

**WRITTEN TESTIMONY OF  
OLIN CORPORATION**

**BEFORE THE  
SENATE COMMERCE COMMITTEE**

**HEARING ON PASSENGER AND FREIGHT RAIL:  
THE CURRENT STATUS OF THE RAIL NETWORK AND THE TRACK  
AHEAD**

Mr. Chairman and Members of the Committee, my name is Frank Chirumbole. I am the Vice President, Global Supply Chain for Olin Corporation (“Olin”). I am also appearing here today on behalf of the American Chemistry Council (“ACC”). I appreciate the invitation to appear and the opportunity to participate in this hearing to discuss the status of the railroad industry and railroad service.

**Identity and Interest**

Headquartered in Clayton, Missouri, Olin is a publicly traded company listed on the New York Stock Exchange with 8,200 employees at 70 locations worldwide. Olin has three business segments: Winchester Ammunition, a leader in small caliber ammunition production and a supplier to U.S. law enforcement and military; Epoxy, a leading producer of epoxy and industry-leading epoxy technology; and Chlor Alkali Products & Vinyls, a leading producer of bulk chlorine, caustic soda, bleach, and other chemicals in North America. Olin was the first commercial supplier of chlorine in the United States and has been involved in the chlor alkali industry for over a century. Chlorine is an essential chemical building block for numerous materials and products used by the public, beyond the well-known uses in water treatment. Olin is the nation’s

largest manufacturer of bleach, and our products are also used in the manufacturing process for both pharmaceuticals and an array of medical supplies. Olin currently ships over 47,000 rail cars annually from its various North American manufacturing locations, each of which is captive to a single railroad. Because of Olin's dependency on railroad service, rail transportation is one of the single largest costs of its production and distribution process, and the need for efficient, cost-effective service is essential for Olin.

Olin is a member of the ACC. ACC is an industry association that represents America's leading chemical companies. Its members produce and manufacture a wide variety of chemicals, polymers, and related products that make our lives and our world healthier, safer, more sustainable, and more productive. ACC members depend on the nation's railroads for the safe, efficient, and secure transportation of their products, and they also depend on the availability of reasonable rates to move those products.

**A. Railroad Service During the Covid-19 Pandemic**

Olin recognizes that during this national emergency period, the railroads have sought to work cooperatively with their customers to manage the effects of the COVID-19 pandemic, and to ensure that that critical chemical products, including chlorine, are timely shipped, while protecting the safety of the railroad workforce.

The railroads and shippers have faced unprecedented challenges, but still have been able to protect their service due to stakeholder cooperation and the assistance of federal and state authorities. For example, the Department of Homeland Security issued guidance in March 2020 that transportation and the chemical and industrial supply

chains, including chlorine and alkali manufacturing, are deemed essential critical infrastructure services and functions. The Federal Railroad Administration (“FRA”) issued emergency relief from limited compliance rules where necessary to ensure continued service and the delivery of vital commodities essential to the health, safety, and security of the nation.

Since the onset of COVID-19, the Surface Transportation Board (“STB” or “Board”) and the FRA have maintained communication with the railroads and engaged in efforts to ensure continuity of service. State and local officials have cooperated and generally worked to ensure that critical railroad and shipper workers be allowed to have access to their workplaces, including locomotives/trains, while maintaining appropriate safety protections. This Committee has sent letters to the surface transportation sector soliciting insights and experiences in responding to and learning from COVID-19, and it held a hearing in June 2020 to examine the impacts and responses to the pandemic, and how stakeholders have continued to provide critical services during this period.

These collective efforts have greatly assisted Olin in maintaining rail system fluidity during this challenging period. While certainly service has not been perfect, Olin is grateful that private and public stakeholders have generally worked cooperatively in good faith to balance public safety, while ensuring continued production and delivery of essential products.

