

March 25, 2009

VIA HAND DELIVERY

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 F. Street, SW
Washington, DC 20423



Re **STB Finance Docket No. 35219, Union Pacific Railroad Company—
Petition for a Declaratory Order**

Dear Ms Quinlan

224746

Enclosed for filing in the above-captioned case please find the original and ten (10) copies of Olin Corporation's Reply to the Petition for a Declaratory Order filed by Union Pacific Railroad Company. An additional copy is included for date-stamping and return via our messenger.

Please feel free to contact me with any questions

Sincerely,

Gregory M Leitner

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Husch Blackwell Sanders LLP
Counsel for Olin Corporation

Enclosure

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35219



**REPLY OF OLIN CORPORATION TO
THE PETITION OF UNION PACIFIC RAILROAD
COMPANY FOR A DECLARATORY ORDER**

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Dated: March 25, 2009

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35219

**REPLY OF OLIN CORPORATION TO
THE PETITION OF UNION PACIFIC RAILROAD
COMPANY FOR A DECLARATORY ORDER**

INTRODUCTION

Olin Corporation, through its Chlor Alkali Products Division (“Olin”), hereby submits the following Reply to the Petition of Union Pacific Railroad Company (“UP”) for a Declaratory Order filed on February 18, 2009 (the “Petition”) UP filed the Petition seeking to have this Board declare in an expedited manner whether it must follow existing law by giving a tariff quote to its unnamed customer¹ UP also seeks a declaration on “whether a shipper has an unlimited right to ship [toxic inhalation hazards (“TIH”)] wherever it chooses without considering the safety of the employees and the public who would be at risk unnecessarily in light of demonstrably better alternatives.” (Petition, last paragraph of Argument section) The Petition is UP’s third attempt to have the Board change the common carrier obligation. The timing of the Petition is curious, because UP has already raised the same issue in a filing made on April 17, 2008 in Ex Parte No. 677 (“STB 677”), and in a filing made on July 10, 2008 in

¹ On March 23, 2009, U S Magnesium, LLC filed comments (the “USM Reply”) opposing UP’s Petition, thereby disclosing itself as the UP customer in issue, and contradicting many factual claims of UP

Ex Parte No 677 (Sub-No. 1. Obligation of Railroads-Transportation of Hazardous Materials)
("STB 677 (Sub-1)").

On April 17, 2008, the Association of American Railroads (the "AAR") filed a brief in STB 677 (Sub-1) in which it raised the issue of the long distance shipment of TIH, and asserted that "[t]his traffic should not be moving long distances across the country to further the commercial interests of producers or receivers when closer sources of supply are available." AAR Brief at p 26 This AAR brief was adopted by UP, yet UP did not request an expedited hearing on this matter on April 17, 2008, or in its filing made on July 10, 2008, or even prior to February 18, 2009 It would seem there must have been an unstated reason that UP filed this latest Petition to change the common carrier obligation, for which it suddenly seeks an expedited declaration. The USM Reply shows the true reason for this latest Petition is a commercial dispute between UP and USM

UP's own Petition defeats its argument for an expedited declaration because UP admits to the Board that, "despite previously having rail rates available, the customer [undisclosed] has shipped a total of one car to these four [Texas and Louisiana] destinations within the last year " Petition at p 2² That is, there is no emergent safety or security reason supporting UP's request for an expedited declaration UP does not tell the Board why it thinks that under the (refused) tariff quote, USM would increase its shipments from those it made in the last year—totaling one—or why UP was willing to voluntarily enter into contractual "rail rates" with USM last year, but suddenly, in February of 2009, it is unsafe to give a tariff quote to this small shipper of chlorine. It would seem that UP requested "expedited handling" of its Petition because it violated the law by refusing to quote a tariff to a shipper upon request, in effect implementing *in advance* the change in the common carrier obligation law that it seeks. Yet, UP

² The USM Reply contradicts this UP claim, but UP should be bound by its own allegations, even if inaccurate

fails to cite (and provides no evidence) of any alleged imminent threat or danger along the route in question, which, according to the Petition, and as confirmed by the USM Reply, emanates near Salt Lake City, and travels through Kansas City and Fort Worth.

