

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42121

TOTAL PETROCHEMICALS & REFINING USA, INC.
v.
CSX TRANSPORTATION, INC.

Digest:¹ The Board grants in part and denies in part the complainant's petition to supplement the evidence in this proceeding. In addition, the Board orders the parties to each submit sufficient supplemental evidence to allow the Board to consider their operating plans. The Board also establishes a procedural schedule for the remainder of the proceeding.

Decided: July 21, 2015

On May 3, 2010, Total Petrochemicals & Refining USA, Inc. (TPI) filed a complaint challenging the reasonableness of rates established by CSX Transportation, Inc. (CSXT) for transportation between 104 origin and destination pairs, located primarily in the Midwestern and Southeastern United States. In a decision served on April 5, 2011, the Board elected to bifurcate this proceeding and decide the market dominance issue before entering the case's rate reasonableness phase. A procedural schedule to govern the rate reasonableness phase was set forth in a decision served on September 26, 2013, which explained that the rate reasonableness phase would begin on October 17, 2013, at the close of supplemental discovery. Multiple motions to extend the procedural schedule were subsequently granted, the most recent in a decision served on September 5, 2014. That decision set December 19, 2014, as the due date for final briefs.

On November 5, 2014, TPI submitted its rebuttal evidence, which was accompanied by a petition to supplement the record. CSXT responded to TPI's petition to supplement on November 25, 2014.² In a decision served on December 10, 2014, the deadline for final briefs was held in abeyance in order for the Board to consider the arguments presented in TPI's petition to supplement and CSXT's reply.³ Subsequently, on its own initiative, the Board held a

¹ 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).

² We will cite this filing as CSXT Reply to Petition. We will cite CSXT's reply to the rate reasonableness evidence that was filed on July 21, 2014 as CSXT Reply.

³ On February 2, 2015, TPI filed a letter in which it made requests regarding the procedural schedule and expressed concerns about the delay in this proceeding. CSXT filed a letter in reply on February 5, 2015. As discussed below, this decision establishes a procedural schedule for the remainder of this proceeding.

technical conference with the parties regarding their operating plans and Rail Traffic Controller (RTC) model evidence on May 27, 2015. In this decision, we will address the TPI petition to supplement, order the parties to each submit sufficient supplemental evidence to allow the Board to consider the parties' operating plans, and establish a procedural schedule to complete the submission of evidence in this rate reasonableness phase of this proceeding.

BACKGROUND

The parties' arguments regarding the petition to supplement. TPI requests to supplement the record in three respects and claims that its requests substantially satisfy the Board's standard for a petition to supplement and/or that the standard should not apply here. TPI argues that principles of fairness and equity require the Board to grant its petition.

First, TPI asks to submit an argument challenging the internal cross-subsidy test first announced in Otter Tail Power Co. v. BNSF Railway (Otter Tail), NOR 42071 (STB served Jan. 27, 2006), aff'd sub nom. Otter Tail Power Co. v. STB, 484 F.3d 959 (8th Cir. 2007).⁴ (The Otter Tail test is designed to help ensure that the rate reduction does not cause an impermissible cross subsidy.) TPI claims that it did not submit an argument regarding the Otter Tail test on opening because there were no cross subsidies in its opening evidence, but that the argument is now necessary because its rebuttal evidence shows a possible cross subsidy on one line segment that would increase the rate prescription for one lane.⁵ TPI argues that because the Board has not previously applied the Otter Tail test, TPI should have the opportunity to contest the test's validity.

Second, TPI seeks to eliminate the investment costs for certain intermodal facilities that TPI asserts were mistakenly included in its opening evidence.⁶ TPI cites a November 5, 2010 letter from CSXT's counsel that TPI claims it discovered while preparing its rebuttal evidence. According to TPI, the letter explains that the facilities are not CSXT's responsibility; rather, CSXT pays a fee to CSX Intermodal Terminals, Inc., for handling containers and trailers at the facilities. TPI claims that because it included the costs but not the revenues of the facilities, it would be inequitable to deny its petition. TPI argues that the massive volume of discovery and the length of time that passed between the letter and the filing of opening evidence make TPI's oversight reasonable, and that it is in the public interest to develop the SAC analysis based upon correct facts.

