

BEFORE THE
SURFACE TRANSPORTATION BOARD

M&G POLYMERS USA, LLC)
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)
 Complainant,)
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 v.)
)
 CSX TRANSPORTATION, INC.)
)
)
 Defendant.)

Docket No. NOR 42123
232744

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CSX TRANSPORTATION, INC.'S REPLY IN OPPOSITION TO
COMPLAINANT'S SECOND MOTION TO COMPEL

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**CSX TRANSPORTATION, INC.’S REPLY IN OPPOSITION TO
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CSX Transportation, Inc. (“CSXT”) respectfully submits this Reply in Opposition to M&G Polymers USA, LLC’s (“M&G”) Second Motion to Compel. M&G’s Motion is foreclosed as a matter of law on multiple independent bases. Moreover, the Motion seeks new discovery for the first time nearly 19 months after CSXT requested bifurcation; seeks to undermine the very savings and efficiencies that caused the Board to consider market dominance jurisdictional issues separately; would impose a very large, undue burden on CSXT before the parties know whether this case will even go forward – let alone go forward with substantially the same traffic group – after the Board issues its market dominance decision; and does not remotely approach satisfaction of the standard for granting a motion to compel. M&G expressly agreed to bifurcation, and did not reserve any right to seek supplemental discovery. In the event that this case proceeds after the Board’s jurisdictional decision, it is possible that some limited, targeted additional information production may be appropriate. At this juncture, however, as a matter of law and equity, M&G has utterly failed to demonstrate it is entitled to any additional discovery or that any such discovery is appropriate. Accordingly, the Motion should be denied.

I. M&G's MOTION IS PRECLUDED BY GOVERNING REGULATIONS, THE BOARD'S ORDER BIFURCATING THIS CASE, AND THE CLOSE OF DISCOVERY WITHOUT OBJECTION OVER A YEAR AGO.

The Motion should be denied without further consideration because it violates the Board's express order prohibiting any further motions regarding rate reasonableness until the Board determines whether CSXT has market dominance over the transportation at issue. Separately, the regulation upon which M&G relies does not provide for supplementation of discovery under the present circumstances and does not impose any general duty of supplementation. Moreover, the Board's regulations do not authorize a motion to compel under the present circumstances. Finally, discovery closed well over a year ago, without any objection from M&G or any assertion that CSXT had an obligation to supplement its responses after discovery had closed.

A. The Board's Bifurcation Order Prohibits M&G's Motion.

When the Board decided to bifurcate this case into two phases, it stayed all motions related to rate reasonableness until resolution of the market dominance phase, stating

[t]he rate reasonableness phase of this proceeding, including *all motions related to rate reasonableness, is held in abeyance* pending further order of the Board.

M&G v. CSXT, Decision at 5, STB Dkt. No. 42123 (served May 6, 2011) (emphasis added). The import and effect of this order are unambiguous. During the pending market dominance phase of this case, motions pertaining to the potential future rate reasonableness phase of this case are suspended – a party may not file such a motion. M&G's present motion seeks discovery that it alleges is relevant to the rate reasonableness phase of this case. Absent an order of the Board, such motions are not allowed. Thus, M&G's Motion is prohibited by a governing order of the Board and should be denied without further consideration.

B. The Regulations Upon Which M&G Relies Do Not Authorize The Supplemental Discovery It Seeks.

The regulations on which M&G relies (49 C.F.R. §§ 1114.31(a), 1114.29) do not authorize the relief it seeks. As a threshold matter, governing regulations do not authorize a motion to compel supplementation of previously completed responses. Separately, the Board's regulations do not provide for supplemental discovery based on the passage of time after the close of discovery under the governing procedural schedule.

First, the regulation pursuant to which M&G filed its Motion does not authorize it. Section 1114.31(a) provides for motions to compel only when the party to which discovery is directed “fails to answer or gives evasive or incomplete answers” to discovery propounded by the other party. 49 C.F.R. § 1114.31(a). As M&G expressly concedes, however, it is seeking new, additional discovery concerning “requests to which CSXT has already responded.” *See* Second Motion to Compel at 5.¹ M&G does *not* allege that CSXT “fail[ed] to answer,” its discovery requests. Nor does it allege that CSXT's completed responses (including extensive document production) were either evasive or incomplete. Because M&G alleges none of the prerequisite conditions for a motion to compel, its Motion is not authorized by governing regulations. For this independent reason alone, the Motion must fail.

