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**STB EX PARTE NO. 676**

**Advance Notice of Proposed Rulemaking**

**Consideration of Full disclosure/informed consent requirement on railroad pricing practices**

**Comments Submitted by**

**Olin Corporation**



Olin Corporation, through its Chlor Alkali Products Division, (“Olin”) is submitting the following comments to the “Advance Notice of Proposed Rulemaking” for Surface Transportation Board (STB) Ex Parte No. 676. Olin is one of the leading producers of chlorine and caustic soda in North America. Olin is headquartered in Cleveland, Tennessee and includes manufacturing sites in New York, Georgia, Tennessee, Alabama, Nevada, Louisiana, California and Washington state, plus facilities in two Canadian provinces, Quebec and New Brunswick.

Olin would like to thank the STB for the opportunity to comment on the “Advance Notice of Proposed Rulemaking” for STB Ex Parte No. 676. At the outset, Olin commends the STB for its recent decision in STB Ex Parte No. 669 in not attempting to define the term “contract” which is a matter of state statutory and common law. Olin felt that the proposal to define a “contract” (if it would have been finalized) would have resulted in further collusion and price signaling by the railroads which would have likely caused even further increase in rail rates.

In the “Advance Notice of Proposed Rulemaking” for STB Ex Parte No. 676, the STB is asking for comments on the “proposal to consider imposing a “full disclosure/informed consent requirement” on railroads’ pricing practices.

In Docket Nos. 42099, 42100 and 42101, *E. I DuPont De Nemours and Company v. CSX Transportation, Inc.*, the Board recited what Olin believes is an accurate and sensible statement as to the status of contracts under 49 U.S.C. 10709:

The Board has primary authority to determine its own jurisdiction. See *Burlington N., Inc. v. Chicago & N.W. Transp. Co.* 649 F. 2d 556, 558 (8<sup>th</sup> Cir. 1981) When the question is whether a valid rail transportation contract exists, the Board will often defer to the courts. But before we will dismiss a rate complaint, the defendant railroad must demonstrate a reasonable possibility that a rail transportation contract governs the movement in question. See *Toledo Edison Co. v. Norfolk & Western Ry. Co.*, 367 I.C.C. 869 (1983). (Decision at p. 4)

Plainly, the question of whether the parties to any business transaction, including a rail freight movement, intend to enter into a legally binding contract is a question of law

to be decided by the courts of the state where that transaction is properly consummated. The Board may indeed determine as an initial matter whether it believes that it has jurisdiction over the transaction, but the ultimate decision is not one for the Board to make.

Under a contract, this proposal could require shippers, like Olin, to agree in writing to abusive terms and conditions imposed by a carrier, to which Olin would never agree if there were equal bargaining power. As a result, it would give railroads further leverage to be even more market abusive in the terms and conditions of a contract in order to force shippers to avoid a higher priced tariff arrangement. Furthermore, under this proposal, if a shipper accepts in writing (or is forced by a railroad to accept in writing) a "full disclosure statement" certifying the relationship is a contract, shippers could lose the ability to argue that the carrier's forced terms and conditions create a contract of adhesion, and thus are not enforceable under state law. Under current law, railroad contracts may be contracts of adhesion due to the unequal bargaining power between the parties. See Canon USA, Inc. v. Norfolk S Ry Co., 936 F. Supp. 968, 973 n.7 (N.D. Ga. 1996); see also Aguillard v. Auction Mgmt. Corp., 908 So. 2d 1, 9 (La 2005) (quoting Saul Litvinoff, Consent Revisited: Offer Acceptance Option Right of First Refusal and Contracts of Adhesion in the Revision of the Louisiana Law of Obligations, 47 La. L. Rev. 699, 757-59 (1986-1987)). If a large sophisticated shipper signs a paper saying there is a contract, however, this shipper might lose or waive its argument on enforceability of abusive terms.

If a shipper prefers a private contract to avoid even higher tariffs, then a shipper could be forced by the carriers to accept terms and conditions such as the following: 30 day contracts; indemnity to railroads for their negligence or gross negligence; minimum volumes; and rate-based fuel surcharges which are banned by the STB in regulated traffic (STB Ex Parte No. 661 (Jan. 25, 2007)). With this additional leverage by the railroads, tariff rates will go even higher, because shippers will be left with no commercial alternative.

Olin respectfully requests that if there is a new rule, the STB explicitly state that it is not preempting state law on what constitutes a contract, or on whether one can have an enforceable contract on rates without other terms and conditions being agreed to. Under this approach, the state law of private contracts will not be preempted, and private parties would be allowed to agree to terms that are mutually agreeable. A court of law would then be charged with applying the common law as to the terms and conditions of a contract.

In light of the aforementioned reasons, Olin further requests that any STB rule which requires a shipper to sign a written informed consent statement ("WIC"), forgo its STB rights, and indicate that a contract exists, should include at least the following six provisions:

- require railroads to quote reasonable contract rates from point to point;

- require railroads to negotiate contract terms and conditions in good faith, at arms length, and ban railroads from imposing tariffs on a shipper who in good faith declines any particular terms or conditions other than rates,
- prohibit railroads from using their unequal bargaining power to impose any terms and conditions not acceptable to shipper in a contract;
- recognize that if the parties agree on contract rates, but cannot agree to other terms and conditions, this can still constitute a contract under state law;
- recognize that a shipper's signing a WIC and a written contract would not prevent the shipper from arguing in a court or at the STB that the contract, or parts of it, are unenforceable due to its being a contract of adhesion Under this rule, a shipper would not waive any defenses or rights it would have under applicable state law on enforceability of adhesive contract terms, and
- the WIC contain the following language: "The parties intend that this document constitute a rail transportation contract within the meaning of 49 U.S.C. 10709 solely for the purpose of placing the transportation services covered hereby outside of the regulatory jurisdiction of the Surface Transportation Board. The parties do not intend, by signing this document, to fix, alter, change or in any way affect their respective rights under the laws of the State of \_\_\_\_\_ that otherwise govern the legality of the terms hereof."

In conclusion, more than eighty percent (80%) of Olin's chlorine is transported by rail to customers who have no other option than to receive chlorine by rail. Because of this fact, Olin has a very strong interest in any STB ruling affecting the rail transportation of Olin's products. Consequently, Olin respectfully requests that STB, in any final rule, preserve the ability of shippers to enter into private contracts for rates only; or if forced to accept abusive and adhesive terms from the railroads, not prevent shippers from raising these defenses in an appropriate court. Moreover, if the STB proceeds with STB Ex Parte No. 676, Olin requests that the final rule include the five suggestions as discussed above.

If you have any questions regarding these comments by Olin, please do not hesitate to contact us. Thank you again for this opportunity to provide a comment on STB Ex Parte No. 676.

Respectfully submitted on behalf of the Olin Corporation by:

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