



1050 Thomas Jefferson Street, NW
Seventh Floor
Washington, DC 20007
202- 298-1800 Phone
202- 338-2416 Fax

Michael F. McBride
Partner
(202) 298-1989
mfm@vnf.com

248261

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, S.W.
Washington, DC 20423

ENTERED
Office of Proceedings
July 29, 2019
Part of
Public Record

Re: STB Docket No. Nor 42164, Olin Corporation v. Union Pacific Railroad Company

Dear Ms. Brown:

Accompanying this letter for filing is Olin Corporation's revised Certificate of Service, showing service by facsimile on Rhonda Ferguson, Esq., Vice President and General Counsel of Defendant Union Pacific Railroad Company, of the Complaint and Motion to Hold Proceeding in Abeyance, originally filed herein on July 8, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael F. McBride".

Michael F. McBride
Attorney for Complainant Olin Corporation

Enclosures
cc (w/encl.): Counsel for Defendant

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

OLIN CORPORATION,	)	
	)	
<u>Complainant,</u>	)	
	)	
v.	)	Docket No. NOR 42164
	)	
UNION PACIFIC RAILROAD	)	
COMPANY,	)	
	)	
<u>Defendant.</u>	)	

COMPLAINT

COMES NOW Olin Corporation, with offices at The Offices at Park Ten, Phase II, 16290 Katy Freeway, Suite 600, Houston, Texas 77094 ("Olin" or "Complainant"), and files this Complaint against Defendant Union Pacific Railroad ("UP"), with offices at 1400 Douglas Street, Omaha, NE 68179. Complainant brings this Complaint pursuant to 49 U.S.C. §§ 10702, 11101, 11121, 11122, 11701, and 11704, and 49 C.P.R. Part 1111. In support of this Complaint, Complainant states the following:

THE PARTIES

1. Olin is a corporation engaged, *inter alia*, in the business of producing chemicals. Among those chemicals are chlorine and caustic soda, both of which are transported in tank cars. Olin owns or leases 7,304 private railroad tank cars operating in North America. Olin ships and receives loaded rail tank cars on UP, and since UP does not provide rail tank cars, Olin must provide rail tank cars to UP if its products are to move by rail.

2. Olin's products are used to manufacture the petrochemicals that are used as building blocks for thousands of vital daily life functions, ranging from computers to medicine to parts used in all modes of transportation.

3. UP is a common carrier railroad engaged in the transportation of freight in interstate commerce. UP is subject to the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10101, et seq., and to the jurisdiction of the Surface Transportation Board (the "Board"). As further described herein, UP regularly and extensively provides rail transportation in rail tank cars that it does not own, but which it requires shippers and receivers to either own directly or obtain from car owners on a leased basis.

NATURE OF THE ACTION

4. The Complaints (as may have been amended) pending before the Board in NOR Docket No. 42144, *et al.* were brought by various trade associations Complainants on behalf of their member companies (including Olin, which is a member of the Chlorine Institute and the American Chemistry Council) who own or lease rail tank cars, and by the Individual Complainants, who own or lease rail tank cars. Olin relies herein on the pleadings, evidence, and arguments made in Docket No. NOR 42144, *et al.* and seeks relief, if any, to which Olin is entitled, after the Board resolves the matters at issue in Docket No. NOR 42144, *et al.*

5. UP does not provide most or all of the rail tank cars necessary for it to meet its common carrier obligations to move commodities offered for transportation by Olin and (on information and belief) other shippers. Instead, UP relies on tank cars supplied to it by Olin and other shippers to fulfill its common carrier obligation.

6. Pursuant to 49 U.S.C. §§ 11121 and 11122, as interpreted by the precedent of this agency and the courts, UP must either supply the tank cars necessary for its provision of transportation services or compensate tank car owners for the tank cars that they supply. The rate of compensation must be determined by the expense of owning and maintaining tank cars and must consider factors that affect the adequacy of the national freight car supply.

7. In Ex Parte No. 328, *Investigation of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986), the Interstate Commerce Commission adopted a negotiated agreement for the calculation of compensation for the use of private tank cars in accordance with the statute.