¹ M&G essentially concedes that failure to answer a discovery request fully is a precondition to a motion to compel. *See* Motion at 4 (“When a party does not fully respond to discovery requests, a motion to compel may be filed.”). M&G does not allege here that CSXT failed to fully respond to valid discovery requests. Nor, with one exception, did it make any such claim to the Board during the discovery period. *See* Decision, *M&G v. CSXT*, STB No. 42123 (served Nov. 24, 2010) (denying M&G's First Motion to Compel discovery of CSXT internal costing data). What M&G is seeking here is *additional* discovery well *after the discovery period has closed*, not a fuller or more complete response to the discovery requests it served during the discovery period.

Second, contrary to M&G's impression, the Board's regulations do not impose a general duty to supplement completed discovery responses or document production.² In fact, the regulation upon which M&G relies is quite narrow, requiring supplementation based upon after-acquired information under two circumstances: (i) a party learns additional information about the identity and location of persons having knowledge of discoverable matters, or about the identity and testimony of an expert witness; and (ii) a party who learns that his response to a discovery request is incorrect must correct it. *See* 49 C.F.R. § 1114.29 (a), (b). None of M&G's 51 supplemental discovery requests or their myriad sub-parts concerns either of the two narrow, specific circumstances in which supplementation of discovery is required. Instead, all seek additional information concerning discovery requests to which CSXT completed its responses more than a year ago.

Nor can M&G rely on the residual provision of the regulation, which provides that a duty to supplement responses may exist where the parties have agreed to such a duty or where the Board has imposed such a duty through an order. *See* 49 C.F.R. § 1114.29(c). Neither of those conditions obtains here. M&G and CSXT did not agree to supplement discovery responses after discovery had closed, and the Board did not impose such a duty in any order issued in this case.

When M&G withdrew its opposition and joined CSXT in seeking bifurcation, it sought only one condition, that the Board issue an expedited schedule for the submission of market dominance evidence. *See* M&G Withdrawal of Opposition to Bifurcation Request and Motion to Modify Procedural Schedule (April 15, 2011). Important for the present Motion, M&G did not

² Indeed, if the temporally unlimited obligation M&G hypothesizes were the rule, then M&G would be obliged to produce supplemental discovery to CSXT concerning discovery requests CSXT propounded to M&G, including requests concerning competitive transportation alternatives and other market dominance issues. Presumably, under M&G's theory, CSXT would then be entitled to file additional evidence concerning market dominance based on that new evidence. Such a process would be potentially endless.

condition its support for bifurcation on an opportunity to seek additional discovery after the discovery period closed. The Board granted the only condition M&G sought, the expedited schedule it requested for submission of market dominance evidence. *See* Decision, *M&G v. CSXT* (served May 6, 2011). Thus, M&G neither sought nor obtained an order from the Board providing for supplemental discovery, at any time. The residual provision does not apply because there is no order of the Board or agreement of the parties providing for the supplemental discovery M&G now requests. M&G's request for supplemental discovery is not allowed by governing regulations. Thus, the Motion should also be denied on this separate and independent ground.

C. M&G Has Waived Any Argument That a New Discovery Obligation Should Be Imposed.

M&G waived any other argument that CSXT should be required to undertake additional highly burdensome discovery by failing to raise it at any relevant time before this month. CSXT moved for expedited determination of market dominance in January 2011. In its initial memorandum opposing CSXT's motion, M&G argued that bifurcation would not promote efficient processing of the case because the parties had already *completed* discovery, which constituted a major portion of the work in a SAC case. *See* M&G Reply in Opposition to CSXT Motion for Expedited Determination of Jurisdiction at 5³ ("A large portion of the major work in a SAC case comes in the discovery phase, which ended pursuant to the procedural schedule over

³ The Board subsequently extended discovery for a short period for the narrow purpose of allowing Defendant CSXT to obtain limited discovery concerning two specific lanes that M&G added to the case after discovery had closed. *See* *M&G v. CSXT*, STB Dkt. No. 42123, Decision at 4 (served May 6, 2011).

two months ago.”)⁴ Briefing of that motion concluded on April 15, 2011, with M&G withdrawing its opposition and agreeing to bifurcation. At no time during the bifurcation briefing did M&G take the position that bifurcation would require additional discovery, nor did it reserve a right to request further discovery.

The parties submitted market dominance evidence in the summer of 2011, concluding with M&G’s rebuttal filing more than a year ago, on August 4, 2011. Again, at no time in its evidentiary submissions did M&G take the position that additional discovery would be needed in the event that the case went forward following the Board’s market dominance ruling.

In March 2012, M&G submitted a letter to the Board, seeking an investigation of the time that had elapsed since the submission of market dominance evidence. *See* J. Moreno Letter to Chairman Elliott (March 22, 2012). Once again, M&G said nothing about additional discovery.

