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November 28, 2012

ENTERED

Ms. Cynthia T. Brown
Chief of the Section on Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Office of Proceeding
November 28, 2012
Part of Public
Record

Re: M & G Polymers USA, LLC v. CSX Transportation, Inc. NOR 42123

Dear Ms. Brown:

This letter constitutes the Comments of Amicus Consumers United for Rail Equity ("CURE"), and a Motion for Leave to File these Comments, in response to the Board's decision served October 25, 2012 in the above-referenced proceeding.

Initially, CURE did not elect to file Comments in response to the refined market dominance methodology followed in the Board's decision served September 27, 2012 herein, because CURE believed that the opportunity to comment should be confined to the parties. CURE did not want to cause any delay in concluding this proceeding.

However, now that the Board has specifically invited non-parties to file Comments as Amici, CURE is seeking leave to file these brief Comments to assist the Board in resolving the issues in this proceeding and to put the railroads' previously filed Comments in context.

Motion for Leave to File. CURE seeks leave to file these Comments as an Amicus of the Board, to assist the Board in evaluating market-dominance disputes in chemical and other types of rail rate challenges. Several railroads who are not parties to the above-referenced proceeding have already filed letters in response to the Board's decision served September 27, 2012, so allowing CURE to participate will provide the Board with balanced comments from the various Amici who are participating.

Interest of CURE. CURE is an incorporated, non-profit advocacy group with the single purpose of seeking rail policy favorable to rail-dependent shippers, many of which are referred to as captive rail customers or captive shippers. CURE is sustained financially by the annual dues and contributions of its members, who are individual rail-dependent rail customers and their trade associations. Included in CURE are electric utilities that generate electricity from coal,

chemical companies, forest and paper companies, cement companies, agricultural entities, various manufacturers and national associations, including both trade associations and associations of governmental institutions whose members work to protect consumers.

The issues that are the subject of this proceeding are of interest to all of CURE's members, either because many of them have filed complaints challenging rail rates for being in excess of a reasonable maximum or because others may consider doing so in the future. The Board's rules, policies, and applications of such rules and policies in such challenges are often determinative of whether CURE's members challenge the rail rates quoted to them or agree to rates after negotiation with the railroads. The accessibility of the Board's rate-reasonableness process and the perceived chance the rail customer has to prevail at the Board often are the only bargaining leverage that a captive rail customer has in a rate negotiation with its rail carrier.

Argument

First, the determination of market dominance in a rate challenge was intended by Congress to be relatively inexpensive, efficient and not to cause inordinate delay. In the 4-R Act, in which Congress first adopted the "market-dominance" concept, and which Congress adhered to in relevant respects in the Staggers Rail Act of 1980, Congress directed the ICC to "establish, by rule, standards and procedures for determining ... whether and when a carrier possesses market dominance.... Such rules shall be designed to provide a practical determination without administrative delay."¹ Application of objective, even quantitative, methodologies or guidelines would best carry out Congressional intent.² Use of tests such as (a) the "substantial investment" test (*i.e.*, did the shipper or its customers invest significantly in rail-related infrastructure or equipment), (b) the 70-percent test (*i.e.*, has the shipper used the rail mode of at least 70 percent of the subject movements), or (c) whether the shipper diverted traffic from CSX to another railroad or another mode when CSX substantially increased M & G's rates, not only would be efficient, expeditious, and economical, but also are quantitative tests not prohibited by statute.³

Second, the railroads claim on occasion that, in general, "quantitative" tests for determining market dominance are contrary to the 49 U.S.C. § 10707(d)(2), but that is not correct. Rather the statute merely states that the fact that the rate(s) for the challenged

¹ *Western Coal Traffic League v. United States*, 719 F.2d 772, 780 (5th Cir. 1983) ("*Western Coal Traffic League*"), citing Section 202(b) of the 4-R Act, Pub. L. No. 94-210, 90 Stat. 31 (1976); see also, 49 U.S.C. § 10101 (15).

² While it may be argued that Congressional intent "was not to establish hard and fast rules for every situation; the myriad individual circumstances in the complex world of rail transportation make that an impossibility," *Western Coal Traffic League*, 772 F.2d at 780, there is nothing in the statute to prevent the Board, in general, from using quantitative approaches to determining market dominance as guidelines, or rebuttable presumptions, and then to allow a party to rebut the presumption if case-specific evidence warrants. The statute (49 U.S.C. § 10707(d)(2)) states that the mere fact that a rate equals or exceeds 180 percent of variable costs "does not establish a presumption (A) that such rail carrier has or does not have market dominance over such transportation." However, clearly a rate that exceeds 180 percent of variable costs is necessary to establish jurisdiction (*id.*, § 10707(d)(1)(A)), and so is of course some evidence of market power, even if not legally sufficient to establish a presumption of market dominance.