As the country moves to reopen in a phased approach, it is critical that this cooperation continue. This includes continued regulatory oversight to ensure that the railroads’ common carrier obligation to serve the public is fully protected. In this respect,

Olin is aware that the STB and FRA have been in communications with the Class I railroads in recent weeks over service disruptions. As referenced, Olin has faced periodic service challenges with its railroad partners, and many stakeholders have expressed concerns about service problems arising as a result of the railroads adoption of major operational changes and cost-cutting to implement Precision Scheduled Railroading. We must ensure that the U.S. freight rail network is safe, reliable, and resilient. Communications and transparency are critical to resolve service issues as they arise and prevent more widespread issues. Olin supports continued close oversight and pledges to work with all stakeholders, private and public, to help ensure railroad service reliability.

**B. The Need for Meaningful Competitive Protections for Captive Shippers**

The need for meaningful protections for captive shippers against unreasonable railroad practices and rates is fundamental and paramount. The Interstate Commerce Commission Termination Act of 1995 created the STB and tasked it with carrying out the national rail transportation policy “to maintain reasonable rates where there is an absence of effective competition.” 49 U.S.C. § 10101(6). That obligation is not discretionary. Absent effective competition, rates on market dominant rail traffic “must be reasonable.” *Id.* §§ 10701(d)(1), 10702(1).

Olin is a classic captive shipper. Olin’s captivity at each of its chlor alkali production facilities means it has no effective market competition for its railroad service and must rely on the Board to fulfill its statutory obligation to establish and maintain meaningful regulatory rate relief protection.

While Congress has mandated that rates for captive shippers be reasonable, that directive has been completely unrealized for carload shippers such as Olin. In the 40 years since the Staggers Rail Act of 1980, no carload shipper has succeeded in a major rate challenge against a railroad, and only a few have succeeded in “small” rate cases. The reason is fairly obvious. Under the current test, railroads are able to unilaterally impose rate increases on customers without providing any justification for the new rates; customers must file a complaint and spend millions of dollars and several years to challenge the new rates in an attempt to block the new rates; customers must pay the railroads rate demands during the pendency of cases; and customers have all of the burdens of proof to show that the challenged rates are unreasonable. Olin respectfully submits that this model is not fair and makes little sense.

The STB’s principal “large” rate case standard, the stand-alone cost test (“SAC”) was designed and works only, if at all, for unit-train shippers, principally coal shippers. While unit train coal shippers with movements in single origin-to-destination pairs have had some modest, mixed success using SAC, carload shippers have unfortunately failed miserably. No carload shipper has succeeded in a SAC case in the 34 years since SAC was adopted.

Olin has first-hand experience with this process. In the early 2000s, Olin challenged rates for one of its major shipment lanes for chlorine. *SunBelt Chlor Alkali P’ship v. Norfolk S. Ry.*, Docket No. NOR 42130. In the proceeding, Olin’s subsidiary SunBelt Chlor Alkali Partnership (“SunBelt”), looked to the STB as the last line of

defense against monopoly pricing, and to SAC as the only viable regulatory remedy available for it to challenge the defendant carrier's rates.

SunBelt utilized four in-house witnesses and retained 18 expert witnesses to design and build the hypothetical railroad, model it, and present testimony. SunBelt submitted over 1,400 pages of hard copy evidence and substantial gigabytes of electronic evidence, train modeling, and spreadsheets. The Board's 215-page decision found that NS had market dominance over the involved traffic, but that the challenged rates were not unreasonably high until year 2021, and the Board declined to prescribe rates or order damages and reparations. *SunBelt Chlor Alkali P'ship v. Norfolk S. Ry.*, Docket No. NOR 42130 (STB served June 20, 2014).

In a spirited dissent, then Board Member (now Chairman) Begeman lamented about the "hundreds, if not thousands, of calls [that] are made at the Board that lead up to its determination of whether a rate is unreasonable," and the subjective approach utilized by the majority to deny rate relief to SunBelt. *Id.* at 32. Commissioner Begeman concluded, "[n]ow, the Board should ask whether the SAC process can provide a meaningful gauge of rate reasonableness for carload traffic shippers. I stand ready to work with my colleagues and Board stakeholders to improve our rate processes." *Id.* All three Board Members expressed significant concerns about the substantial scope, complexity, and difficulty of SAC cases, the extreme burdens placed on shippers in bringing and succeeding in such cases, and the need for the Board to evaluate and implement alternative rate reasonableness standards to ensure shippers have a viable method and meaningful opportunity to challenging rates.