It was not until nearly a year after the parties had completed submission of market dominance evidence that M&G first suggested that CSXT undertake a second extraordinary effort to gather, develop, and produce huge volumes of additional evidence, including the preparation of new traffic and event files. *See* J. Moreno Letter to P. Moates et al (July 13, 2012) (Attachment 1 to Motion). When CSXT declined to undertake a second huge and costly discovery project in this case – particularly before the parties even knew whether the case would go forward following the Board’s market dominance ruling – M&G filed the present Motion to Compel. That motion – filed more than nineteen (19) months after CSXT filed its request for expedited determination of market dominance – was the first time M&G had raised any possibility of further discovery with the Board. M&G had numerous opportunities to raise this

⁴ M&G now takes a much different position concerning what it previously called the “major work” of a SAC case (discovery), asserting that the burden to CSXT of replicating most of its previous discovery effort would be “speculative and minor.” Motion at 10.

issue over those 19 months, but declined to do so. It should not be heard now to raise, for the very first time, a new request for “supplemental” discovery.

II. REOPENING DISCOVERY NOW WOULD BE INCONSISTENT WITH THE PURPOSE OF DECIDING JURISDICTIONAL QUESTIONS BEFORE PROCEEDING TO RATE REASONABLENESS.

As established in the preceding sections, M&G’s Motion is not authorized by the Board’s regulations and is prohibited by Order of the Board. Moreover, even if the Motion were not otherwise precluded as a matter of law, discovery closed long ago, and M&G did not reserve a right to request additional discovery, or even raise the possibility of additional discovery until July 2012. Thus, as a matter of law and equity, M&G’s motion to compel additional discovery should be flatly denied.⁵ In this section, CSXT further demonstrates that even if the Board were to consider whether some focused, limited additional discovery might be allowed in the event that the case goes forward, any such consideration must await the completion of the market dominance phase of this case. The Board should evaluate whether any supplemental production of data and information may be warranted – if at all – only *after* it has completed the market dominance phase *and* M&G has declared it intends to go forward with a SAC case challenging the remaining rates. Any consideration of additional discovery or information production before then would be contrary to the purpose and intent of bifurcating this case, and would risk wasting substantial resources on efforts that ultimately may be unnecessary.

⁵ CSXT’s position is that the Motion is unauthorized and prohibited and therefore must fail as a matter of law, without further consideration. Neither this Section II nor any other portion of this Reply is intended to waive that argument. Instead, this section shows that even assuming, *arguendo*, that some limited additional information production might be warranted in the future if this case were to go forward, at this point any consideration of the production of such further information would be entirely premature and inappropriate.

A. M&G’s Motion Flouts the Board’s Purpose – Supported by the Parties – of Determining Whether it Has Jurisdiction Over the Challenged Rates Before the Parties Expend Further Resources on Rate Reasonableness Matters

The relief M&G seeks would undermine a principal purpose of separating the market dominance and rate reasonableness phases in this case – to avoid expenditure of resources on matters that may be unnecessary. The Board bifurcated this case in order to decide substantial jurisdictional questions before the parties would be required to expend substantial additional resources on rate reasonableness issues and evidence. M&G itself advocated this goal when it withdrew its initial opposition and joined CSXT in requesting bifurcation. *See, e.g.,* M&G Withdrawal of Opposition to Bifurcation at 1 (“M&G requests that the [] Board decide the market dominance portion of this proceeding before rate reasonableness . . .”); *id.* at 4 (“[B]oth M&G and CSXT now agree that bifurcation should occur . . . [and] a quick Board decision [regarding bifurcation] will allow M&G to defer preparation of SAC evidence and conserve limited litigation resources.”). As the Board summarized in granting bifurcation in a parallel case against CSXT, the “advantage of a sequential process” (*i.e.*, a market dominance phase followed by a rate reasonableness phase if necessary) is that parties are “spared the time and expense of filing rate reasonableness evidence where the carrier [i]s not found market dominant.” *TPI v. CSXT*, STB Dkt. No. 42121, Decision at 4 (served April 5, 2011).⁶ Recognizing that the interests of resource conservation extend to all further activity concerning the rate reasonableness phase, the Board held the entire rate reasonableness phase in abeyance pending completion of the market dominance phase. *See M&G v. CSXT*, Decision at 5 (May 6, 2011).

⁶ After the Board’s bifurcation decision in the *TPI* case, M&G withdrew its opposition and agreed to bifurcation, recognizing that the same analysis and resource conservation principles the Board applied in *TPI* also applied in this case. *See generally*, M&G Withdrawal of Opposition to Bifurcation (April 15, 2011).

