

SERVICE DATE – JULY 15, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42121

TOTAL PETROCHEMICALS USA, INC.

v.

CSX TRANSPORTATION, INC.

Digest:¹ The complainant shipper, in a case where it alleges that the defendant railroad charges unreasonable rates, has submitted certain documents as evidence under a special designation that prevents the documents from being viewed by anyone other than the parties' outside attorneys and outside consultants. The Board is granting in part the defendant railroad's motion to redesignate the documents to a lesser level of confidentiality, under certain conditions, so that they may be viewed by the railroad's internal personnel.

Decided: July 13, 2011

This decision grants in part a motion filed by CSX Transportation, Inc. (CSXT) for a Board order redesignating certain information that was designated "Highly Confidential" in the opening market dominance evidence filed by Total Petrochemicals USA, Inc. (TPI) on May 5, 2011.

BACKGROUND

TPI challenges the reasonableness of rates established by CSXT for the transportation of polypropylene, polystyrene, polyethylene, styrene, and base chemicals (issue commodities) between 104 origin and destination pairs, located primarily in the Midwestern and Southeastern United States.² 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. By decision served on June 23, 2010 (June 2010 Decision), the Board established a procedural schedule and issued a protective order, which includes provisions governing the production of "Highly Confidential" material and other related provisions required by Procedures to Expedite Resolution of Rail Rate Challenges to Be Considered Under the Stand-

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 The last amended complaint, filed by TPI on February 3, 2011, challenged the rates on 105 origin and destination pairs. However, in its opening market dominance submission filed on May 5, 2011, TPI states that it has elected not to pursue its complaint as to one of those lanes.

Alone Cost Methodology, 6 S.T.B. 805, 813-15 (2003). By decision served on April 5, 2011 (April 2011 decision), the Board determined that it was appropriate to 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.

The Board's April 2011 decision also established a new procedural schedule for the submission of market dominance evidence. In accordance with that procedural schedule, TPI submitted its opening market dominance evidence on May 5, 2011.³ As part of TPI's opening market dominance evidence, TPI submitted certain workpapers and exhibits under the "Highly Confidential" designation. TPI included among the evidence submitted as "Highly Confidential" a customer email (Exhibit II-B-9) and other documents in an electronic workpapers folder, which TPI provided in support of its argument that "the 'needs' of TPI's customers are paramount in the establishment of CSXT's market dominance." TPI Opening Market Dominance Evidence at I-7.

On May 18, 2011, CSXT filed a motion to redesignate the contents of Exhibit II-B-9 and the electronic workpapers folder from "Highly Confidential" to "Confidential." CSXT argues that this evidence does not fall under the definition of "Highly Confidential" material under the protective order adopted for this proceeding, i.e., "specific rate, traffic, or cost data or other competitively sensitive information." June 2010 Decision, slip op. at 3. CSXT also states that TPI, through this "Highly Confidential" designation, has shielded from CSXT's in-house marketing and operating personnel all of its lane-specific allegations regarding the need for TPI's customers to receive products via rail. CSXT argues that in-house personnel are better positioned to respond to TPI's arguments than its outside counsel or outside consultants. CSXT contends that TPI's refusal to disclose the contents of Exhibit II-B-9 and the electronic workpapers folder to CSXT employees in their entirety violates due process because the defendant railroad has not been allowed to see all of the lane-specific allegations made against it or have a chance to respond to those allegations.

On May 19, 2011, TPI filed a reply in opposition to the motion to redesignate. In addition to its arguments against the redesignation, TPI requested that, if the Board should grant the motion, it be afforded the option of withdrawing material from the record as an alternative to disclosing it to CSXT personnel. In its reply, TPI states that it has properly categorized the contents of Exhibit II-B-9 and the electronic workpapers folder as "Highly Confidential" because they are competitively sensitive to TPI and also to non-parties to this proceeding. TPI contends that releasing this evidence to CSXT employees would provide information about TPI's customers that CSXT is unlikely to have knowledge of through the normal course of business.

³ By decision served on June 2, 2011, the Board held in abeyance the deadline for CSXT's reply market dominance evidence and all other remaining deadlines set by the current procedural schedule pending further order of the Board following the resolution of CSXT's motion to redesignate.

TPI states that the majority of its evidence supporting lane-specific allegations of market dominance has not been labeled “Highly Confidential.” This evidence included: (1) a declaration that all of its customers required rail cars for storage; (2) identification of customers using issue commodities for medical applications; (3) identification of high volume lanes, identification of lanes with third party processors or compounders, and identification of leased tracks; and (4) identification of lanes with customer-selected facilities where the customer is responsible for subsequent transportation.

TPI argues that CSXT is not prejudiced by the “Highly Confidential” designation because CSXT has not demonstrated that its internal personnel are likely to have knowledge of the subject matter contained in Exhibit II-B-9 or the electronic workpapers folder. TPI contends that CSXT is free to discuss the subject matter of this evidence with internal personnel through general questions in order to ascertain what knowledge they have, but that CSXT cannot disclose the format or source of the subject matter referenced in Exhibit II-B-9 or the electronic workpapers folder. TPI states that CSXT’s due process arguments fail because CSXT has not demonstrated that internal personnel are better positioned to respond to the “Highly Confidential” evidence, given that CSXT has engaged outside experts to review all “Highly Confidential” information.