⁴ TPI Pet. 2.

⁵ A lane refers to an origin and destination/commodity pair.

⁶ TPI Pet. 2-4.

Third, TPI asks to change two input errors concerning certain clearing and grubbing and bridge abutment quantities included in its opening evidence workpapers.⁷ TPI argues that the Board has previously accepted similar corrections of an opening evidence mistake by the complainant on rebuttal and, therefore, TPI's request to supplement may not be necessary here.⁸

In response, CSXT argues that the Board should deny the petition to supplement because TPI failed to meet its burden on the elements required of such a petition. CSXT cites Duke Energy Corp. v. CSX Transportation, Inc. (Duke/CSXT), NOR 42070, slip op. at 4 (STB served Mar. 25, 2003), arguing that a complainant seeking to supplement the record in a rail rate case must show that "the material sought to be introduced is central to its case, could not reasonably have been introduced earlier, and would materially influence the outcome of the case."

CSXT claims that TPI should have made its arguments regarding the validity of the Otter Tail test on opening.⁹ CSXT also argues that because the cross-subsidy issue only relates to 1 of 88 lanes at issue in the proceeding, the issue is neither central to the case nor material to the proceeding's outcome.¹⁰ CSXT asserts that TPI's petition is an inappropriate attempt to reverse settled law and that the issue is unripe until the Board determines whether application of the cross-subsidy test is necessary.¹¹

CSXT also claims that TPI did not show that the evidence regarding the intermodal facilities could not have been introduced earlier.¹² CSXT argues that TPI admits the intermodal facilities evidence is not central to the case¹³ and that a full and correct adjustment of TPI's opening evidence would not materially affect the case.¹⁴

Finally, CSXT argues that TPI should not be allowed to supplement its evidence regarding clearing and grubbing and bridge abutments.¹⁵ CSXT also claims that TPI did not attempt to show that its request meets the Board's standard for a petition to supplement.

⁷ Id. at 4-5.

⁸ Id. at 5.

⁹ CSXT Reply to Pet. 25.

¹⁰ Id.

¹¹ Id.

¹² Id. at 11-16.

¹³ Id. at 10.

¹⁴ Id. at 16-21.

¹⁵ Id. at 22-24.

The parties' operating plans. TPI and CSXT each submitted an operating plan, and each claims to identify significant flaws with the other party's plan. As relevant to this decision, on opening, TPI states that it developed its train list based on historical CSXT traffic data and related sources.¹⁶ However, CSXT replies that TPI failed to include essential trains, including "Y", or yard, trains and other local trains that provide service between yards and customer locations.¹⁷ TPI claims that most of these additional trains are unnecessary.¹⁸ Regarding CSXT's operating plan, TPI argues that CSXT's operating plan is not supported by a working Rail Traffic Controller (RTC) model that includes all of the trains that CSXT claims are necessary to provide service.¹⁹

On opening, TPI includes time-sensitive, high-priority intermodal traffic as part of its traffic group. CSXT argues that TPI's operating plan does not provide service that meets the Board's standard for this traffic and CSXT therefore removes the traffic from its operating plan.²⁰ TPI responds that, under its operating plan, the high-priority customers receive service equal to or better than CSXT provides in the real world and leaves the disputed traffic in its operating plan.²¹

DISCUSSION AND CONCLUSIONS

The petition to supplement. The Board has held that where a complainant seeks to supplement the record in a rail rate case, it must show that "the material sought to be introduced is central to its case, could not reasonably have been introduced earlier, and would materially influence the outcome of the case." Duke/CSXT, slip op. at 4. We will grant the petition regarding the Otter Tail issue and the clearing and grubbing and bridge abutment quantities evidence but we will deny it with respect to the intermodal facilities matter.

TPI has met the Duke/CSXT standard to supplement its evidence on the Otter Tail issue. First, TPI need not have anticipated on opening that the reply or rebuttal evidence would reveal a potential cross subsidy. Therefore, it is reasonable that TPI did not introduce its argument earlier.²² Second, the cross subsidy issue is central to TPI's case regarding the individual lane at

¹⁶ TPI Opening I-17.