The Motion to compel new discovery disregards the goal of resource conservation animating the bifurcation decision, by seeking very substantial and burdensome additional discovery *before* the Board has determined whether it has jurisdiction over the majority of the lanes at issue in this case. Requiring CSXT to provide such additional discovery at this juncture would defeat a central goal of bifurcation – which M&G itself endorsed in supporting bifurcation – avoidance of unnecessary expenditure of resources on matters that may be rendered moot or unnecessary by market dominance determinations. Having supported bifurcation and the attendant conservation of parties’ resources, M&G should be estopped from reversing its position and advocating the imposition – on CSXT alone – of a heavy new burden of additional rate reasonableness-related discovery before the first, threshold phase of the case has concluded.

B. Even if M&G Were Entitled to Limited Additional Discovery in the Event This Case Goes Forward, Requiring Such Discovery Before a Market Dominance Decision Would Risk Wasting Resources on Unnecessary Efforts.

CSXT has challenged directly the Board’s jurisdiction over approximately two-thirds of all rates at issue in this case. *See, e.g.*, Motion at 8-9 (acknowledging that CSXT has contested jurisdiction over 43 of 69 issue movements). Those lanes account for approximately {{

}} of the issue traffic by volume. *See* CSXT Reply Market Dominance Evidence Workpaper “CSXT CarWaybills and CarShipments Data for M&G Traffic IQ09 to 2Q10_updated.xlsx.” If the Board were to find it lacks jurisdiction over two-thirds of the challenged rates – covering almost {{ }} percent of the M&G traffic at issue in this case – it is not only possible but likely that M&G would either abandon its challenge to the remaining rates or seek to challenge those rates under one of the Board’s alternative approaches for medium and smaller cases. This is not only because only one-third of the lanes would remain, but also because it is unlikely that a viable SAC presentation could be assembled based on the particular lanes and volumes that would remain. If CSXT were required to undertake additional discovery

and production efforts now, and following the Board's market dominance decision M&G decided not to pursue the case, then the very substantial expenditure of CSXT resources on additional discovery would have been unnecessary and wasted.

Notably, M&G has *not* stated that it necessarily would pursue this case if the Board found it lacked jurisdiction over 43 of the challenged rates. *See* Motion at 8-9 (claiming that some additional discovery would remain relevant if 43 lanes were eliminated from the case, but not committing to pursue the case in that event). M&G's contention that some of the additional discovery it now seeks would remain relevant even if the Board dismissed 43 lanes would itself be wholly irrelevant if M&G declined to pursue a challenge to the remaining rates. Without such a commitment by M&G to pursue a SAC case regardless of the Board's market dominance decision, it would be particularly unfair and unwise to require CSXT to gather and produce extensive additional data and information before a market dominance decision.

More generally, it would not be efficient to require CSXT to produce additional information concerning all of the complaint lanes and surrounding lines in 20 different states before the Board determines which rates (and lanes) are within its jurisdiction and thus subject to challenge in this case. One of the Board's primary reasons for bifurcating this case and the parallel *TPI v. CSXT* case is the knowledge that the cases, and hence the parties' rate reasonableness evidence, may be substantially less complex if they involve fewer rates and lanes. *See* Decision *M&G v. CSXT*, (served May 6, 2011); *TPI v. CSXT*, STB Dkt. No. 42121, Decision at 7 (served April 5, 2011). By the same logic, any limited additional discovery that might be allowed following the Board's market dominance decision would also be less complicated and less burdensome if it applied to fewer lanes and rates. Accordingly, fairness, efficiency, and avoidance of unnecessary expenditure of parties' resources all favor deferring any potential

supplemental information production until the completion of the market dominance phase. At that point, the Board and the parties will know what rates and lanes will be subject to challenge in this case and all will be in a much better position to evaluate if any additional discovery or information production is appropriate.

III. M&G HAS UTTERLY FAILED TO MEET ITS BURDEN OF SHOWING IT IS ENTITLED TO THE EXCESSIVE AND BURDENSOME ADDITIONAL DISCOVERY IT SEEKS.

As demonstrated above, M&G's Motion is barred as a matter of law and the Board should deny it without further review of the myriad requests for additional discovery propounded by M&G. *See I supra*. Ordering additional discovery concerning all challenged rates at this juncture would also frustrate a primary aim of proceeding sequentially in this case – to avoid potentially unnecessary expenditure of time and resources on matters related to the potential rate reasonableness phase of this case. *See II supra*. Even if the Motion were not prohibited and contrary to the purpose and intent of bifurcating this case, it would still fail to satisfy the standards governing motions to compel discovery. Other than a few cursory general assertions that are not connected to any specific requests, the Motion makes no attempt to make the particularized showings of entitlement to specific additional discovery that are required to meet the movant's burden of proof in a motion to compel.

