

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42123

M&G POLYMERS USA, LLC

v.

CSX TRANSPORTATION, INC.

Digest:<sup>1</sup> To hear a rate reasonableness case, the Board must find that the railroad has market dominance over the transportation. Normally, the Board considers evidence on market dominance and the reasonableness of the rate simultaneously. But in this case the shipper does not oppose bifurcation of these issues, and the Board has granted the railroad's unopposed request. Therefore, the Board will first determine whether the railroad faces effective competition from other transportation providers. If the Board finds that the carrier has market dominance over some or all of the challenged rates, it will then set a schedule for the parties to submit evidence on the maximum reasonable rates.

Decided: May 6, 2011

This decision grants the railroad's motion for expedited determination of jurisdiction over the challenged rates and denies its request to strike portions of the third amended complaint. The Board will bifurcate this proceeding into separate market dominance and rate reasonableness phases, 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.

BACKGROUND

On June 18, 2010, M&G Polymers USA, LLC (M&G) filed a complaint challenging the reasonableness of rates established by CSX Transportation, Inc. (CSXT), for the transportation of polyethylene terephthalate (PET) between 69 origin and destination pairs. M&G alleges that CSXT possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed using the Board's Stand-Alone Cost (SAC) test. By a decision served on August 4, 2010, a procedural schedule and a protective order were established. On August 16, 2010, M&G filed an amended complaint, which deleted 6 lanes from the challenged traffic and added 5 more, resulting in a total of 68 origin and destination pairs.

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

On October 18, 2010, M&G filed a motion for leave to file a second amended complaint, which, among other things, added South Carolina Central Railroad Company (SCRF) as a defendant. On January 27, 2011, M&G filed a motion to dismiss the complaint against SCRF with prejudice, stating that those parties reached a settlement agreement. On that same date, CSXT filed a motion for expedited determination of jurisdiction over the challenged rates (motion to bifurcate). In its motion to bifurcate, CSXT argued that M&G has in the past utilized truck transportation for some of the commodities at issue, and that M&G could feasibly and cost-effectively transport PET via truck and rail-truck alternatives for most of the issue traffic.

On January 31, 2011, M&G filed a third amended complaint, which it corrected on February 1, 2011. The third amended complaint reflected the removal of SCRF as a defendant and added 2 new lanes of traffic. In an accompanying letter, M&G explained that this traffic was a result of new business and, therefore, the traffic was not known when M&G filed its original complaint or any of the subsequent amended complaints.

In a decision served February 4, 2011, the Board granted M&G's motion to dismiss SCRF. In response to an unopposed motion by M&G to modify the procedural schedule on February 24, 2011, the Board modified the procedural schedule, postponing each submission by over 2 months, as requested.

On February 11, 2011, CSXT filed what it styled a reply to M&G's request to file the third amended complaint, essentially requesting that the Board strike the 2 new lanes because the late addition of the lanes would prejudice CSXT. On February 15, 2011, M&G filed a reply explaining that the new lanes are recently acquired business that M&G did not have when it filed its prior complaints, and arguing that CSXT would not be prejudiced by adding the 2 new lanes of traffic.

On February 18, 2011, M&G filed a reply in opposition to CSXT's motion to bifurcate. However, on April 15, 2011, M&G withdrew its opposition to the motion to bifurcate and filed a motion to modify the procedural schedule. M&G states that its proposed procedural schedule is based on the schedule recently established by the Board in Total Petrochemicals USA, Inc. v. CSX Transportation, Inc., NOR 42121 (STB served Apr. 5, 2011). M&G also states that its proposed schedule is designed to prevent conflicts with Total Petrochemical's procedural schedule, as counsel for the parties in that proceeding also represent the parties in this proceeding. On April 19, 2011, CSXT filed a response to M&G's request to modify the procedural schedule and requested a later date for submission of its market dominance reply evidence.

## DISCUSSION AND CONCLUSIONS

Motion to Bifurcate. The default procedural schedule in SAC proceedings—as well as the modified procedural schedule that currently governs this proceeding—provides for evidence on market dominance and rate reasonableness to be submitted simultaneously. See Expedited Procedures for Processing Rail Rate Reasonableness, Exemption & Revocation Proceedings, 1 S.T.B. 754, 760 (1996), M&G Polymers USA, LLC v. CSX Transp., Inc., NOR 42123 (STB served Feb. 24, 2011) (extending procedural schedule deadlines adopted by decision served on August 16, 2010). CSXT, in its motion, requests that the Board issue a new procedural schedule that holds the rate reasonableness portion of this case in abeyance until after the Board examines the parties' market dominance evidence. The motion to bifurcate is unopposed and will be granted. We will hold the rate reasonableness phase of this proceeding in abeyance pending further order of the Board. The Board will issue a decision on market dominance as expeditiously as possible so that the case may proceed, as appropriate. We will require all market dominance arguments (i.e., qualitative and quantitative) to be addressed at the same time in this proceeding.

