Testimony of:

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"How Small Businesses Benefit from Smart Shipping Regulation"

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Senator Kennedy and members of the Committee, thank you for inviting me to provide testimony today.

My name is John McIntosh, and I am the Executive Vice President for Olin Corporation.

I have worked in many different roles within Olin since I joined the company in 1977, and have been closely involved with transportation policy for much of that time.

Before I begin, let me express our gratitude to you, Sen. Kennedy for your leadership that led to a solution on the unjustified phasing out of DOT authorized TIH tank cars. We would not have been able to achieve the negotiated solution that we did without your effort. Those efforts, including this hearing, will result in more economic shipping and lower costs for small business in Louisiana and across the country.

Olin ship's more than 45,000 rail cars annually, and we have been awarded AAR's Grand Slam safety award for three years in a row. Winning once is exceptional, and three years in a row is just extraordinary, and it reflects Olin's commitment to safety.

The rail industry's Grand Slam award is presented to companies with spotless safety records, meaning zero non-accident releases, and is a significant accomplishment in rail hazmat transportation.

I am also the Chairman of the American Chemistry Council's Board level Committee on Rail Transportation, and the concerns that I will elaborate on today are shared by many similarly situated chemical companies.

Olin is an active participant in the Rail Customer Coalition www.freighrailreform.com, which is made up of about 80 trade associations representing virtually all commodities shipped by rail. While our specific problems vary across the customer base, the underlying issues around high and escalating rail rates and poor service are consistent.

Following Olin's transformative acquisition of Dow's chlor-alkali assets in 2015, we are the world's largest chlorine company, the world's largest epoxy manufacturer, and a leading ammunition company under the Winchester brand. Our company recently celebrated 100 years on the New York Stock Exchange, and we have over 6,400 employees at 70 locations worldwide.

We also have nearly 700 employees and contractors in the State of Louisiana at our Plaquemine and St. Gabriel sites. Louisiana is a critical state for Olin and we have plans to invest significantly in this great state.

Surely, we are not a small business. However, thousands of small business rely on the timely and economic delivery of chlorine chemistry products to do business. Chlorine ensures that our drinking water is safe, and that restaurants, nursing homes and all types of medical facilities have the sanitizers and disinfectants needed to help prevent the spread of infectious diseases.

The rail challenges we face affect our entire supply chain with all of the costs and service problems ultimately impacting everyone who relies on our products.

You encounter our products every day—whether you know it or not. Chlorine, caustic soda and their derivative products are used for water purification, pharmaceutical and paper manufacturing, durable infrastructure products, and thousands of other industrial processes and applications.

Breweries and food producers rely on hydrochloric acid, a derivative product of chlorine. Methyl Chloroacetate and Choroacetic Acid are used in hair care salons. Metallic Chloride is used in our fireworks every July. There are simply limitless small business applications for these products-- including dental sealants and cements, paints and varnishes of all types, even the wetsuits used in diving, down to the soles of our shoes.

Rail Economic Regulatory Environment

Let me first say that we need rail in order to survive and compete in a global marketplace. Railroads are critically important to our business, and we need the industry to continue to be economically viable.

Unfortunately, for shippers like Olin that have access to only one railroad, what we encounter is a monopoly service provider that exerts market power because of overly permissive laws and regulations.

The rail industry was on its heels in the 1970's, and Congress created a very loose legislative scheme that allowed the rails to return to health in the 1980's-- called the Staggers Rail Act. Since then, the rail industry consolidated from more than two dozen Class I railroads in 1980 to only four major railroads today.

The Interstate Commerce Commission, and later the Surface Transportation Board (STB), effectively nullified the protections Congress included in the Staggers

Rail Act through poor regulatory implementation. Congress sent the STB a message to get more aggressive in 2015 with the passage of STB reform legislation, but we have made little progress since, as we have been awaiting Senate confirmation for STB Board Members for almost three years.

Rail to rail competition in this industry is rare, and unless your facility is blessed by geography, the results are entirely predictable. About two-thirds to three-quarters of chemical facilities are captive to a single railroad, and all of Olin's sites are captive.