M&G has not narrowly tailored its additional discovery requests to seek information it would actually need—in addition to the voluminous information previously produced by CSXT—to prepare SAC evidence. Instead, M&G has indiscriminately recycled and re-issued 51 discovery requests with 256 subparts, with no apparent attempt to balance the burden of production with the relevance, materiality, or potential probative value of the requested information. The Motion and the discovery it seeks evidence no effort to cull or narrow the scope or burden of those myriad requests in any way. The result of M&G's lack of care or

tailoring in simply re-issuing its prior requests is a confused set of broad, burdensome, and unnecessary requests. M&G's assertion that the burden to CSXT of responding to these requests would be "speculative and minor" cannot be taken seriously. The burden of such additional discovery would be enormous. M&G's contrary claim undermines the credibility of the entire Motion. Moreover, as demonstrated below, the Motion does not even *attempt* to meet M&G's burden of showing that each of its specific requests is narrowly tailored to serve a real, practical need for information through the least intrusive means.

A. The Additional Discovery M&G Seeks Would Be Extraordinarily Burdensome

As the Board has recognized, responding to discovery requests is a time-and-resource-intensive endeavor. In this case, the process required not only numerous CSXT personnel, rate case consultants and outside counsel, but also required the engagement of additional specialized outside consultants and experts to assemble, process, and produce documents and data. During the discovery period, CSXT devoted extraordinary resources to identifying, developing, gathering and producing documents and information sought by M&G's many requests. As a result of that effort, CSXT produced 26,150 paper pages and over 100 gigabytes of data.

As CSXT explained in its responses to M&G's requests during discovery, much of the data M&G seeks is not collected, organized, or maintained in the form requested by M&G for its purposes in a rate case. During discovery, CSXT objected to 30 of the 51 requests M&G has now re-issued, on the ground that responding to them would require a special study. CSXT nonetheless endeavored to produce information and documents responsive to most of those requests, sometimes conducting special studies even though it was not required to do so.

For example, because CSXT does not maintain waybill, car, train, event, revenue, and other traffic records and data in the forms sought by M&G, CSXT conducted a large special

study—involving numerous IT personnel and outside software consultants and programmers—to develop, compile, test, and produce traffic data in a form that M&G could use for its rate case purposes. This was an extraordinarily expensive, time-and-resource-intensive project. For quality assurance purposes alone, CSXT personnel and outside consultants spent several weeks reviewing the voluminous traffic data, and interconnections between various databases, files and records developed specifically for this case. The data reviewed during this quality assurance process amounted to approximately 44 gigabytes of data including 24 gigabytes of car event data, 3.5 gigabytes of waybill and traffic data, and 16.2 gigabytes of train sheet data.

M&G’s present motion seeks to require CSXT to go through the entire traffic data generation process again for an additional *two years* of data – approximately the same time period covered by the voluminous data produced during discovery — without *any* attempt to narrow the scope or burden of that request.⁷ Heedless of the extraordinary burden and cost of collecting, developing, testing, and producing such additional traffic and revenue data, and the resources CSXT already expended to produce such data during discovery, M&G attempts to justify its request with the simplistic general assertions that the “most recent cost, traffic, and revenue should be produced” and that “ the Board prefers actual data and updated figures.” Motion at 3.⁸ The Complainant made no attempt whatsoever to narrow its requests or to identify alternative information or less burdensome requests that could adequately serve its perceived

⁷ Although the Motion is not entirely clear on this point, it appears that it seeks data from June 2010 to the present (presumably September 2012), or approximately 27 months. During discovery, the parties agreed that CSXT would produce data covering 2008, 2009 and the first 6 months of 2010, or approximately 30 months.

⁸ Because M&G fails to reference any specific discovery requests it contends are encompassed by these conclusory rationales, it cannot be determined which—if any—additional discovery requests M&G claims are justified by those general, cursory statements. For purposes of this discussion, CSXT assumes M&G may intend those superficial assertions refer to its requests for car, train, event, and waybill records.

needs. Instead, it simply republished a numerical listing of 51 of its prior requests and demanded all responsive data. *See* J. Moreno Letter (July 13, 2012) (Attachment 1 to Motion).

In sum, discovery in this case was a massive undertaking, and M&G now asks CSXT to replicate the process in its entirety for many requests, without any apparent effort to narrow the scope or burden of those requests, or to confine them to seeking only the additional information M&G believes it truly needs.

