NS and the BNSF (public tariff from Mobile to LaPorte) legs totaled $7,254 with no rate-based fuel surcharge: substantially less than the NS private contract rate. SunBelt shipped 57 cars at this combined tariff rate. Once the NS found out that SunBelt was using its public tariff, it again demonstrated its market dominance on March 16, 2011 by imposing delivery restrictions so that SunBelt could not use this tariff to ship its products to Texas, including to its sole chlorine customer at LaPorte.

Recently, the BNSF advised SunBelt of its intent to let its Mobile-LaPorte tariff expire effective March 15, 2011—a few weeks before the March 30, 2011 expiration date of the NS/SunBelt private contract. Since then, the BNSF has declined to publish a public rate or offer a private contract rate for the Mobile-LaPorte lane, despite multiple requests by SunBelt and despite the more than $12 million of potential revenue for a railroad from a 250,000 ton chlorine move. What could motivate a carrier to turn away such business? Regardless of motive, which the STB should investigate, the STB should investigate the conduct of the NS and the BNSF to eliminate competition and thus SunBelt's shipping options. This type of behavior is just one example of why the proposed competition rules should be implemented by the STB.

No western carrier has attempted to gain access to the SunBelt plant via Mobile despite the large revenue available from the move to LaPorte. If there were bottleneck lane reform, reciprocal shipping, and terminal access, the practices discussed here would disappear.

Now that the NS has removed all potential options, SunBelt continues to attempt to "negotiate" for a private contract with the NS and the UP for the McIntosh-LaPorte lane, which includes the BNSF's only western competition, the UP via New Orleans. To date, NS/UP's contract offer includes an unreasonable rate of $8,920 per car (R/VC of 433%) with additional onerous conditions, such as the rate-based fuel surcharge banned by the STB.

The NS/UP continue to demand an excessive rate-based fuel surcharge that significantly over-recovers their fuel costs. The NS/UP are also demanding changes to the previously negotiated NS master terms and conditions applicable to the lane. The NS/UP have added a new proposed volume requirement to their contract proposal that would force SunBelt to ship a minimum of 100% of the LaPorte contract volume to the LaPorte customer from McIntosh, and is demanding that Olin agree to ship a set number of rail cars on the lane even if it exceeds the total number of rail cars delivered to LaPorte. Consequently, this destroys any possibility of competition. In addition to destroying the possibility of competition, this requirement by the NS effectively yields control of how Olin runs its business to the NS, despite the NS' lack of knowledge and expertise in running a multi-plant chlor alkali business.

Additionally, the NS/UP proposal imposes excessive shortfall payment requirements that further punish SunBelt for attempting to ship its product at a reasonable rate. Finally, the NS/UP demand that SunBelt acquiesce to new onerous indemnity language and demand that SunBelt affirm facts outside its knowledge regarding Positive Train Control related to this contract offer.

In response to the NS/UP's unwillingness to negotiate in good faith, SunBelt requested a tariff rate for this lane on January 4, 2011. The NS initially declined to issue a tariff rate, insisting that it had already provided a rate for this volume. Only after SunBelt's further insistence did the NS, on February 18, 2011, issue its tariff requirements at $11,763 per car. This rate has R/VC of 571%, which is clearly unreasonable as determined under previous STB decisions. To compare, before its tariff expired recently, the BNSF shipped chlorine cars from

Mobile, right past SunBelt's McIntosh plant, and on to LaPorte for $4,354 (216% R/VC), which is $7,409 less than the tariff offered by the NS. Only a year ago, in February, 2010, the NS published a tariff for this same move at 474% R/VC. What has changed in only a year to justify such a high tariff increase over a single year?

In another attempt to solicit competitive alternatives from the western carriers (BNSF and UP) for this chlorine move, SunBelt requested that the BNSF provide a private contract rate from New Orleans to LaPorte so that SunBelt could then use the private contract rate to force the NS to provide a bottleneck rate (similar to the request by SunBelt for a contract from Mobile to LaPorte that was denied by the BNSF). The BNSF declined to provide a private contract rate. Similarly, the UP has also declined to provide a private contract rate from New Orleans to LaPorte. The inability to obtain private contract rates from any carrier other than the bottleneck carrier for a 250,000 ton move demonstrates, at a minimum, that the state of competition for captive shippers is that there is no competition.

SunBelt's inability to obtain any competitive options was further reinforced by a new tariff set by the Alabama and Gulf Coast Railway ("AGR") recently. AGR provides service from Mobile on the NS track to Amory, Mississippi, where it interchanges with the BNSF to LaPorte, Texas. On March 11, 2011, AGR issued a new tariff that purports to prohibit more than 3 loaded chlorine cars from being transported in the same train at any time, and to require a $15,000 charge per train. This new tariff prevents any further attempt by SunBelt to obtain competition—yet another example of why the STB should issue new rules to address the lack of competition in the rail industry today.

SunBelt is now bringing a rate case as it has exhausted all possible alternatives to obtain relief from the onerous terms and excessive rates imposed on it. SunBelt recognizes that an STB

SAC rate challenge could cost up to $12 million in legal fees and increased freight rates to ship the contractually required volume to its Texas customer, and require up to two years to prosecute. This amount could increase even more if the NS continues to punish SunBelt with additional rate increases.

This situation demonstrates why new rules to drastically lower the cost of pursuing such claims for unreasonable rates and practices should be imposed by the STB. In effect, the current rules and regulations give the railroads a club to use against captive shippers. Most importantly, as shown in Olin's comments, the STB should follow Mr. Pittman's recommendation that an R/VC ceiling be imposed. Imposing a ceiling would be a logical method of moderating rates without the need of costly SAC challenges. The functionality of the R/VC measure in determining rates is already evidenced by Congress' use of it to set a floor for jurisdiction. Such a ceiling, along with a railroad obligation to quote, upon request, a single line rate applicable from any origin or interchange point served by it to any destination or interchange point served by it, without restricting in any way the application of such a single line rate in combination with other rail rates, would help to address the competitive problems that exist today with current rail policy and the consolidated state of the rail industry.