

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

TOTAL PETROCHEMICALS & REFINING USA, INC.)	
)	
Complainant,)	
)	
v.)	Docket No. NOR 42121
)	
CSX TRANSPORTATION, INC.)	
)	
Defendant.)	
)	

**MOTION FOR AN EXPEDITED DECISION ON
COMPLAINANT’S THIRD MOTION TO COMPEL**

Pursuant to 49 CFR § 1117.1, complainant Total Petrochemicals & Refining USA, Inc. (“TPI”) hereby asks the Surface Transportation Board (“Board”) for an expedited decision on TPI’s previously-filed Third Motion to Compel. Now that the Board has issued its market dominance decision in this case, it is appropriate for defendant CSX Transportation, Inc. (“CSXT”) to update its discovery requests promptly. **TPI requests expedited action upon this Motion.**

I. Background.

TPI filed a Third Motion to Compel on August 3, 2012 (“Motion to Compel”), requesting that the Board order CSXT to update certain discovery responses due to the extensive delay that had occurred since the end of discovery. CSXT replied in opposition to the Motion. In a decision served on August 23, 2012 (“August 2012 Decision”), the Board held the Motion to Compel in abeyance because the rate reasonableness phase of the case was itself in abeyance.

On May 31, 2013, however, the Board issued a decision on market dominance (“Decision”), thereby completing the jurisdictional phase of this case. As the parties now embark on the rate reasonableness phase, the time is ripe for CSXT to update its discovery responses as described more fully in the Motion to Compel.

Since the Board’s Decision on market dominance, TPI and CSXT have agreed upon the proper scope for updated discovery responses. In order to establish that agreement in the record of this proceeding, and to permit CSXT to either concur or disagree, TPI summarizes the agreed upon scope as follows:

CSXT will update its discovery responses, through 2012 and such part of 2013 that data is available, for traffic, revenue and density data; positive train control; and forecasts. The foregoing subject matter is encompassed by the following TPI document requests:

1. Traffic Volume -- #20, #21, #22, #23, #34, #35, #36
2. Revenue -- #20, #34, #35, #36
3. Density Data -- #18, #19
4. Forecasts -- #29, #30, #31, #156, #157
5. PTC -- #149

In consideration of this narrower scope for updated discovery, other than updated discovery responses covered by the foregoing requests, neither party will use private information in the rate reasonableness phase of this case that was not previously produced prior to the close of discovery on October 15, 2010.

As a result of the foregoing agreement on the scope of updated discovery (assuming that CSXT concurs in its Reply), the only remaining aspect of TPI’s Third Motion to Compel for the Board to resolve concerns the timing of CSXT’s updated responses. This is closely related to TPI’s “Motion for Procedural Schedule,” which TPI is filing simultaneously with this Motion. If CSXT does not concur with the scope described above, the Board will need to decide TPI’s entire Motion to Compel, which is broader than the foregoing agreement.

II. Argument.

In the Motion to Compel, TPI requested that the Board order CSXT to update its responses to certain discovery requests “so that the parties may base their SAC evidence on the most accurate and current data that is reasonably available.” Motion to Compel at 5. The need for updating is even more pressing now, given that an additional ten-and-a-half months have passed since TPI filed the Motion to Compel. The original discovery responses of CSXT were based on the time period through June 2010 – three years ago. CSXT should update its responses so that the parties can base their rate reasonableness evidence on the most current data through 2012 and such part of 2013 that is available.

In holding the Motion to Compel in abeyance, the Board stated that “the rate reasonableness phase of this proceeding, including all motions related to rate reasonableness, is in abeyance.” See August 2012 Decision at 3. Therefore, the Board decided to hold the Motion in abeyance “pending further order of the Board.” *Id.* at 3. The time has come for the Board to issue a further order. On May 31, the Board issued the Decision, thereby ending the market dominance phase of the case and signaling the start of rate reasonableness. As directed by the Board in the Decision, TPI and CSXT have conferred in an attempt to agree upon a procedural schedule for the rate reasonableness phase, but no agreement was possible. A major reason for their disagreement was CSXT’s insistence that updated discovery be deferred until the Board decides CSXT’s Petition for Reconsideration. TPI has explained more fully in its Motion for Procedural Schedule that this case should move immediately to rate reasonableness, but the bottleneck in that process is the promptness by which CSXT updates its discovery responses.

There is no justification for delaying CSXT’s updated discovery responses even while the Board is deciding CSXT’s Petition for Reconsideration. CSXT’s arguments for reconsidering

the Decision mostly rehash the same arguments that it and other railroads made in STB Docket No. 42123, M&G Polymers USA, LLC v. CSX Transp., Inc., and that the Board addressed in the Decision. Furthermore, even if any of CSXT's arguments were to change the Board's market dominance determination in a handful of lanes, the nature and scope of the updated discovery is not lane dependent. For example, traffic, revenue and density data; PTC information; and forecasts will be the same regardless whether a particular lane is in or out of the case based on market dominance. Therefore, by ordering CSXT to begin updating its discovery responses immediately, the Board will enable TPI to prepare and submit opening evidence earlier than otherwise would be possible, thereby keeping this case on a forward trajectory.

Furthermore, in order to ensure that CSXT does not unnecessarily or inappropriately delay its discovery responses, which would prejudice TPI's ability to meet its own proposed deadline for submitting opening evidence, TPI asks the Board to establish a fixed date by which CSXT must complete its responses and to direct CSXT to produce information as it is available rather than waiting until the very last day to dump all of its responses on TPI. Therefore, TPI asks the Board to set a fixed date deadline of August 29, 2013, consistent with TPI's proposed procedural schedule.

Although this Motion is closely related to TPI's Motion for Procedural Schedule, it is not necessary for the Board to decide both motions simultaneously. The Board may order CSXT to begin updating its discovery immediately, and even set a date for completing CSXT's production, before the Board has decided on the rest of TPI's procedural schedule. Therefore, TPI is requesting expedited action on this Motion.

In refusing TPI's request to immediately begin the process of updating discovery responses, CSXT effectively and unilaterally has stayed the forward progress of this case, in

violation of the procedures in 49 C.F.R. § 1115.3(f). Prompt action by the Board is necessary to compel CSXT to update its discovery responses so that the parties can expeditiously prosecute the rate reasonableness phase consistent with TPI's proposed procedural schedule. This proceeding has been delayed long enough. In further support of this Motion to Expedite, TPI refers the Board to the Motion to Compel.

III. Conclusion.

For the foregoing reasons, TPI respectfully requests that the Board issue an expedited decision on TPI's Third Motion to Compel by ordering CSXT to begin to update its discovery responses (either as agreed by the parties or as described in the Motion to Compel) immediately and to complete the process by August 29, 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June 2013, I served a copy of the foregoing upon counsel for defendant CSXT via electronic mail and U.S. first-class mail, postage prepaid, at the address below:

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