B. M&G Has Made No Attempt to Meet Its Burden of Demonstrating it is Entitled to Additional Discovery.

The “Board requires ‘more than a minimal showing of potential relevancy’ before granting a motion to compel discovery. Complainants must demonstrate a real, practical need for the information.” *Total Petrochemicals USA, Inc. v. CSX Transp.*, Docket No. NOR 42121 at 2 (decided Nov. 24, 2010) (internal citations omitted). Moreover, as the very decision that M&G relies upon provides, the discovery requests at issue “must be *reasonably tailored* to the particular charges to be proved and reflect the *least intrusive means* of obtaining the information.” *Coal Rate Guidelines*, 1 ICC 2d 520, 548 (1985) (emphasis added).⁹ If the Board were to consider M&G’s Motion on the merits, it would necessarily fail because M&G makes no attempt to satisfy these basic standards and requirements.

For example, M&G *has not even attempted to meet its burden* to demonstrate a particularized “real, practical need” for each of the 256 additional discovery requests (including subparts) it re-issued. In order to obtain discovery it seeks in its Motion, M&G would be required to explain and support a real and practical need for the specific information at issue in

⁹ M&G relies upon *Coal Rate Guidelines* for the standard for a motion to compel. Tellingly, its incomplete discussion fails to mention the essential requirements that a movant show “a real, practical need for the information” and that the request be “reasonably tailored” and employ the “least intrusive means of obtaining the information.” *Compare* Motion at 4 with *Coal Rate Guidelines*, 1 ICC 2d at 548.

each Interrogatory or Request for Production (“RFP”), including their subparts, and demonstrate that each request is reasonably tailored to the particulars of the case and employs the least intrusive means available to obtain that information. For the overwhelming majority of the 51 requests, however, M&G proffers no supporting rationale or argument at all, not even a general assertion or argument.¹⁰ Even a casual review of the 256 subparts M&G has attempted to resuscitate would demonstrate they are far from narrowly tailored or reasonably drawn. Because M&G made no attempt to show that its Motion or the republished requests satisfy the standard for granting a motion to compel, the Motion would fail even if it were not barred as a matter of law.

C. Had it Tried, M&G Could Not Have Met its Burdens of Showing A Real Practical Need for the Additional Discovery or That the Requests Were Reasonably Drawn.

Review of M&G’s recycled requests shows that it did not carefully select or consider them and that M&G could not have demonstrated it was entitled to the additional discovery it seeks, had it attempted to do so. Many of M&G’s requests are demonstrably irrelevant, unnecessary, redundant, or seek information to which it is not entitled. Below, CSXT provides some illustrative examples of M&G’s flawed additional discovery requests, and why M&G would have been unable to meet its burden of proof, had it attempted to do so.¹¹

¹⁰ M&G arguably did assert a generalized, scattershot rationale for seeking one category of additional information, traffic data. See Motion at 3. But even there, M&G failed to identify which discovery requests were covered by that rationale; and did not discuss why creating and producing full system car, train, waybill and event files and interconnections is necessary or whether a more narrow and less burdensome alternative might be sufficient to update traffic volumes and revenues. See *Waterloo Ry. Co. – Adverse Abandonment – Lines of Bangor & Aroostook R.R. Co.*, STB Docket No. AB-124 (Sub-No. 2) (Nov. 13, 2003) (“[D]iscovery also may be denied if it would be unduly burdensome in relation to the likely value of the information sought.”).

¹¹ The examples discussed below are merely illustrative. They are not intended to present an exhaustive discussion of M&G’s flawed additional discovery requests or the reasons it could not

1. Requests For Information Not Produced in the First Instance

M&G's careless and ill-considered repetition of prior requests is exemplified by its inclusion of several requests: (i) to which CSXT flatly objected during discovery; (ii) that CSXT did not search for or produce responsive information; and (iii) which M&G did not pursue any further. The Motion claims that M&G is asking CSXT to "supplement (i.e., update)" its "discovery responses." Motion at 1. M&G further asserts that its additional discovery are merely "requests to which CSXT has already responded," suggesting that CSXT produced responsive information during discovery. Motion at 5. With respect to several of the re-issued requests, however, this is simply not the case. CSXT "responded" to those requests only by objecting and advising M&G that it would not produce responsive information. Because CSXT properly produced nothing in response to these requests in the first instance, there is nothing to "supplement."

M&G has made no attempt to explain why information that was not necessary during discovery has become necessary today. RFP No. 24, for example, sought "all studies, analyses, reports, or other documents that evaluate or report on CSXT's implementation and recent update of its 'ONE Plan.'"¹² But CSXT specifically objected to the request as not relevant and not reasonably calculated to lead to the discovery of admissible evidence, and did not produce any

have met its burden of proof for a motion to compel. Of course, it is the movant's burden to show it is entitled to the relief it seeks, here to compel CSXT to produce the additional information M&G has requested – it is not CSXT's burden to prove that M&G is not entitled to that additional discovery. Because the Motion makes no meaningful attempt to satisfy M&G's burden of proof, it would necessarily fail if the Board were to consider it on the merits.