³ We note that, at the time of the enactment of the Staggers Rail Act, the R/VC ratio necessary for all rates to cover their total costs was approximately 150 percent of variable costs. See H.Rep. No. 96-1430, 96th Cong., 2d Sess. 90 (1980). Today, that percentage would be about 130-145 percent, depending on the railroad, because of the substantial productivity of the railroads since 1980, eliminating fixed costs that used to drive up the amount of revenue needed to cover total costs. The fact that every rate must exceed 180 percent of a railroad's variable costs in order for the Board to have jurisdiction to determine if a rail rate exceeds a reasonable maximum demonstrates that market power exists in every rate challenge proceeding, because otherwise the railroad could not charge in excess of its total costs.

movement(s) are equal to or are greater than 180 percent of variable costs (the Board's jurisdictional threshold) is insufficient to establish a presumption of market dominance. But that does not mean that other quantitative means of determining market dominance are not permissible.

In the Staggers Rail Act of 1980, as noted above, Congress established the "jurisdictional threshold," effectively deregulating rates below 180 percent of a railroad's variable costs as determined by the ICC. Moreover, even if the rate exceeded 180 percent of variable costs, Congress directed that the ICC "still must determine if market dominance exists." Former 49 U.S.C. § 10709(a), (b). "Although Congress did revamp the ICC's regulations in these respects, it did not alter the market dominance statute enacted in the 4R Act and, in fact, emphasized that it did not intend 'in any way to restrict the ability of the Commission to apply the market dominance concept, both in its regulations and individual cases.'"⁴ So, there is nothing in the statute that, in general, bars the STB from promulgating quantitative market dominance standards.

Third, while the Board's refined market dominance methodology has promise (although we leave the details to the parties, as the Board intended, especially because only the parties have access to the information under protective order necessary to apply that methodology to the facts), we join M & G in urging the Board to backstop its findings under that refined approach. The Board should find, in the alternative, that market dominance is also shown for other reasons, such as the fact that M & G did not divert traffic to trucks or other railroads despite (a) CSX's substantial rate increases on M & G's traffic, (b) M & G's near-total reliance on the rail mode (except during service failures or emergencies⁵), and (c) the substantial investment in rail-related facilities and equipment by M & G and its customers.

Determination of market dominance in a coal rate proceeding is generally straightforward, with large volumes moving in unit trains from one or two origins to a single destination. In fact, in such cases the railroad defendants typically have conceded market dominance.⁶ In contrast, chemical traffic generally involves multi-car or carload traffic over several lanes instead of unit trains of coal over one lane. Thus far, railroads generally have not conceded market dominance in chemical rate challenges. Nevertheless, it is clear that Congress intended that the determination of market dominance should be practical and without administrative delay in all rate challenges. We believe the way to accomplish this objective is to apply objective, quantitative tests of the sort CURE proposes herein, and that the ICC had in place when the Staggers Act was enacted, while allowing railroads to rebut the presumption of market dominance created by such objective tests. How the Board carries out the adoption of such objective tests is a matter we leave to the Board, in the first instance.

⁴ *Western Coal Traffic League*, 772 F.2d at 777, citing H.Rep. No. 96-1430, 96th Cong., 2d Sess. 89 (1980), US.Code Cong. & Admin. News 1980, pp. 3978, 4120. In the Staggers Rail Act, Congress intended that the ICC take another look at its market dominance standards, including consideration of product and geographic competition, but it did not require the ICC to repeal those standards (else Congress would simply have said so).

⁵ The mere possibility that a shipper "could" use a transportation alternative falls far short of supporting a conclusion that the alternative constitutes effective competition so as to negate a finding of "market dominance." *Salt River Project Agri. Imp. and Power District v. United States*, 762 F.2d 1053 (D.C. Cir. 1985); *Central Power and Light Co. v. United States*, 634 F.2d 137, rehearing granted and opinion supplemented, 639 F.2d 1104 (5th Cir.), cert. denied, 454 U.S. 831 (1980).

⁶ The Petition for Rulemaking filed by the Association of American Railroads in Ex Parte No. 717 to reintroduce the complex subject of "product and geographic competition" into market dominance determinations for coal rate challenges would, if granted, make such proceedings more complex. CURE intends to reply in opposition to that Petition in Ex Parte No. 717, so will not further address it here.

Respectfully submitted,

Michael F. McBride

Michael F. McBride

cc: All Persons on the Service List