8. On information and belief, even though well over 90% of tank car shipments are made by UP using private tank cars provided to it for this transportation, UP does not compensate shippers for the use of their private tank cars provided to it for the shippers' transportation movements.

9. UP's refusal to provide railroad tank cars for service to its customers has increased the need for private non-railroad investment in such cars over the past 30 years. While the cost of owning and maintaining tank cars also has increased during this time, UP has systematically all but ceased to pay any compensation to those entities supplying the rail tank cars that UP uses to meet its common carrier obligation.

10. The lack of compensation for UP's use of private tank cars is exacerbated by UP's adoption of Tariff UP 6004, Item 55-C, effective January 1, 2015 (attached as Exhibit A to this Complaint), which shifted the cost of transporting empty tank cars to and from "Repair Facilities" (as defined in Tariff UP 6004) from UP to Olin, without

compensating Olin for UP's use of its cars. Until 2015, UP provided this transportation service without charge, just as it does for rail cars that UP itself leases or owns. However, UP has not implemented measures to ensure that the parties providing it with tank cars are compensated for this additional expense associated with UP's use of their tank cars.

JURISDICTIONAL ALLEGATIONS

11. The Board has jurisdiction to require that UP provide the rail tank cars that are reasonably necessary to furnish safe and adequate transportation of commodities that must be transported in rail tank cars under 49 U.S.C. §§ 11101 and 11121.

12. The Board has jurisdiction to encourage the purchase, acquisition and efficient use of rail tank cars under 49 U.S.C. § 11122(a), and to establish the rate of compensation to be paid for UP's use of private rail tank cars under 49 U.S.C. § 11122(b).

13. The Board has jurisdiction to prohibit UP from charging for the movement of empty rail tank cars to repair facilities under 49 U.S.C. §§ 10702, 11101, 11121 and 11122.

14. The Board has jurisdiction to award damages to Olin pursuant to 49 U.S.C. § 11704(b).

COMPLAINT COUNT I **UP's New Repair Facility Charge**

15. Olin relies on the Board's ultimate determination of the lawfulness of UP's charges for transporting empty tank cars to and from railcar Repair Facilities in Docket No. NOR 42144, *et al.*, subject to any judicial review thereof, and does not seek to re-litigate herein any determination by the Board on the lawfulness of UP's charges for transporting empty tank cars to and from railcar repair facilities in Docket No. NOR 42144, *et al.*, as the

same may be finally determined by the Board or a court on review of the Board's ultimate determinations.

16. As of 2015, UP Tariff 6004, Item 55-C applies per car and mileage-based charges to all empty rail tank car moves by UP to and from Repair Facilities except: (1) empty movements immediately preceded by loaded line-haul revenue movements on UP; (2) if UP's Mechanical Department removes a defective car from service and waybills the defective car under AAR Interchange Rule 1; or (3) if UP damaged the car. The tariff defines "Repair Facilities" as "any facility that cleans, lines, relines, maintains, modifies repairs, or retrofits tank cars."

17. The most recent charges, as published in UP Tariff 4703, Item 1200-D, effective July 1, 2019 (attached as a part of Exhibit A to this complaint), are calculated as follows:

1-250 miles	\$1,656 per car
251-500 miles	\$1,857 per car
501 miles or greater	\$3.72 per mile

Thus, a minimum round trip charge for a movement to and from a repair facility is \$3,312 for a one-mile movement.

18. Prior to January 1, 2015, UP provided the transportation services covered by Tariff 6004, Item 55-C, without charging Olin a line-haul rate for those services.

19. UP Tariff 6004, Item 55-C, requires Olin to pay UP for a service that UP otherwise would provide for itself, without charge, if UP were to provide the tank cars for rail service provided to Olin.

20. The publication of UP Tariff 6004, Item 55-C, was not accompanied by

any measures to compensate Olin for the use of its tank cars, including UP's Repair Facility transportation charges. UP Tariff 6004, Item 55-C, imposes a new cost of ownership upon private car owners that is not part of any compensation owed to tank car owners.