Rail rates across the industry continue to spiral up, more than tripling the rate of inflation according to ACC data, and our service levels have been in a near continuous decline with periodic catastrophic service emergencies. Unfortunately, we have virtually no recourse under current law because the checks Congress put in place are simply not functional.

Olin is one of the few chemical companies to bring a rate case before the STB. We spent many millions of dollars on lawyers and consultants to construct a hypothetical railroad, which is necessary to bring a case under STB procedures. Shippers are required to litigate issues such as how many bathrooms a hypothetical railroad company needs, and how often the grass needs to be cut. To say this process is a disincentive for companies to avail themselves of STB processes is an understatement.

At the end of this arduous process, my interpretation of the decision from the STB was that they do not have a process whereby a chemical shipper could ever win a rate case.

This is the key quote from the current Chairman Ann Begeman from our decision, and her conclusion was echoed by other Board Members:

> "While I had been skeptical about the Stand Alone Cost (SAC) test prior to my service at the Board, my concerns have only grown as I have seen the SAC process in action."
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> "The Board has a duty to ensure that shippers have a viable means to challenge a rate… *Now, 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."

Until the STB makes serious reforms to their processes, we have no real recourse—which of course creates a further imbalance in the relationship between railroads and their customers.

Unlike the rail sector, the chemical industry is fiercely competitive, and rail rates and service have a significant impact on our ability to compete globally as an industry.

Olin and our chemical company peers are focused on retaining our existing customers, and competing for new customers-- by providing the lowest price and highest quality products possible. We invest appropriate levels of capital anticipating market demand, we innovate, and we compete fiercely with our peers. My experience with the railroad industry is that they extract the highest possible rate from customers that have no alternative, while providing the minimal level of service to those customers. This is not a free or competitive market.

The STB has been understaffed for years and unable or unwilling to move forward with necessary reforms. We appreciate the attention Sen. Kennedy is giving to these critical issues, and ask for your continued engagement to help push the STB to move forward with reforms.

<u>Rail Service</u>

To make matters worse, in recent years we have also experienced additional cuts in service and investment in the rail network. This trend took hold when activist investors installed Hunter Harrison as CEO of CSX railroad, and we have seen this movement spread across the entire rail industry. These cuts and resulting service breakdowns have had serious business consequences for Olin and many of our peers and small business customers.

During the worst of the CSX service crisis, we experienced lost railcars that were carrying toxic by inhalation material, we observed rail cars “ping ponging” across the network via our GPS devices that we have installed on our cars, and we spent countless hours trying to communicate these problems to CSX, which was virtually completely unresponsive.

Imagine your frustration calling your cable provider with a problem, and amplify that by 1000x and you can begin to understand our level of frustration. I’ll acknowledge that the situation with CSX has improved with another change in management, but this episode caused tremendous damage throughout the economy, and CSX faced virtually no consequences.

Given the lack of consequences, most of the other railroads are moving forward to implement new operations strategies modeled after CSX. We fear this will lead to stripping out employees and reducing investment in the network in order to drive down operating ratios. We also fear that the slightest strain on a network this thinly resourced will lead to many more service problems in the future.

Operating ratios reflect the businesses' operating expenses as a percentage of revenue, and are common in capital-intensive industries like rail. A low operating ratio indicates high profitability, i.e. increasing revenue and decreasing expenses and investments. We are seeing operating ratios in the rail sector fall below 60%, which is an astonishing level of profitability. Rail operating ratios were in the 70%'s and 80%'s just a few years ago. This appears to be an indication of reduced investment in the network and increased pricing, and provides further evidence of our observation of reduced service at higher rates.

The primary beneficiaries of this practice are investors—not the customers that rely on the railroads to do business. Nobody is saying profitability is a bad thing; to the contrary, we want railroads to be prosperous and invest in their network and service. But you can't consider these radically lower operating ratios without also considering that railroads are essentially a utility industry with an insurmountable barrier to entry, and one that is allowed to have total market power over the customers that need them in many places. It is just another piece of evidence that this industry deserves a closer examination from Congress and the STB.