¹⁷ CSXT Reply III-C-15 to III-C-36.

¹⁸ TPI Rebuttal III-C-38 to III-C-82.

¹⁹ Id. at III-C-16 to III-C-19.

²⁰ CSXT Reply III-A-8 to III-A-10.

²¹ TPI Rebuttal III-A-5 to III-A-6.

²² No cross subsidy issue was apparent on opening. CSXT alleges that one lane fails the Board's "threshold cross-subsidy test" commonly referred to as the PPL test. CSXT Reply III-

(continued . . .)

issue, and could materially influence the outcome regarding that individual lane. Finally, we disagree with CSXT's argument that the cross-subsidy issue is unripe, and conclude that this is an appropriate time for the parties to address the issue. Therefore, we will accept TPI's supplemental argument on the Otter Tail issue.²³

TPI may not supplement its evidence on the intermodal facilities issue. See Duke/CSXT, slip op. at 4. TPI admits that it overlooked the November 5, 2010 CSXT letter that was in its possession before the filing of its opening evidence. Although TPI asks us to conclude that the oversight was reasonable given the volume of discovery, rates proceedings typically involve large amounts of discovery. Further, delay does not change the complainant's duty to make its best case on opening. See Intermountain Power Agency v. Union Pac. R.R. (IPA), NOR 42127, slip op. at 3 (STB served Apr. 4, 2012). It also appears that TPI did not just overlook a single letter, but that TPI overlooked other evidence that shows that the intermodal facilities are not CSXT's responsibility.²⁴ Therefore, TPI's argument that it reasonably did not introduce the evidence earlier fails.

The equitable considerations that TPI claims exist here do not change our finding. TPI suggests that it is unfair to include the costs of the facilities without the revenues, but even if true, that is the result of TPI's oversights. See IPA, slip op. at 3 (denying a petition to supplement when the petitioner requested it "merely because the complainant believes the modification to be in its best interest"). Although TPI claims that it is in the public interest to develop the SAC analysis based upon correct facts, there is also a public interest in maintaining an evidentiary standard that protects litigants from unnecessary costs caused by their opponents' errors. As a result, we will deny TPI's petition to supplement the intermodal facilities evidence.

We will accept TPI's rebuttal clearing and grubbing and bridge abutment quantities evidence because the supplemental evidence corrects minor technical errors. See E.I. DuPont de Nemours & Co. v. Norfolk S. Ry. (DuPont), NOR 42125, slip op. at 33-34 (STB served Mar. 24,

(. . . continued)

H-21 to III-H-27. TPI strongly disputes this calculation, TPI Rebuttal III-H-31 to III-H-33, and we agree that the opening evidence did not show a cross subsidy. Moreover, CSXT provides no further argument on this calculation as part of its reply to TPI's petition to supplement. Therefore, we need not consider whether a shipper has any burden to address cross subsidy issues on opening if such issues are (or should be) readily apparent.

²³ The parties' arguments on Otter Tail's merits will be considered after the parties have had the opportunity to fully address the issue under the procedural schedule established below.

²⁴ See CSXT Reply to Pet. 13-15. The other evidence includes agreements, interrogatory answers, and CSXT's publically available R-1 reports. Id.

2014). TPI's supplemental evidence will not change TPI's operating plan. The evidence merely corrects input errors for the quantities for these items. Further, CSXT will have an opportunity to reply to the revised evidence, and replying to that revised evidence should not be burdensome to CSXT given the minor nature of the change.

Supplemental evidence regarding operating plans. How a stand-alone railroad (SARR) would operate influences both its configuration and annual operating expenses. AEP Tex. N. Co. v. BNSF Ry., NOR 41191 (Sub-No. 1), slip op. at 16 (STB served Sept. 10, 2007), recons. denied (STB served May 15, 2009), vacated on other grounds and remanded sub nom. AEP Tex. N. Co. v. STB, 609 F.3d 432 (D.C. Cir. 2010). Although the operating plan must be able to meet the transportation needs of the traffic to be served, it need not match the existing practices of the defendant railroad, as the objective of the SAC test is to determine what it would cost to provide the service with optimal efficiency. The assumptions used in the SAC analysis, including the operating plan, nonetheless must be realistic, i.e., consistent with the underlying realities of real-world transportation. Ariz. Elec. Power Coop. v. BNSF Ry., NOR 42113, slip op. at 16 (STB served Nov. 22, 2011). The RTC model supports the operating plan by demonstrating the adequacy of the configuration and providing transit times and mileage-based service units.