21. UP's implementation of the January 1, 2015 modification to Tariff 6004, Item 55- C, namely the adoption of separate tariff charges for the movement of empty tank cars to Repair Facilities, is (a) an unreasonable practice in violation of 49 U.S.C. § 10702, and (b) a violation of UP's statutory obligations to compensate private car owners for the use of their tank cars set forth in 49 U.S.C. § 11122(b).

REQUEST FOR RELIEF

WHEREFORE, Olin prays that the Board require that Defendant, UP, answer the charges alleged herein, and, after a hearing and investigation conducted pursuant to 49 U.S.C. § 10704(a)(1) and the Board's implementing regulations, and further, in reliance on the Board's determinations of the lawfulness of UP's practices in Docket No. 42144, *et al.*, subject to judicial review thereof, the Board:

(1) find that UP's implementation of Tariff 6004, Item 55-C, to the extent it imposes per-car charges for empty tank-car movements to and from Repair Facilities (as defined therein), is an unreasonable practice under 49 U.S.C. § 10702, and that it also violates 49 U.S.C. §§ 11121 and 11122;

(2) order UP immediately to rescind Tariff UP 6004, Item 55-C to the extent it imposes charges for movement of empty tank cars to and from Repair Facilities;

(3) order UP, pursuant to 49 U.S.C. § 11704(b), to pay reparations to Olin for the

Tariff UP, Item 55-C charges adopted by UP on or after July 8, 2017;

(4) grant to Olin such other and further relief as the Board may deem proper, based on the record, and on the Board's rulings in Docket No. NOR 42144, *et al.*, subject to judicial review thereof.

Respectfully submitted,



Michael F. McBride
Keturah A. Brown
Van Ness Feldman, LLP
1050 Thomas Jefferson Street, N.W.,
Suite 700
Washington, DC 20007-3877
(202)298-1800
mfm@vnf.com
kab@vnf.com

Attorneys for Olin Corporation

July 8, 2019

EXHIBIT A

 UP 6004-C	Item: 55-C MOVEMENT OF EMPTY TANK CARS WITH PRIVATE MARKINGS
MOVEMENT OF EMPTY TANK CARS [i] Empty tank car movements provided below are subject to Union Pacific line-haul charges, as provided in UPRR 4703-series, for the portion of the empty movement that occurs on Union Pacific: A. New tank cars moving prior to their first loaded move in commercial service (STCC 3742213); B. Restenciled tank cars moving prior to their first loaded move in commercial service (STCC 3742213); C. Tank cars moving for dismantling, sale, or scrap (STCC 3742293); and D. Empty tank cars moving to and from Repair Facilities (STCC 3742217) except that (i) empty movements that are immediately preceded by a loaded line-haul revenue movement on Union Pacific will move free of charge to Repair Facilities, (ii) empty tank cars taken out of service by Union Pacific inspection and waybilled by Union Pacific's Mechanical Department under Rule 1 of the Association of American Railroads Interchange Rules will move free of charge to and from Repair Facilities, and (iii) empty tank cars damaged by Union Pacific will move free of charge to and from Repair Facilities. For purposes of this Item, the capitalized term "Repair Facilities" means any facility that cleans, lines, relines, maintains, modifies, repairs, or retrofits tank cars.	
Issued: December 10, 2014 Effective: January 1, 2015	UP 6004-C Page: 1 of 1 Item: 55-C Concluded on this page