Motion to Strike. CSXT argues that because discovery is now closed CSXT is foreclosed from posing lane-specific discovery requests on the 2 new lanes. CSXT also explains it would be prejudiced because it has already invested time analyzing the other complaint lanes and has offered evidence regarding M&G's competitive options for many of those movements in its jurisdictional motion. CSXT requests that if M&G is allowed to add the 2 new lanes, CSXT should be allowed to proffer additional market dominance evidence in support of its jurisdictional motion. CSXT also offers evidence to refute M&G's claim that it did not know of nor could have known of these additional lanes when it filed its original complaint and amended complaints.

In its reply, M&G notes that the PET market is constantly changing and that M&G must compete for business from customers each year; therefore, M&G asks its rail carriers to quote rates on a comprehensive list of destinations that includes both current business and business it hopes to obtain. M&G explains it did not include the 2 new lanes in prior complaints because it did not have that business, and has only now received that business. To address CSXT's prejudice claims, M&G agrees to supplement CSXT's prior discovery requests and to waive any timeliness objection to additional lane-specific discovery requests by CSXT.

Under 49 C.F.R. § 1104.11, leave to amend any document is a matter left to the Board's discretion. Amended complaints, under 49 C.F.R. § 1111.2, may be tendered for filing against a defendant named in the original complaint stating a cause of action accruing within the statutory time frame immediately preceding the tender.

CSXT will not be prejudiced by including the 2 new lanes in M&G's third amended complaint. Because CSXT's motion to bifurcate will be granted, we will need to issue a new

procedural schedule. The new procedural schedule will allow for further lane-specific discovery by CSXT on the 2 new lanes until June 6, 2011. M&G will also be directed to provide any documents regarding the 2 new lanes that are responsive to prior CSXT discovery requests as soon as possible, but no later than June 6, 2011. The revised procedural schedule set forth in this decision, coupled with the reopened discovery period on the 2 new lanes, will allow CSXT to analyze the 2 new lanes in time for submission of its reply market dominance evidence, thus removing any prejudice to CSXT because of the addition of lanes after the close of discovery.

Procedural Schedule. CSXT's motion to bifurcate included a proposed procedural schedule that provided approximately 30 days for M&G's opening market dominance evidence, approximately 30 days for CSXT's reply, and approximately 15 days for M&G's rebuttal. The proposed procedural schedule also included an oral argument on qualitative market dominance. M&G's withdrawal of opposition to the motion to bifurcate also included a proposed procedural schedule. M&G's proposed schedule relied on the schedule set forth in the Board's April 5, 2011 decision in Total Petrochemicals. This proposed schedule would allow for approximately 30 days between each of the 3 evidentiary submissions. CSXT, in its response to M&G's withdrawal, now argues that the 30 days to file reply evidence is no longer sufficient to analyze M&G's evidence and prepare a reply. CSXT now requests approximately 60 days to file its reply. In an effort to minimize the delay caused by bifurcation of this proceeding, we will establish a procedural schedule consistent with the deadlines adopted in the April 5, 2011 Total Petrochemicals decision and decline to schedule an oral argument at this time.<sup>2</sup>

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

It is ordered:

1. CSXT's motion for expedited determination of jurisdiction over the challenged rates is granted.
2. CSXT's request to strike the addition of 2 new lanes from the third amended complaint is denied.
3. Discovery is reopened for CSXT with regard to the 2 new lanes contained in the third amended complaint. Discovery on those lanes will close on June 6, 2011.
4. This proceeding is bifurcated for separate determinations of the market dominance and

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<sup>2</sup> On March 16, 2011, M&G filed a motion to correct the procedural schedule adopted in the Board's February 24, 2011 decision. Because we are establishing a new procedural schedule here, that motion is now moot.

rate reasonableness issues. The rate reasonableness phase of this proceeding, including all motions related to rate reasonableness, is held in abeyance pending further order of the Board. The procedural schedule for the market dominance phase is as follows:

Complainant's opening market dominance evidence is due by June 6, 2011;

Defendant's reply market dominance evidence is due by July 5, 2011;

Complainant's rebuttal market dominance evidence is due by August 4, 2011.

5. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.