Since it appears obvious that the true motivation behind this latest UP Petition is to gain an unfair advantage in a commercial dispute between UP and USM, the UP Petition should be denied, as it asks this Board to decide the exact issue already before it, and, while resolution of the issue is pending, UP should be ordered to comply with the law and give a tariff quote to its customer, as USM requests

BACKGROUND

By way of background, Olin's Chlor Alkali Products is one of the leading producers of chlorine and caustic soda in North America. Chlor Alkali Products is headquartered in Cleveland, Tennessee and includes manufacturing sites in New York, Georgia, Tennessee, Alabama, Nevada, Louisiana, California and Washington, plus one facility in Canada.

Olin has been involved in the U.S. chlor alkali industry for over one hundred years, and was the first commercial supplier of chlorine in the United States. Olin continues to grow and service the chlor alkali industry. Besides chlorine and caustic soda, Olin Chlor Alkali Products manufactures and sells many derivatives of the chlorine manufacturing process, such as hydrochloric acid, hydrogen, sodium chlorate, bleach products and potassium hydroxide.

As one of the nation's leading producers and shippers of chlorine, Olin produces an essential chemical that has played a key role in dramatically reducing infant mortality rates and eliminating water-borne diseases around the world. Moreover, the biggest end use for chlorine is housing and commercial construction, in which chlorine is used to produce products such as

vinyl siding, PVC piping, insulation, and most paints and fire retardant additives - all products critical to the North American economy.

For the purposes of its reply, and because the issue raised by UP is already before the Board, Olin adopts by reference and incorporates:

- 1 Reply of the Chlorine Institute filed in this matter on March 12, 2009.
- 2 Reply of Olin Corporation filed in STB 677 on April 16, 2008.
3. Reply of Olin Corporation filed in STB 677 (Sub-1) on July 10, 2008
4. Reply of the Chlorine Institute filed in STB 677 on April 17, 2008
5. Reply of the Chlorine Institute filed in STB 677 (Sub-1) on July 10, 2008.
- 6 Reply of the American Chemistry Council filed in STB 677 on April 17, 2008.
- 7 Reply of the American Chemistry Council filed in STB 677(Sub-1) on July 10, 2008.

DISCUSSION

UP filed a brief on April 17, 2008 in STB 677 and adopted the comments of the AAR, also filed on April 17, 2008, which admitted on page 24 that chlorine is safe to ship by rail

Each year 1.7 to 1.8 million carloads of hazardous materials (hazmat) is transported by rail. . . . 'Toxic inhalation hazards' . . . are a small subset . . . Railroads typically transport around 100,000 carloads of TIH each year, virtually all in tank cars. The rail hazmat safety record is extremely favorable. In 2005 (the most recent year for which data are available), 99.997 percent of rail hazmat shipments reached their final destination without a release caused by an accident.

UP also submitted testimony on July 10, 2008 in STB 677 (Sub-1). Because UP conceded that TIH shipping is safe, its comments in both filings concentrated on allegedly unfair shifting of risk to the railroads. In neither filing did UP request the right, based on safety or security of the public, to refuse tariff quotes if *UP decides* subjectively that ample chlorine is "already" available to the shipper's customer in the area of the destination. Interestingly, UP is silent in its Petition about whether the Board should *prohibit* UP from giving a tariff quote for the movement of chlorine through any High Threat Urban Area ("HTUA") or "large community". Moreover, UP does not tell the Board who would get to decide the issue of

“ample” chlorine at the destination UP, the Board, the Federal Railroad Administration (“FRA”), the Transportation Security Administration (“TSA”), the Department of Homeland Security (“DHS”), the Department of Transportation (“DOT”), a chlorine producer, a UP customer, and/or the chlorine producer’s customer? This is a recipe for chaos

Olin would show that UP presently participates in the movement of thousands of shipments of chlorine across distances exceeding 300 miles, with many exceeding 1500 miles. This chlorine surely passes through “large communities” as well as HTUAs from time to time.