¹² Complainant's First Requests for Admissions, Interrogatories, and Requests for Production of Documents to Defendant, Docket No. NOR 42123 at 48 (served July 26, 2010) ("Complainant's First Discovery Requests").

information in response to that request.¹³ RFP No. 26 sought CSXT's "geographic information system ("GIS")."¹⁴ CSXT objected to the request because production would violate its software license, the program was commercially available, and the request was not reasonably calculated to lead to the discovery of admissible evidence.¹⁵ CSXT did not produce anything responsive to RFP No. 26 and M&G did not further pursue the request. Similarly, M&G has also recycled its request for Rail Traffic Controller ("RTC") models in RFP No. 43. As CSXT objected during discovery, the request is overbroad because it requests RTC studies funded and/or owned by third parties, which are the proprietary information of those parties.¹⁶ Nothing has changed that would alter CSXT's responses to or position on these requests.

2. Request Whose Responses Would Not Change Over Time

CSXT fully responded to several of the requests M&G has now re-issued, and its response would not change with the passage of time. For example, RFP No. 153 asks for GIS data for virtually CSXT's entire system.¹⁷ CSXT produced such data during discovery. The location of CSXT's rail lines and facilities would not change over the course of two years and neither would the GIS data identifying those locations.

RFP No. 23 asks for "decoders" and other data use instructions that CSXT has already produced. Such information would not change during the time M&G had that information in its

¹³ Defendant's Responses and Objections to Complainant's First Requests for Admission, Interrogatories, and Requests for Production of Documents, Docket No. NOR 42123 at 44-45 (served Aug. 25, 2010) ("Defendant's Responses and Objections").

¹⁴ Complainant's First Discovery Requests at 48.

¹⁵ Defendant's Responses and Objections at 45-46.

¹⁶ Defendant's Responses and Objections at 56.

¹⁷ Complainant's First Discovery Requests at 110-111.

possession.¹⁸ RFP No. 112 asks for documents regarding fifteen different types of facilities in the SARR states, information that CSXT has already provided.¹⁹ Various contracts and agreements M&G seeks are static historical documents which would not change. *See, e.g.*, RFP No. 73 (requesting agreements regarding access to the MGA coal region that CSXT obtained in connection with the Conrail transaction).²⁰

3. Requests for Information that Either Does Not Exist or is Publicly Available

Some of M&G's re-issued requests could not be answered for other reasons. Seven of M&G's requests or their subparts ask for information about CSX Intermodal, Inc. *See* RFP No. 20; RFP No. 35; RFP No. 105; RFP No. 108; RFP No. 114; RFP No. 156; and RFP No. 157. As CSXT previously explained, CSXI was a subsidiary of CSX that merged into CSXT in 2010. Because CSXI no longer exists, CSXT cannot provide additional discovery related to that former entity.

CSXT also explained to M&G during discovery that some of the information M&G sought is publicly available and thus CSXT is not obliged to produce such information. That remains true for requests M&G re-asserts in its Motion. RFP No. 31, for example, asks for eight different inflation or rail cost adjustment estimates or calculations.²¹ CSXT explained in its original response to M&G's request that the information was publicly available for M&G to access and the Board had held it unduly burdensome to require a party to produce information that is publicly available.²² *See Duke Energy v. Norfolk So. Co.*, STB Docket No. 42069 (July

¹⁸ Complainant's First Discovery Requests at 47-48.

¹⁹ *See Id.* at 87-88.

²⁰ *See Id.* at 68-69.

²¹ Complainant's First Discovery Requests at 51.

²² Defendant's Responses and Objections at 49-50.

26, 2002) (“[I]t is unduly burdensome to require a party to produce information that is available from public records or through less intrusive means.”). RFP No. 100, requesting documents related to ad valorem taxes, similarly includes information that CSXT previously explained is publicly available.²³

4. Repeated Requests for Information and Things to Which M&G is Not Entitled.

M&G has also re-proponded requests for information it is plainly not entitled to receive. RFP No. 26, for example, requests CSXT’s GIS program. CSXT explained in its discovery response that production of the software was a potential violation of applicable licensing agreements and intellectual property laws and, further, the software could be obtained commercially from other sources.²⁴ M&G also included RFP No. 163 in its additional discovery requests. RFP No. 163 sought documents related to studies “pertaining to the profitability of the revenue generated by the transportation rates charged by CSXT to M&G for the Issue Movements.”²⁵ CSXT objected to the request because the RFP sought internal railroad costing data, which longstanding precedent held was not subject to discovery.²⁶ M&G then filed a Motion to Compel production of that information which the Director of the Office of Proceedings rejected and the Board itself rejected on appeal.²⁷ In seeking “more” information under RFP No. 163, M&G has ignored the Board’s decision in this case. This is another

²³ Defendant’s Responses and Objections at 91-92.