UPRR 4703 Item 1200-D

	UPRR 4703	Item: 1200-D EMPTY TANK CAR, REVENUE MOVEMENT
CHANGE KEY: A-Add; C-Change; D-Decrease; I-Increase; and X-Expire		
For billing purposes use the following rate authority: UPRR 4703-1200-D		
STCC/GROUP	STCC	DESCRIPTION
3742217		Revenue Movement, Cars, Railway Freight , Not Railway Owned, Not New, Not Newly Acquired, Not Restenciled, Or Not For Sale, Moved On Own Wheels, (Private Marked Cars,) Nec
Prices are subject to Fuel surcharges.		
General Application Rules for Item 1200-D		
1.	Applies in AAR Car Type T, tank cars.	
2.	Price is subject to Exempt Circular UP 16 (series) , item 695 (series).	
3.	Price applies in United States funds.	
4.	Subject to maximum liability of \$10,000.00 per Car.	
5.	Switching charges at both origin and destination will not be absorbed.	
6.	Price does not apply if special train movement service is provided.	
7.	Price does not apply if heavy duty flat car service is provided.	
8.	Price does not apply if diversion service is provided.	
9.	Price does not apply if stopping to partially unload service is provided.	
Issued:	May 31, 2019	Page: 1 of 2
Effective:	July 1, 2019	Item: 1200-D
Expiration:	December 31, 2019	Continued on next page
UPRR 4703		

General Application Rules for Item 1200-D	
10.	Mileage allowance payment on private equipment will not apply.
11.	Idler car(s) may be used and the charge will be \$2,275.00 per Car.
APPLICATION AND RATES	
COLUMN	RATE APPLICATION RULES
1.	Rates are in U.S. dollars Per Car.
STCC: 3742217 Revenue Movement, Cars, Railway Freight , Not Railway Owned, Not New, Not Newly Acquired, Not Restenciled, Or Not For Sale, Moved On Own Wheels, (Private Marked Cars,) Nec From: ALL UP OTE To: ALL UP OTE Route: UP Rail mileage as stated in ALK Technologies' PC*Miler/Rail (Fuel Surcharge Algorithm)	
Mileage Ranges	
Col 1 Rate	
0 - 250	1 1656.00
251 - 500	1 1857.00
APPLICATION AND RATES	
COLUMN	RATE APPLICATION RULES
1.	Rates are in U.S. dollars Per Mile.
STCC: 3742217 Revenue Movement, Cars, Railway Freight , Not Railway Owned, Not New, Not Newly Acquired, Not Restenciled, Or Not For Sale, Moved On Own Wheels, (Private Marked Cars,) Nec From: ALL UP OTE To: ALL UP OTE Route: UP Rail mileage as stated in ALK Technologies' PC*Miler/Rail (Fuel Surcharge Algorithm)	
Mileage Ranges	
Col 1 Rate	
501 - 3000	1 3.72
Issued: May 31, 2019 Effective: July 1, 2019 Expiration: December 31, 2019	
UPRR 4703	
Page: 2 of 2 Item: 1200-D Concluded on this page	

CERTIFICATE OF SERVICE

I do hereby certify that on this 8th day of July, 2019, I have served a copy of the foregoing *Complaint* and *Motion to Hold Proceeding in Abeyance* via electronic mail and regular mail to counsel for Defendant at the following address:

Michael Rosenthal, Esq.
Covington & Burling
850 10th Street, NW
Washington, DC 20001

And by regular mail to:

Rhonda Ferguson, Esq.
Vice President and General Counsel
Union Pacific Railroad Company
1400 Dodge Street
Omaha, NE 68179



Michael F. McBride
Keturah A. Brown
Van Ness Feldman, LLP
1050 Thomas Jefferson Street, N.W.
Suite 700
Washington, DC 20007-3877
(202)298-1800
mfm@vnf.com
kab@vnf.com

Attorneys for Olin Corporation

OLIN CORPORATION,	)	
	)	
<u>Complainant,</u>	)	
	)	
v.	)	Docket No. NOR 42164
	)	
UNION PACIFIC RAILROAD	)	
COMPANY,	)	
	)	
<u>Defendant.</u>	)	
	)	

Olin Corporation (“Olin” or "Complainant") hereby moves to hold this proceeding in abeyance, pending the outcome of related proceedings in Docket No. NOR No. 42144, *et al.*

As set forth in greater detail in the accompany Complaint, Olin is a corporation engaged, *inter alia*, in the business of producing chemicals. Among those chemicals are chlorine and caustic soda, both of which are transported in tank cars. Olin owns or leases 7304 private railcars operating in North America, a significant percentage of which are railroad tank cars. Olin ships and receives loaded rail tank cars on UP, and, because UP does not provide rail tank cars for Olin's use, Olin must provide rail tank cars to UP if its products which move in tank cars are to move by rail. Olin's products are used to manufacture the petrochemicals that are used as building blocks for thousands of vital

daily life functions, ranging from computers to medicine to parts used in all modes of transportation.