### **C. Improvements Brought About by the STB Reauthorization Act of 2015**

Olin believes that a central role of Congress in the railroad regulatory arena is to provide effective oversight of the STB, and in particular, to ensure that the agency administers the law in an efficient, open, and evenhanded manner and implements appropriate and reasonable standards consistent with its statutory directives. Olin also believes that Congress' duty is to provide transportation policies that help ensure that free enterprise, commerce, and competition are allowed to flourish while protecting those consumers who are "captive" to a single railroad from economic abuses by the highly concentrated railroad industry.

However, Olin believes that the STB and its predecessor, the Interstate Commerce Committee for many years interpreted its regulatory authority in a manner that emphasized the railroad industry's financial needs at the expense of allowing competitive forces to operate as Congress intended when it enacted the Staggers and ICC Termination Acts. The Agency simply has not done enough over time to ensure that shippers are protected from the loss of competition resulting from the wave of mergers and consolidations in the railroad industry.

Congress, through the leadership of this Committee, correctly recognized and responded to stakeholder concerns about the STB's administration of its statutory authority over rail rates and rail practices with the enactment of STB Reauthorization Act ("STB Reauthorization Act" or "Act") of 2015. A few of its pertinent provisions are discussed below.

First, stakeholders expressed concerns about delays in the processing of regulatory proceedings. Congress addressed these concerns in the Act by, among other things, requiring the STB to provide a quarterly report to this Committee, and to the House Committee on Transportation and Infrastructure, that “describes the [STB’s] progress toward addressing the issues in each unfinished regulatory proceeding.” Act, § 15(b). Following the enactment of the STB Reauthorization Act, then Chairman Thune requested that the STB include in its § 15(b) quarterly pending case reports specific target dates for future actions, including completion. This reporting, including the listing of target deadlines, has proved helpful in better informing stakeholders of case status matters and generally spurring more timely processing of proceedings before the Board.

Second, many stakeholders expressed concerns that the Board’s methodologies for setting maximum reasonable rates afforded them no practical means to obtain rate relief. Congress responded in the Act by, among other things, directing the STB to submit a report to the House and Senate a report that “indicates whether current large case methodologies are sufficient, not unduly complex, and cost effective” and “indicates whether alternative methodologies exist, or could be developed, to streamline, expedite, and address the complexity of large rate cases.” Act, § 15(a). Congress also revised the text of the Act so to read: “[t]he Board shall maintain 1 *or more* simplified and expedited methods for determining the reasonableness of challenged rates in those cases in which a full [SAC] presentation is too costly, given the value of the case.” 49 U.S.C. § 10701(d)(3) (emphasis added). In addition, section 11 of the STB Reauthorization Act modified 49 U.S.C. § 10704(d) to require that the Board “maintain



procedures to ensure the expeditious handling of challenges to the reasonableness of railroad rates.”

In response, in September 2019, in Docket No. EP 755, *Final Offer Rate Review*, the STB initiated a Notice of Proposed Rulemaking (“NPRM”) to bring about a new streamlined final offer rate reasonableness methodology to help provide effective backstop regulatory protections for captive shippers. Streamlined discovery, evidentiary procedures, and decisional timelines call for a final Board decision in 135 days.

Olin commends the Board for recognizing that something more must be done to prevent railroad pricing abuses that are causing considerable economic harm to the public. The final offer procedure follows the recommendations of the U.S. Department of Agriculture, a blue-ribbon committee of the Transportation Research Board, and the STB’s Rate Reform Task Force Report issued on April 25, 2019. The approach is not novel. It is very similar to that currently used by Canadian regulators in the Canadian Transportation Agency’s final offer arbitration rules, but without an arbitrator as the case would be decided by the Board, and the approach is similar to what the Board already uses as part of its Three-Benchmark methodology. The railroads also use a similar mechanism as part of their car hire dispute resolution process. Additionally, final offer procedures are used in many commercial disputes, including resolution of substantial wage disputes in Major League Baseball (so-called “baseball arbitration”).

Olin supports the Board’s proposed final offer rate review rules. The Board’s proposed final offer rate review could provide a meaningful and efficient rate

relief mechanism for carload shippers and promote reasonable commercial resolution of disputes.