After reviewing the parties' operating plans and RTC models, and staff holding a technical conference with the parties on May 27, 2015, the Board finds that neither party has provided the evidence necessary for the Board to complete its regulatory review. Accordingly, both parties are directed to submit supplemental evidence on these issues. With respect to the complainant, TPI is asked to submit a revised operating plan that includes any trains necessary to serve its selected traffic group and to submit a working RTC model that reflects the changes. TPI and CSXT dispute whether certain yard trains (referred to as "Y" trains) and other local trains are necessary to serve the traffic group, and TPI has not included approximately 33,000 trains²⁵ that CSXT claims are necessary. An operating plan must provide full service to the selected traffic group, including the trains necessary to move local traffic between yards and shipment origins and destinations. DuPont, slip op. at 38. Therefore, if we determine that the disputed local trains are necessary, we will not be able to accept TPI's operating plan regardless of whether it would otherwise be acceptable. This omission leaves us with an incomplete record, and our precedent establishes that we may request that TPI provide us with evidence necessary to complete our regulatory review process. Pub. Serv. Co. of Col. d/b/a Xcel Energy v. Burlington N. & Santa Fe Ry. (Xcel 2005), NOR 42057, slip op. at 3-5 (STB served Jan. 19, 2005); Otter Tail Power Co. v. Burlington N. & Santa Fe Ry. (Otter Tail 2004), NOR 42071, slip op. at 1-2 (STB served Dec. 13, 2004); Pub. Serv. Co. of Col. d/b/a Xcel Energy v. Burlington N. & Santa Fe Ry. (Xcel 2004), 7 S.T.B. 589, 609-10 (2004) (The Board may seek supplemental evidence

²⁵ On reply, CSXT argues that TPI omitted approximately 44,000 local trains. CSXT Reply III-C-16. On rebuttal, TPI adds approximately 11,000 of the trains that CSXT claims were missing, leaving approximately 33,000 trains in dispute. TPI Rebuttal I-21.

from parties in order to provide an adequate record to fulfill its responsibilities to “investigat[e] the reasonableness of a challenged rate, mak[e] findings as to its reasonableness, and then tak[e] appropriate action to compel compliance with the statute.”). TPI’s revised operating plan should include all historic trains that deliver and pick up SARR traffic at shipper locations.

With respect to the defendant, CSXT is asked to submit an RTC model that reflects its narrative and spreadsheet evidence in order to provide a complete record for this proceeding. See Xcel 2005, slip op. at 3-5; Otter Tail 2004, slip op. at 1-2; Xcel 2004, 7 S.T.B. at 609-10. CSXT’s operating plan is not supported by an RTC model that includes all of the trains it claims are necessary to provide service,²⁶ making it impossible for the Board to assess CSXT’s operating plan (given that the RTC model is used to demonstrate the adequacy of the configuration and to provide transit times). CSXT acknowledges that rather than using its MultiRail train list to run its RTC model, it updated TPI’s opening train list by adding 95 local trains and a “sample of 16 industrial yard trains.”²⁷ However, as CSXT itself argues,²⁸ an RTC model must account for all trains in order to demonstrate the adequacy of the track configuration and the accuracy of the statistics generated by the RTC model. Additional trains, including yard and local trains, could affect the model by occupying tracks and affecting the operations of other trains, potentially requiring additional infrastructure to allow traffic to move sufficiently. CSXT’s decision to include only a “sample” of industrial yard trains therefore renders its RTC model inadequate as evidence to support the configuration proposed in its operating plan.

