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SERVICE DATE – LATE RELEASE NOVEMBER 24, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42123

M&G POLYMERS USA, LLC

v.

CSX TRANSPORTATION, INC., AND
THE SOUTH CAROLINA CENTRAL RAILROAD COMPANY¹

Decided: November 24, 2010

This decision grants the motion of M&G Polymers USA, LLC (M&G) for leave to file its second amended complaint, and denies M&G's motion to compel discovery.

BACKGROUND

On June 18, 2010, M&G filed a complaint challenging the reasonableness of rates established by CSX Transportation, Inc. (CSXT), for the transportation of polyethylene terephthalate between 69 origin and destination pairs. M&G alleges that CSXT possess 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.

On October 18, 2010, M&G filed a motion for leave to file a second amended complaint. M&G's second amended complaint: (1) joined 1 short line carrier, the South Carolina Central Railroad Company (SCRF), as a defendant; and (2) modified the routings, rates, fuel surcharges, and R/VC ratios for 3 origin and destination pairs. By a reply filed on November 8, 2010, CSXT states that it does not oppose the motion, but asks the Board to state that it will look with disfavor on any future attempts by M&G to amend its pleadings. Also on November 8, 2010, SCRF filed its answer to the second amended complaint.

On November 4, 2010, M&G filed a motion to compel discovery from CSXT of documents pertaining to the carrier's internal management costing data. In particular, M&G's Requests for Production of Documents Nos. 163 and 164 seek from CSXT: (1) all documents, studies, or analyses pertaining to the profitability of the revenue generated by the transportation

¹ By decision served July 22, 2010, the Board dismissed with prejudice the complaint against Canadian National Railway Company at the request of the complainant.

rates charged to M&G for the issue movements; and (2) all documents relating to any methodology, including computer programs, databases, and documentation used by CSXT for internal management purposes to determine its costs of handling the issue movements, as well as any adjustments to any methodology to account for special studies. On November 15, 2010, CSXT replied in opposition to the motion to compel discovery.

DISCUSSION AND CONCLUSIONS

Motion for Leave to File a Second Amended Complaint. M&G's unopposed motion for leave to file a second amended complaint will be granted. Any amendments to the complaint sought in the future will be considered on a case-by-case basis. The defendant added under the second amended complaint, SCRF, has already filed its answer.²

Motion to Compel Discovery. Parties are entitled to discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R. § 1114.21(a)(1). However, the Board requires "more than a minimal showing of potential relevancy" before granting a motion to compel discovery. Potomac Elec. Power Co. v. CSX Transp., Inc., (PEPCO), 2 S.T.B. 290, 292 (1997). Furthermore, complainants must demonstrate a real, practical need for the information. Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d 520, 548 (1985). Because M&G's discovery requests run contrary to well-established Board precedent and have not been shown to be justified, the motion to compel discovery will be denied.

M&G contends that CSXT's internal costing data will provide evidence relevant to determine whether CSXT enjoys market dominance over the issue traffic in this complaint. In particular, M&G notes that intermodal competition will play an important role in determining whether CSXT has qualitative market dominance in this proceeding. M&G states that the internal costing data would help to determine whether the intermodal competition is an effective constraint on CSXT's prices. M&G contends that discovery of CSXT's internal costs would demonstrate that CSXT operates at a large cost advantage relative to the transload options that CSXT has claimed are effective competitive restraints.

CSXT, in its reply, argues that M&G's request is contrary to longstanding Board precedent, and that internal costing data is outside the proper scope of rate case discovery. In addition, CSXT states that its internal costing data would be of little help to M&G in terms of qualitative market dominance.

² On November 19, 2010, SCRF filed a motion for a protective order and a motion to bifurcate. Those motions will be ruled upon separately.

The Board has consistently ruled against motions to compel a party to produce internal management costing information, because it is well established that costs in rate reasonableness proceedings are determined using the Board's Uniform Rail Costing System (URCS).³ M&G argues that the prohibition on compelling parties to produce internal costing data is limited to when the data is sought for the purpose of arguing rate reasonableness, and that discovery may include a railroad defendant's internal costing data where the purpose is to elicit information relevant to market dominance. M&G cites FMC Wyoming Corp. v. Union Pacific Railroad, 4 S.T.B. 699 (2000), for the proposition that a railroad that operates at a large cost advantage and has a dominant market share is not effectively constrained by competition. M&G argues that the internal costing data that it seeks from CSXT would be relevant to an argument on that issue. However, M&G has not cited to any part of the Board's FMC decision to demonstrate that the Board relied on internal costing data, as opposed to URCS data. Moreover, relying on internal costing data would run contrary to the Board's longstanding policy of using URCS as its general purpose costing system for all regulatory purposes. See generally Adoption of the Unif. R.R. Costing Sys. as a Gen. Purpose Costing Sys. for All Regulatory Costing Purposes, 5 I.C.C. 2d 894 (1989).

The Board has been clear and consistent in its prior determinations that internal costing data are not discoverable in rate reasonableness proceedings. M&G has not presented evidence or arguments that would lead the Board to depart from this well-settled precedent. Therefore, M&G's motion to compel discovery will be denied.

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

It is ordered:

1. M&G's motion for leave to file its second amended complaint is granted.
2. M&G's motion to compel discovery is denied.

³ Kan. City Power & Light Co. v. Union Pac. R.R., NOR 42095, slip op. at 2, (STB served Feb. 15, 2006); see also Entergy Ark., Inc. v. Union Pac. R.R., NOR 42104, slip op. at 4 (STB served May 7, 2008); Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry., NOR 42056, slip op. at 3 n.8 (STB served Feb. 9, 2001); Minn. Power, Inc. v. Duluth, Missabe & Iron Range Ry., 4 S.T.B. 64, 73 (1999); PEPCO at 292-94.

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

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