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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42121

TOTAL PETROCHEMICALS & REFINING USA, INC.

v.

CSX TRANSPORTATION, INC.

Decided: August 23, 2012

This decision holds in abeyance the motion to compel discovery filed on August 3, 2012, by Total Petrochemicals & Refining USA, Inc. (TPI).

BACKGROUND

On May 3, 2010, TPI filed a complaint challenging the reasonableness of rates established by CSX Transportation, Inc. (CSXT) for the transportation of polypropylene, polystyrene, polyethylene, styrene, and base chemicals between 104 origin and destination pairs, located primarily in the Midwestern and Southeastern United States. TPI alleges that CSXT possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed pursuant to the Board's Stand-Alone Cost (SAC) test. On June 23, 2010, the Board served a decision establishing a procedural schedule and protective order. Following that decision, TPI amended its complaint four times. The fourth amended complaint was filed February 3, 2011.

On October 1, 2010, CSXT filed a motion for expedited determination of jurisdiction over the challenged rates (motion to bifurcate). CSXT argued that CSXT's service over 97 of the 120 lanes that were challenged in the first amended complaint is subject to effective competition from rail, truck, or rail-truck transportation alternatives, and, therefore, not subject to the Board's rate reasonableness jurisdiction. On October 21, 2010, TPI replied in opposition to the motion to bifurcate.

In Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc. (Bifurcation Decision), NOR 42121 (STB served Apr. 5, 2011), the Board determined that it was appropriate to bifurcate this proceeding into separate market dominance and rate reasonableness phases, holding the rate reasonableness portion of the proceeding in abeyance and postponing the submission and consideration of rate reasonableness evidence, if necessary, until after the Board has made a determination on the issue of market dominance. The Bifurcation Decision also established a new procedural schedule for the submission of market dominance evidence. The Board modified that procedural schedule in a decision served on July 15, 2011. Submission of

the market dominance evidence was completed on September 6, 2011, when TPI filed its rebuttal evidence. On September 29, 2011, CSXT filed a motion to strike certain portions of TPI's Rebuttal Evidence. TPI filed its reply to CSXT's motion on October 17, 2011.¹

TPI filed the instant motion to compel discovery on August 3, 2012. Because the motion seeks discovery relating only to rate reasonableness, a phase of this proceeding held in abeyance pursuant to the Bifurcation Decision, the motion to compel discovery will be held in abeyance pending further order of the Board.

DISCUSSION AND CONCLUSIONS

TPI contends that under 49 C.F.R. §§ 1114.31(a) and 1114.29, CSXT should update the discovery evidence related to the rate reasonableness portion of the proceeding. TPI asserts that an update is necessary given the time that has passed since the close of discovery, that waiting to update until after the Board issues a market dominance decision would cause unnecessary delay in the proceeding, and that the burden for CSXT would be minimal. TPI further claims that the Board should balance the burden to TPI of delaying the proceeding against the minimal burden imposed upon CSXT by requiring an update of its discovery responses now rather than after the Board issues a decision on market dominance.²

Citing the Board's Bifurcation Decision statement that "[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," slip op. at 7, CSXT claims that the Board should deny the motion to compel because the requested discovery relates to rate reasonableness and therefore falls under the current abeyance. CSXT also argues that §§ 1114.31(a) and 1114.29 do not authorize the discovery sought by TPI, and that TPI waived any argument that additional discovery should take place by failing to previously raise the issue. Finally, CSXT raises multiple objections to the discovery that TPI requests, including that it is irrelevant, duplicative,

¹ CSXT's motion to strike will be addressed in a separate decision.

² TPI correctly notes that because CSXT has not raised a market-dominance related jurisdictional challenge to certain rates, at least some portion of this case likely will proceed to the rate reasonableness phase. At the same time, TPI concedes that the geographic scope of the anticipated SAC analysis could be reduced by more than an insignificant amount depending on how the Board resolves the market dominance issue.

and/or overly broad and burdensome and that TPI has failed to meet its burden of demonstrating that it is entitled to the additional discovery.

As the passage from the Bifurcation Decision quoted above states, the rate reasonableness portion of this proceeding, including all motions related to rate reasonableness, is in abeyance. There is no dispute here that the discovery sought by TPI's motion relates to the rate reasonableness portion of this proceeding. Thus, this motion will be held in abeyance pending further order of the Board.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. TPI's motion to compel discovery filed on August 3, 2012, is held in abeyance pending further order of the Board.
2. This decision is effective on its date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.