UP is a common carrier railroad engaged in the transportation of freight in interstate commerce. UP is subject to the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10101, *et seq.*, and to the jurisdiction of the Board. UP regularly and extensively provides rail transportation to Olin in rail tank cars that Olin provides to UP for UP to meet its common carrier obligations to move commodities offered for transportation by Olin.

The Complaints (as they may have been amended) pending before the Board in Docket No. NOR 42144, *et al.* were brought by various trade associations Complainants on behalf of their member companies (including Olin, which is a member of the Chlorine Institute and the American Chemistry Council) who own or lease rail tank cars, and by the Individual Complainants, who own or lease rail tank cars. In this proceeding, in which Olin only seeks the reparations, if any, to which it may be entitled as a result of the pending proceedings in Docket No. NOR 42144, *et al.*, and does not seek to re-litigate any matters that are at issue in those consolidated proceedings, Olin relies herein on the pleadings, evidence and arguments filed therein¹ and seeks relief in the form of reparations, if any, to which Olin is entitled, after the Board resolves the matters at issue in Docket No. NOR 42144, *et al.* Olin filed this separate Complaint for reparations because it did not participate as an individual Complainant in Docket No. NOR 42144, *et al.* to seek a ruling from the Board as to the reparations, if any, to which it is entitled.

¹ In accordance with the procedural schedule as ordered by the Board therein, all evidence and argument was submitted in Docket NOR No. 42144, *et al.* by May 31, 2019, and the record in those proceedings was closed as of that date.

Olin is filing this Complaint now, instead of after the resolution of Docket No. NOR 42144, *et al.*, in order to toll the running of the statute of limitations.²

Even though Olin's tank car shipments are transported by UP using tank cars provided to it by Olin for this transportation, Olin is not compensated by UP for those tank-car shipments. The lack of compensation paid by UP to Olin for UP's use of Olin's tank cars is exacerbated by UP's recent adoption of Tariff UP 6004, Item 55-C, effective January 1, 2015 (attached as Exhibit A to the Complaint filed herein), which shifts the cost of transporting empty tank cars to and from repair facilities from UP to Olin.³ UP previously provided this transportation service without charge, just as it does for rail cars that UP itself leases or owns. However, UP has not implemented measures to ensure that the parties providing it with tank cars are compensated for this additional expense associated with UP's use of their tank cars.

With respect to the reparations relief Olin seeks in the accompanying Complaint filed herein, Olin herein relies on the Board's ultimate determination of the lawfulness of UP's charges for transporting empty tank cars to and from railcar repair facilities in Docket No. NOR 42144, *et al.*, subject to any judicial review thereof, and does not seek to re-litigate herein any determination by the Board on the lawfulness of UP's charges for

² Under 49 U.S.C. § 11705(c), a complainant before the Board may seek reparations relief for a two-year period prior to the date of filing the complaint, in addition to the period during which the complaint is pending and until the effective date of the Board's decision on the merits.

³ UP Tariff 6004, Item 55-C, effective January 1, 2015, applies per-car and mileage-based charges to all empty rail tank car moves by UP to and from repair facilities except: (1) empty movements immediately preceded by loaded line-haul revenue movements on UP; (2) if UP's Mechanical Department removes a defective car from service and waybills the defective car under AAR Interchange Rule 1; or (3) if UP damaged the car. The tariff defines "Repair Facilities" as "any facility that cleans, lines, relines, maintains, modifies repairs, or retrofits tank cars."

transporting empty tank cars to and from railcar repair facilities in Docket No. NOR 42144, *et al.*, as the same may be finally determined by the Board or by a court on review of the Board's ultimate determinations.