DISCUSSION AND CONCLUSIONS

Typically, at the beginning of a SAC rail rate case, the parties negotiate a proposed protective order that contemplates the levels of confidentiality (“Public,” “Confidential,” and “Highly Confidential”) that would govern the exchange of information during the proceeding, including submissions to the Board. The parties then submit the negotiated protective order to the Board for approval. Under the protective order governing this proceeding, either party may designate materials as “Confidential” when that party in good faith believes that the materials reflect proprietary or confidential information. Such materials may be disclosed only to employees, counsel, or agents of the party requesting such material, for purposes of this proceeding only, after the recipients sign the necessary undertaking for receiving confidential information. Furthermore, either party may designate materials as “Highly Confidential” when they contain specific rate, traffic, or cost data or other competitively sensitive information. Materials designated “Highly Confidential” may be viewed only by outside counsel or consultants, for purposes of the specific proceeding only, after signing the necessary undertaking for receiving highly confidential information.

Pursuant to Paragraph 2 of the protective order adopted for this proceeding, CSXT has asked the Board to redesignate certain information submitted by TPI in its opening market dominance filing. CSXT requests that TPI be required to redesignate as “Confidential” the contents of Exhibit II-B-9 and the electronic workpapers folder so that its in-house personnel can view and analyze the evidence as part of preparing CSXT’s reply market dominance evidence. TPI argues that both the content of the subject evidence and the names of the third parties from whom the evidence was received should remain “Highly Confidential” because the evidence

contains information that is commercially sensitive to TPI, in its relationship with CSXT, and to the third parties. The issue here is not whether TPI's evidence contains specific rate, traffic, or cost data, but rather whether any part of the evidence falls under the protective order's catch-all of "other competitively sensitive information."

TPI has not explained why the content of the subject evidence — without the name or other identifying information of the third parties from which the evidence was provided — is properly designated as "Highly Confidential." For the most part, the evidence itself contains information that, standing alone, would not be considered competitively sensitive. TPI has included lane-specific evidence from non-parties as part of its opening market dominance submission.

In certain circumstances, the Board respects the confidentiality of information from non-parties when information about their relationships with parties before the Board is contained in evidentiary submissions. See Cent. Ore. & Pac. R.R.—Aban. & Discontinuance of Serv.—In Coos, Douglas, & Lane Cntys., Ore., AB 515 (Sub-No. 2), slip op. at 5 (STB served Aug. 15, 2008). At the same time, the Board "will strike the appropriate balance between legitimate access and legitimate protection." Id. at 4. As the Board has previously stated, "[f]or us to be able to give this evidence any weight, the railroad[] must have an opportunity to assess it and respond to it." BNSF Ry.—Aban. Exemption—In Okla. Cnty., Okla., AB 6 (Sub-No. 430X), et al., slip op. at 3 (STB served Jan. 26, 2007), petition to reopen granted in part on other grounds (STB served June 5, 2008).

Here, however, CSXT's due process concerns also fall short. CSXT does not allege that failure to redesignate the documents will preclude it from responding to the "Highly Confidential" information at issue. In fact, CSXT acknowledges that its outside counsel and consulting experts have full access to the materials. Nor does CSXT allege that in-house personnel are precluded from providing pertinent information, only that it will be more burdensome to do so without their access to the subject files.

Therefore, we conclude that, to balance the legitimate interest of the parties, the content of the evidence should be redesignated as "Confidential" because it does not in itself meet the definition of "Highly Confidential" material. However, the "Highly Confidential" status of any part of Exhibit II-B-9 and the electronic workpapers folder that reveals the name or identity of any non-party shall remain in effect.

To ensure that all interested parties will have access to the redesignated information as appropriate, TPI is required to refile full and complete redesignated versions of Exhibit II-B-9 and the electronic workpapers folder in compliance with the instructions in this decision by July 22, 2011.

TPI, in its opposition to the motion to redesignate, requested the option to withdraw material from the record as an alternative to disclosing it to CSXT personnel. Given that the

Board will partially grant CSXT's motion by redesignating the content of the subject evidence while maintaining the "Highly Confidential" status for any references to the names or identities of non-parties, TPI will be afforded the opportunity to withdraw the evidence. TPI may file a notice of withdrawal at any time prior to the due date for resubmitting the evidence in the manner outlined in this decision.

Finally, we will issue a new procedural schedule for the completion of the market dominance phase of this proceeding. CSXT shall submit its reply market dominance evidence by August 5, 2011. TPI shall submit its rebuttal market dominance evidence by September 6, 2011.

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

It is ordered:

1. CSXT's motion to redesignate certain information in TPI's opening market dominance evidence is granted in part, as discussed above.
2. TPI shall file full and complete redesignated versions of Exhibit II-B-9 and the electronic workpapers folder, as instructed above, by July 22, 2011. In lieu of filing redesignated versions of the subject evidence, TPI may file with the Board a motion to withdraw the evidence that is subject to redesignation, by July 22, 2011.
3. The procedural schedule for the remainder of the market dominance phase is as follows:

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

Complainant's rebuttal market dominance evidence is due by September 6, 2011;
4. This decision is effective on its service date.

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