Further, CSXT’s failure to run its full MultiRail train list through the RTC model results in some of its operating statistics being unsupported. It is unclear from the record how CSXT determined locomotive unit hours, which parties typically calculate using segment transit times obtained from the RTC model. Here, any locomotive unit hours calculated based upon the results of CSXT’s RTC model would be unsupported as evidence. Similar to the infrastructure issue explained above, an RTC model with fewer trains could result in faster transit times for the

²⁶ CSXT argues that TPI failed to include more than 44,000 necessary local and yard trains on opening in its base-year operations. CSXT Reply III-C-16. CSXT adds 95 local trains and 16 yard trains on reply to TPI’s opening train list to develop the train list CSXT uses to run its RTC model. Id. at III-C-173 to III-C-174. However, CSXT’s reply argument appears to call for significantly more yard and local trains. Dividing 44,000 by 365 days in the year, and multiplying that result by the number of days (ten) the RTC model simulates indicates that CSXT should have added approximately 1200 trains for consistency with its reply arguments and MultiRail train list. This assumes that both parties included the warm-up and cool-down period trains, but, regardless of whether both parties did this, CSXT omitted a significant number of trains it claims are necessary.

²⁷ Id.

²⁸ Id. at III-C-173.

trains in the model because of less interference from other traffic. Therefore, CSXT's decision to run its RTC model with fewer trains than it actually proposes in its operating plan leaves any operating statistics based on the results from the RTC model unsupported. We will require CSXT to run its RTC model with its full MultiRail train list and to submit an RTC model that has been run with all the trains it proposes as necessary to support its operating plan. As described in more detail below, the parties should agree upon a single release of the RTC model to use in developing their evidence.

Finally, the parties are asked to submit evidence that will allow the Board to resolve the high-priority traffic group issue as the evidence warrants regardless of which party's operating plan is accepted. The Board has previously sought similar evidence where parties presented operating plans with differing traffic groups. See Otter Tail 2004, slip op. at 1-2; AEP Tex. N. Co. v. BNSF Ry., NOR 41191 (Sub-No. 1), slip op. at 1-2 (STB served Mar. 17, 2006).

We therefore instruct the parties to submit the following:

- TPI should add the historic "Y" trains and other local trains that deliver and/or pick up SARR traffic at shipper locations in the base year to its train list.
- CSXT should run its RTC model with all trains that it claims are necessary to provide service to the selected traffic group and that are included in its MultiRail train list.
- Each party should:
 - Provide documentation explaining all changes it made in supplemental evidence.
 - Provide two versions of recalculated growth trains: 1) with "Y" trains and high-priority UPS and Threads Express traffic, and 2) with "Y" trains but without high-priority UPS and Threads Express traffic.
 - Provide a working RTC model that supports its operating plan and configuration as specified in its narrative statements and spreadsheets. As described above, the RTC model should be run with all trains proposed as necessary in the operating plan. Within 15 days of this decision, the parties should agree upon a single release of the RTC model to use in their supplemental and compliance evidence, in order to avoid any potential conflicts created by the use of different versions and releases of the RTC model. In each party's evidence, the RTC model should run to completion. The parties may make limited manual adjustments to the train schedules within the RTC model by holding trains at SARR yards longer than the scheduled dwell time to improve the operations of the SARR.

We note that the parties may not revise their evidence beyond the scope that we describe here. See Otter Tail Power Co. v. BNSF Ry., NOR 42071, slip op. at 1-2 (STB served Feb. 18, 2005). Our requests for TPI to add trains to its operating plan and for the parties to submit alternative high-priority growth train evidence should not be construed as a final resolution of the issues raised. A party may argue that its unrevised evidence is superior to its supplemental evidence, but the party must provide the supplemental evidence regardless of those arguments. In addition, we will order the parties to submit compliance evidence, which is described in a separate, concurrently served decision, but we include the compliance evidence on the procedural schedule here for clarity. The procedural schedule will be modified as follows:

Parties file supplemental and compliance evidence ²⁹	September 22, 2015
Parties file replies to supplemental and compliance evidence	October 22, 2015
Parties file final briefs	November 12, 2015

It is ordered:

1. TPI's petition to supplement the record is granted in part and denied in part as described above.
2. The parties are ordered to supplement the record as described above.
3. The procedural schedule in this proceeding is revised as described above.
4. This decision is effective on the date of service.

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

²⁹ CSXT's evidence should include its Otter Tail and clearing and grubbing and bridge abutment quantities evidence reply arguments.