REQUEST FOR RELIEF

In accordance with 49 U.S.C. § 11705(c), Olin, through its accompanying Complaint, seeks reparations for the periods (1) July 8, 2017 through July 7, 2019 and (2) also, from July 8, 2019 to the effective date of the Board's ultimate decision herein, in reliance on the Board's determinations of the lawfulness of UP's practices in Docket No. 42144, *et al.*, subject to judicial review thereof. In seeking relief herein, Olin does not seek to re-litigate herein any issue that is resolved by the Board in Docket No. NOR 42144, *et al.* (including any judicial review thereof); rather, Olin merely seeks the reparations, if any, to which it is entitled, once the Board has resolved the matters at issue in Docket No. NOR 42144, *et al.*

Therefore, if the Board determines that the shippers and shipper associations (including those litigating on behalf of Olin) should prevail on Count 1 of the First Amended Complaint filed in Docket No. NOR No. 42144, *et al.* with respect to the lawfulness of the transportation charges imposed by UP on movements of empty tank cars to and from tank-car repair facilities, Olin would then seek herein to have the Board determine the precise amount of reparations relief to which it is entitled from UP.

On the other hand, if the STB should determine that the shippers and shipper associations seeking relief in Docket NOR No. 42144, *et al.* are not entitled to reparations relief therein, and that determination is upheld on judicial review, if

any, Olin would not continue to seek relief herein, but would seek to have its Complaint dismissed.

Therefore, to conserve the resources of the parties and the Board, it only makes sense, for the sake of efficiency and in the interests of justice, to hold this proceeding in abeyance, pending the outcome of Docket NOR No. 42144, *et al.* UP will not be prejudiced by granting this Motion, because UP has fully defended itself in Docket No. 42144, *et al.* and can fully defend itself herein, if necessary, including seeking appropriate supportive information from Olin for its reparations claim, once the proceedings in Docket NOR No. 42144, *et al.* have concluded. In the same vein, Olin will be fully protected, because its trade associations have fully litigated the matters at issue in Docket No. NOR 42144, *et al.* and Olin can fully prosecute its claim for reparations, including seeking necessary discovery, if any, after those proceedings in Docket No. NOR 42144, *et al.* have concluded.

Moreover, once all of the matters in Docket No. NOR 42144, *et al.* are resolved, and the only remaining dispute between Olin and UP with respect to the matters at issue in Docket No. NOR 42144, *et al.* and herein is the amount of reparations, if any, to which Olin is entitled for transportation charges of Olin's tank cars to and from tank-car repair facilities, the parties may be able to agree on the amount of reparations, if any, to which Olin is entitled from UP, without the necessity of (a) incurring additional litigation costs or (b) requiring the Board to adjudicate any disputes about such reparations.

For all of these reasons, Olin hereby moves for an order holding this proceeding in abeyance, for all purposes, pending the resolution of the matters at

issue in Docket No. NOR 42144, *et al.*

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael F. McBride". The signature is fluid and cursive, with the first name "Michael" being the most prominent.

Michael F. McBride

Keturah A. Brown

Van Ness Feldman, LLP

1050 Thomas Jefferson Street, N.W.

Suite 700

Washington, DC 20007-3877

(202)298-1800

mfm@vnf.com

kab@vnf.com

Attorneys for Olin Corporation

July 8, 2019

REVISED
CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July, 2019, I caused the Complaint and Motion to Hold Proceeding in Abeyance to be served by facsimile on:

Rhonda Ferguson, Esq.
Vice President and General Counsel
Union Pacific Railroad Company
1400 Dodge Street
Omaha, NE 68179

I further certify that a copy of this Revised Certificate of Service and accompanying cover letter was emailed to:

Michael Rosenthal, Esq.
Covington & Burling
850 10th Street, NW
Washington, DC 20001



Michael F. McBride
Keturah A. Brown
Van Ness Feldman, LLP
1050 Thomas Jefferson Street, N.W.
Suite 700
Washington, DC 20007-3877
(202)298-1800
mfm@vnf.com
kab@vnf.com

Attorneys for Olin Corporation