

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42121

TOTAL PETROCHEMICALS USA, INC.

v.

CSX TRANSPORTATION, INC.; CAROLINA PIEDMONT DIVISION; GEORGIA WOODLANDS RAILROAD, LLC; MADISON RAILROAD; MOHAWK, ADIRONDACK & NORTHERN RAILROAD CORP.; NASHVILLE AND EASTERN RAILROAD CORP.; NEW HOPE & IVYLAND RAILROAD; PIONEER VALLEY RAILROAD; R.J. CORMAN RAILROAD COMPANY (MEMPHIS); SEMINOLE GULF RAILWAY L.P.; SEQUATCHIE VALLEY RAILROAD COMPANY; AND SOUTH BRANCH VALLEY RAILROAD

Decided: November 24, 2010

This decision denies the motion to compel discovery filed on November 4, 2010, by Total Petrochemicals 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.

On July 26, 2010, TPI filed an amended complaint, which removed 2 origin and destination pairs, but added 18 other origin and destination pairs. On October 4, 2010, TPI filed a motion for leave to file a second amended complaint. TPI's second amended complaint: (1) joined 11 short line carriers as defendants; (2) modified the routings, origins, or commodities for 8 origin and destination pairs; (3) added 1 new origin and destination pair; (4) relocated 4 origin and destination pairs from Exhibit A (local moves) to Exhibit B (joint moves); and (5) removed 16 origin and destination pairs.¹ CSXT filed a reply on October 25, 2010. On November 15, 2010, TPI and CSXT jointly filed a motion to extend the deadline for the submission of operating characteristics. By decision served on November 19, 2010, TPI's

¹ On October 1, 2010, 3 days prior to when TPI filed its motion for leave to file a second amended complaint, CSXT filed a motion for a determination of jurisdiction over the challenged rates. That motion, and any related matters, will be ruled upon in a separate decision.

motion for leave to file a second amended complaint and the joint motion to extend the deadline for the submission of operating characteristics were granted.

On November 4, 2010, TPI filed a motion to compel discovery from CSXT of documents pertaining to the carrier's internal management costing data. In particular, TPI's Requests for Production of Documents Nos. 165 and 166 seek from CSXT: (1) all documents, studies, or analyses pertaining to the profitability of the revenue generated by the transportation rates charged to TPI 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.² Because these 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.

DISCUSSION AND CONCLUSIONS

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).

TPI 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, TPI notes that intermodal competition will play an important role in determining whether CSXT has qualitative market dominance. TPI states that the internal costing data would help to determine whether the intermodal competition is an effective constraint on CSXT's prices. TPI 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 constraints.

CSXT, in its reply, argues that TPI'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 TPI in terms of a qualitative market dominance argument.

² On November 16, 2010, TPI filed a second motion to compel discovery, which will be ruled upon in a separate decision.

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 TPI 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. TPI 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. TPI argues that the internal costing data that it seeks from CSXT would be relevant to an argument on that issue. However, TPI 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. TPI has not presented evidence or arguments that would lead the Board to depart from this well-settled precedent. Therefore, TPI'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. TPI's motion to compel discovery filed on November 4, 2010, is denied.
2. This decision is effective on its date of service.

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

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.