The common carrier obligation is the statutory duty of railroads to provide transportation or service for shippers under 49 U.S.C. § 11101(a). Olin takes this obligation very seriously because all of our facilities have access to only one rail carrier. Furthermore, 80 percent of Olin’s chlorine is transported by rail to customers who have no other option than to receive it by rail. For a captive shipper like Olin, regardless of its size or location, the efficient movement of its traffic - in some cases even the very survival of its business - depends on the common carrier obligation.

The common carrier obligation was established by Congress to protect all rail shipments, including chemicals such as chlorine. When examining the common carrier obligation, it is important to review the exact contents of 49 U.S.C. § 11101 (a), which are as follows:

“(a) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request .”

As this statute illustrates, the common carrier obligation is not conditioned on whether or not a chemical is a TIH. In fact, this statute makes no reference to the particular safety of the commodity which is being transported. Rather, the duty applies to all shipments by rail and is based on a reasonable request. Olin believes it is very reasonable to require railroads to carry

substances such as chlorine Congress did not intend for cost and safety issues for railroads or the distance of the move from origin to destination to be reasons to deny service under the common carrier obligation.

It is reasonable to require railroads to transport chemicals like chlorine for two primary reasons: the exemplary safety record of the shipment of chlorine, which UP has admitted, and the extreme importance of chlorine to our nation's health, economy and security

UP's Petition in effect would allow each railroad to subjectively allocate or eliminate the supply of rail services available to (mostly) captive chlorine shippers and to further allocate chlorine supplies, suppliers, and markets, while removing from the Board both its power to prevent such anticompetitive abuse and its power to enforce the common carrier obligation.

Yet, in testimony submitted to the Board in STB 677 (Sub-1), UP admitted that TIH product swaps would be needed for TIH users to be supplied from the nearest TIH production facility **"but we cannot make that happen, and the Department of Justice will not apparently allow chemical companies to arrange them."** See UP's July 10, 2008 filing in STB 677 (Sub-1) at p. 5 It is unusual that UP would think that the Board would be able to impose such a policy when others cannot

UP fails to mention in its Petition how many contracts or tariffs to which it is presently a party that involve the movement of chlorine over 300 miles through HTUAs or "large communities", or how many of its existing chlorine destinations already have "ample" supplies of chlorine **The Board should conduct sworn, confidential, non-public discovery from UP on such information, and discover what UP considers "large communities" to be, as well as any information UP has assembled on availability of "ample" chlorine supplies in all chlorine destinations.**

UP couches its Petition in the name of safety and security of the public. Yet, the governmental agencies—such as the DOT, FRA, TSA, and DHS—that have been charged by Congress with actual authority to regulate the safety and security of TIH movements are already exercising their jurisdiction, and TIH is moved by rail shipment through HTUAs or “large communities” because these agencies have determined that it is safe and secure to do so—as UP has admitted in its STB 677 testimony. Actions of the federal agencies charged with regulating the safety and security of TIH movements are controlling on the question raised by UP in its Petition.

CONCLUSION

In summary, this is UP’s third effort to have this Board change the common carrier obligation, despite the fact that only Congress holds this power. Several parties have material interests in the outcome of this proceeding. The U.S. economy and national security would suffer without the readily available supply of chlorine, which must be shipped by railroads. The producers of chlorine have a strong interest in being able to get their products to market over the rails. The consumers of chlorine have an interest in having the producers compete on pricing, and in having access to reasonably priced shipping. The railroads also have business interests. The railroads would have the Board trump all other interests in their favor, which is not reasonable or necessary. If UP is worried that USM is setting it up for a rate case based on failed contract negotiations, then the easiest remedy is for UP to simply follow the law and give a fair tariff quote to USM, and allow the Board time to make rulings on the two pending proceedings already underway.

Respectfully submitted,

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Dated: March 25, 2009

BEFORE THE
SURFACE TRANSPORTATION BOARD

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25th day of March, 2009, I served two copies of the **REPLY OF OLIN CORPORATION TO THE PETITION OF UNION PACIFIC RAILROAD COMPANY FOR A DECLARATORY ORDER**, in the above captioned matter by first class mail, postage prepaid to:

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Unless otherwise noted, an original and 10 copies have been sent to the Board via hand delivery on the same date.

March 25, 2009.

See @. Sigster