²⁴ Defendant’s Responses and Objections at 45.

²⁵ Complainant’s Third Set of Discovery Requests to Defendant, Docket No. NOR 42123 at 2-3 (served Oct. 11, 2010).

²⁶ Defendant’s Responses and Objections to Complainant’s Third Set of Discovery Requests, Docket No. NOR 42123 at 2 (served Nov. 1, 2010).

²⁷ *M&G Polymers v. CSXT*, Docket No. NOR 42123 (decided Nov. 24, 2010); *M&G Polymers v. CSXT*, Docket No. NOR 42123 (decided Dec. 22, 2010).

example of M&G’s careless and unexamined repetition of prior discovery requests. Plainly, M&G has completely failed to reasonably tailor its Motion as the Board requires.

5. Excessively Burdensome Requests

Finally, several of the requests M&G has re-issued would impose an excessive and undue burden on CSXT. Car and train movement records, linked revenue data, and car and train event records, for example, involve processing, linking and validating enormous data sets, a gargantuan undertaking. *See, e.g.*, RFP Nos. 20, 21, 22, 23, 34, and 36. Responding to these re-issued requests would require processing millions of records and many gigabytes of data. The Motion does not consider any of a number of far less burdensome alternatives.

The foregoing illustrative examples show that M&G exercised little-to-no care, discretion, or judgment in its selection of previous discovery requests for re-issue. M&G’s facile listing of previous requests evidences no effort to narrow or refine those prior requests, or even to determine if they make any sense given what has gone before in the case. M&G has not even *attempted* to satisfy the standard for a motion to compel by demonstrating a “real, practical need” for the information sought by its ill-chosen requests, or that they are narrowly tailored or employ the least intrusive means to obtain information M&G needs. Thus, even if this Motion were otherwise permissible and consistent with the Board’s purposes in bifurcating this case – which it is not – the Motion would necessarily be denied in its entirety because of M&G’s utter failure to meet its burden of proof.

* * * *

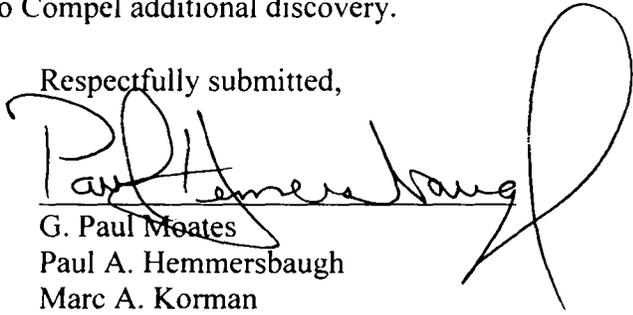
In sum, the Motion must be denied for several independent reasons. First, it would violate the Board’s decision and order directing that all further proceedings regarding the rate reasonableness phase of the case—including motions—were to be held in abeyance. M&G expressly supported bifurcation and holding the rate reasonableness phase in abeyance in its

submission to the Board concerning the issue. Second, the Motion is not allowed by the Board's regulation governing motions to compel. Third, M&G's additional discovery requests are not authorized by the regulation providing for supplementing discovery responses. Fourth, the discovery period in this case ended more than 1 ½ year ago and – despite many opportunities – M&G never reserved a right to seek further discovery or even raised the issue until now. M&G has waived any right it might have had to seek additional discovery. Fifth, engaging in additional discovery activity before the Board has ruled on market dominance would foster the sort of waste of resources the Board and the parties sought to avoid by bifurcating this case. Until the Board rules, the parties cannot know whether this case will go forward at all, and if it does go forward in what form. Finally, even assuming, *arguendo*, that none of the foregoing factors and bars to the Motion existed, M&G has utterly failed to meet its burden of showing it is entitled to the extremely burdensome additional discovery it seeks.

CONCLUSION

The Board should deny M&G's Second Motion to Compel additional discovery.

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Dated: August 13, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 2012, I served a copy of the foregoing CSX Transportation, Inc.'s Reply in Opposition to Complainant's Second Motion to Compel by U.S. mail or more expeditious method of delivery, upon:

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