Third, stakeholders expressed concerns that federal sunshine laws prohibited a quorum of the STB (then, any two members of the three-member Board) from discussing pending matters with each other except in public meetings. Congress responded by enacting Sections 4 and 5 of the Act. Section 4 “expanded membership of the STB from three members to five in order to address inefficient quorum requirements,” and Section 5 “allow[s] for limited instances in which a majority of Board members can communicate without requiring a full public meeting.” Section 5 “appl[ies] for any number of STB board members, with or without the expansion to five members.”

The STB is an independent agency, and new Board members are appointed by the President, subject to the advice and consent of the Senate. Since the Reauthorization Act was passed, the Board has remained a three-member Board. Olin supports a full complement of Board Members, and a fully funded agency. As this Committee is aware, President Trump nominated Michelle Schultz (R) and Robert E. Primus (D) to serve on the Board, their nominations have been approved by this Committee, and they now await full Senate confirmation.

While the Board has remained at three members, the members now have the authority under § 5 of the Act to meet and talk about pending matters privately, and they have exercised that authority on numerous occasions. In addition, the Board revised its rules in 2018 to allow Board Members to engage in *limited* ex parte communications with stakeholders in informal rulemaking proceedings. 49 C.F.R. § 1102. The Board has

also used these new rules over the last few years to engage in meaningful discussions with stakeholders in several major proceedings. Olin has participated in such meetings and believes that they have proven helpful in bringing about a better understanding of issues that can lead to more effective decisions that benefit both shippers and the railroads.

**D. STB Initiatives That Can Help Address the Captive Shipper Problem**

Olin has long supported efforts to develop simple, practical, and effective constraints on unreasonable railroad pricing. We have seen rail rates continually escalate at levels far above inflation with negligible improvements in performance and customer service. Unfortunately, the incentives created by the highly concentrated railroad marketplace and the current state of rail regulation encourage monopolistic behavior that has ramifications for Olin and our customers working in competitive markets.

Olin is pleased that the Board has stepped forward to develop some modest new procedures to help restore balance between railroads and shippers in determining the lawfulness of rates. As mentioned, Olin supports the final adoption of Final Offer Rate Review (EP 755) which is one of the most important reforms the STB can make in the near term; it will help create a more level playing field for negotiations with the railroads. Also, the Board has recently approved new streamlined “market dominance” determinations (EP 756) in rate cases, designed to help remove some unnecessary complexities from the process. Olin supports these new rules and expects the Board to further refine the test to make it more responsive to stakeholder needs in a follow-up rulemaking.

Additionally, the Board has considered the implementation of the revenue adequacy constraint for some time, and Olin has urged the Board to use its hearings on the subject as a springboard to swiftly develop and implement a final proposal for heightened constraints on revenue adequate railroads. Further, Olin has asked the Board to address the fact that many lanes are bundled in private agreements and the railroads make it essentially impossible to challenge a single lane. This is because the railroads require that all the lanes under a bundled private contract be taken to tariff in order for a shipper to bring any case before the STB. Railroad-imposed, anti-competitive bundling arrangements with respect to the provision of rates create a significant barrier to access to the Board's rate relief process.

Olin firmly believes that these and other modest regulatory changes will benefit the long-term health of the rail industry, as well as rail-reliant US manufacturing. Such initiatives are important to further the national transportation policy goals of providing for the expeditious handling and resolution of proceedings, as well as maintaining reasonable rates where there is an absence of effective competition.

Olin supports a robust and highly functioning rail network, and we genuinely want the rail industry to be successful. That said, there must be some reasonable limits. Chlorine car rates of more than \$30,000 per railcar, and revenue-to-variable cost ratios of over 1,000% are not reasonable. We remain hopeful that the Board can and will implement meaningful constraints, and we are confident that it can reach a fair equilibrium in doing so. We respectfully urge this Committee to support the Board in the above initiatives.

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Olin greatly appreciates this opportunity to present our views to the Committee and will be pleased to provide it with any additional information it may need on any of the matters discussed in this testimony.

Respectfully submitted,



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