Service problems are not merely inconvenient—they cause serious disruption to our customers and to our ability to operate. Chlorine plants run 24/7 and we carefully balance our production and our ability to move product offsite.

Likewise, a customer that does not receive their shipment may be forced to shut down, and we have many customers that experienced severe disruptions during the CSX crisis. In some cases not involving chlorine, we were able to provide trucking service at great expense, but for chlorine shipments this is simply not an option. Impacts to small businesses from these disruptions can be devastating.

I'll offer two representative examples to consider. We have a small business customer in Williamsport, PA that is currently losing $100,000 a day due to no chlorine being delivered despite on time orders and on time shipments by Olin. These are lost sales to a small company that is struggling financially. We've also seen a railcar take 40 days to travel from Charleston, TN to New York, with several days of no movement at all. This customer was forced to put their facility in shutdown status as a result.

I believe the STB should look at establishing minimum service requirements as a part of the railroads' common carrier obligation.

AAR Tank Car Committee Problems

I want to discuss two more technical issues where we could use the Committee's assistance and engagement.

1) Tank Car Committee

As a large shipper of tank cars, Olin is deeply vested in policies that impact our ability to maintain a safe and cost effective fleet. Olin owns or leases our entire fleet of tank cars, and while Congress has given sole rulemaking authority to the Department of Transportation (DOT) to establish tank car standards, our experience is that the railroad industry-controlled Tank Car Committee (TCC) has assumed inappropriate control over this function.

The TCC is organized under the control of the Association of American Railroads (AAR), who controls a majority of votes on the Committee. The TCC has asserted that it has authority to prohibit the use of tank cars that meet all applicable DOT requirements, requiring owners to replace these cars long before the end of their useful service life, imposing hundreds of millions of dollars in unwarranted burdens on U.S. manufacturers.

AAR is functioning as the regulator in this space without the requirements typical for a normal rulemaking-- such as cost benefit analysis, safety reviews and public comment. The result is the rail industry exerts their will without the appropriate level of government scrutiny, at the expense of their customers. Olin and other rail shippers make significant long-term capital investments in tank cars, and need confirmation that DOT and not the railroads will be the ultimate authority on what cars we can and cannot use.

I would ask the Committee's assistance in requesting that DOT grant the rail shippers' petition, filed more than two years ago, to initiate a rulemaking that would allow for an open and transparent discussion on TCC reform. I would also ask you to consider introducing legislation that would clarify to DOT that they have the responsibility to set tank car standards for the United States, not a self-interested industry group.

2) Appendix B

Unfortunately, the TCC is also imposing new requirements that inappropriately expand the scope of regulation for routine functions performed at rail shipper facilities. The TCC recently updated its standards for the Certification of Tank Car Facilities – otherwise known as “Appendix B” – in response to unpublished DOT regulatory interpretations that have not been appropriately considered through the rulemaking process.

In documents presented at a public meeting of the Tank Car Committee, the Federal Railroad Administration has taken the position that the replacement of virtually any tank car component is a maintenance function and therefore must be performed only by a certified tank car facility. This interpretation will require facility certification for operations normally conducted at a shipper’s loading facility, including the replacement of plugs, caps, or even a manway bolt. This position is inconsistent with DOT’s longstanding acknowledgement that both inspection and replacement of parts may be part of a shipper’s pre-trip examination of a tank car.

If carried forward, these new and unwarranted “interpretations” will impose significant new regulatory burdens, forcing us to send tank cars to a certified repair shop more frequently. This will take cars out of service for months at a time and further reduce the productivity of our rail car fleet.

Consistent with the Administration’s regulatory reform agenda, DOT/FRA should issue an interpretation that minimizes regulatory burdens without compromising the Department’s highest priority of safety.

<u>Conclusion</u>

Sen. Kennedy, again, thank you for holding this hearing today. You have been a great ally and representative for rail shippers and our small business customers that experience a myriad of challenges with the rail sector. We look forward to continuing to work with you and your staff to find solutions that will improve this situation for rail shippers—and solutions that will ultimately help the economy and the rail industry itself.