

41370
EB

SERVICE DATE – APRIL 5, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42121

TOTAL PETROCHEMICALS USA, INC.

v.

CSX TRANSPORTATION, INC.

Digest:¹ 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 Board has decided to bifurcate these issues because the railroad has raised considerable doubts about market dominance. 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: April 4, 2011

This decision grants a motion filed by CSX Transportation, Inc. (CSXT) for expedited determination of jurisdiction over the challenged rates in this proceeding (motion to bifurcate). 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. We take this unusual step because CSXT has presented evidence that raises considerable doubts as to whether it has market dominance over a number of the challenged movements.

BACKGROUND

On May 3, 2010, Total Petrochemicals USA, Inc. (TPI) filed a complaint challenging 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. Since then, TPI has filed several amended complaints where it has, among other things, added and removed a number of short line defendants. As of the service date of this decision, CSXT is the

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).

only remaining defendant, and TPI is challenging the rates on 105 origin and destination pairs. 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 a decision served on June 23, 2010, the Board established a procedural schedule and a protective order. On February 4, 2011, the Board granted a motion to modify the procedural schedule, at TPI's request. The parties opening evidence is currently due on April 29, 2011.

On October 1, 2010, CSXT filed a motion for expedited determination of jurisdiction over the challenged rates. In its motion, CSXT requests that the Board bifurcate this proceeding and consider the parties' market dominance evidence before proceeding to the examination of the parties' SAC evidence and a Board determination on the reasonableness of CSXT's rates. CSXT argues that there is compelling evidence that CSXT's service over 97 of the 120 lanes that were challenged in the first amended complaint is subject to effective competition from rail, truck, or rail-truck transportation alternatives, and, therefore, not subject to the Board's rate reasonableness jurisdiction.² CSXT argues that its qualitative market dominance evidence demonstrates that the Board's market dominance analysis would likely remove a significant portion of the challenged origin and destination pairs from this proceeding. CSXT further states that consideration of market dominance before rate reasonableness could therefore spare the parties from unnecessarily expending the resources needed to file market dominance and SAC evidence simultaneously.³

In support of its motion, CSXT has proffered information produced by TPI during the discovery process that indicates TPI's use of truck and rail-truck transloading to transport significant amounts of the issue commodities to its customers. CSXT argues that these truck and rail-truck transloading alternatives exert competitive pressure on CSXT and constrain CSXT's rates. CSXT supports its motion with a Verified Statement, in which its expert asserts that TPI could readily transport issue commodities for some of the challenged movements over alternative

² Under the most recently filed complaint, TPI is still challenging all of the 97 lanes over which CSXT argues it does not have market dominance. Therefore, the lane modifications have not materially affected CSXT's motion, and we are able to proceed with an analysis on whether the Board should bifurcate this proceeding.

³ CSXT also requests that 8 of the origin and destination pairs covered by its motion be dismissed for the additional reason that no traffic has moved under the challenged rate. The fourth amended complaint contains only 5 of these 8 origin and destination pairs. Two of the origin and destination pairs were removed via the second amended complaint, Lane 88 and Lane 90. An additional origin and destination pair, Lane 68 was removed via the third amended complaint. The 5 remaining origin and destination pairs are Lanes A-2, 37, 89, 91, and 99. The Board will not rule on CSXT's motion to dismiss the remaining 5 origin and destination pairs until after both parties have submitted their rate reasonableness evidence.

all-rail routings that directly compete with CSXT.⁴ CSXT also argues that truck and rail-truck transload alternatives could be employed by TPI for some routes at delivered costs similar to, or lower than, the challenged rates.⁵

On October 21, 2010, TPI replied in opposition to CSXT's motion. TPI contends that granting CSXT's motion would unnecessarily prolong the proceeding and extend the case beyond the statutory deadline for a final Board decision. TPI argues that a longer procedural schedule only increases the cost and risk to a complainant shipper seeking to lower the rates charged by the defendant railroad. TPI states that CSXT has misrepresented the existence of direct rail competitive options. TPI further states that CSXT has market dominance as it pertains to the subject bulk terminal transload facilities because TPI cannot alter the location. TPI states that it is constrained by the needs of its customers when transload facilities are selected. In many cases it is the customer who selects the particular facility and arranges continuing transportation to end-users. Therefore, the locations, from TPI's perspective, are fixed, and not open to nearby transload facility alternatives. TPI reasons that the customer may choose a particular terminal over another nearby facility for a variety of reasons, including capacity, proximity to the customer's end-users, or the ability of the customer to contract motor carrier access at that terminal. TPI argues that CSXT's evidence pertaining to the relative costs of transportation alternatives for the issue commodities is incomplete and inaccurate. Finally, TPI contends that because the rates it is being charged generate high revenue to variable cost ratios, CSXT could not be facing effective competition.⁶

DISCUSSION AND CONCLUSIONS

Market Dominance. The Board may consider the reasonableness of a challenged rate only if the defendant carrier has market dominance over the traffic. 49 U.S.C. § 10701(d)(1). Market dominance is "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. § 10707(a). There are two components to the Board's market dominance inquiry. The first component is quantitative. The statute establishes a conclusive presumption that a railroad does not have market dominance if the rate it charges produces revenues that are less than 180% of its variable costs of providing the service. 49 U.S.C. § 10707(d)(1)(A). Thus, the 180% revenue-to-variable cost (R/VC) ratio is the floor for regulatory scrutiny of rail rates. That statutory 180% R/VC level is also the floor for any rate relief. Burlington N. R.R. v. STB, 114 F.3d 206, 210 (D.C. Cir. 1997).

⁴ CSXT's Mot. to Bifurcate, V.S. Gordon Heisler at 6.

⁵ CSXT's Mot. to Bifurcate, V.S. Gordon Heisler at 4-5.

⁶ TPI's Reply 30.

If the quantitative threshold is met, the Board moves to the second component, a qualitative analysis. Wis. Power & Light Co. v. Union Pac. R.R., 5 S.T.B. 955, 960-1 (2001). In this analysis, the Board determines whether there are any feasible transportation alternatives that could be used for the issue traffic, considering both intramodal (from other railroads) and intermodal (from other modes of transportation such as trucks, transload arrangements, barges or pipelines) competition. E.I. du Pont de Nemours & Co. v. CSX Transp., Inc., NOR 42099, slip op. at 2 (STB served June 30, 2008). CSXT, in its motion to bifurcate, addresses only qualitative market dominance.⁷

Bifurcation Standard. 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 and Revocation Proceedings, 1 S.T.B. 754, 760 (1996), Total Petrochemicals USA, Inc. v. CSX Transp., Inc., NOR 42121 (STB served Feb. 4, 2011) (extending procedural schedule deadlines adopted by decision served June 23, 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. A motion to bifurcate a SAC case requires that the defendant railroad provide evidence raising considerable doubts as to the shipper's ability to satisfy the Board's market dominance standard. Sierra Pac. Power Co. v. Union Pac. R.R., NOR 42012, slip op. 4 (STB served Jan. 26, 1998). This "considerable doubt" test is borne from the experience of the Board's predecessor, the Interstate Commerce Commission (ICC), with sequential market dominance and rate reasonableness phases in a SAC case. The Board, in establishing new procedures for rates cases after the ICC Termination Act of 1995 (ICCTA), moved away from the ICC's history of sequential procedural schedules where rate reasonableness evidence was filed only after a determination was made on market dominance. The advantage of a sequential process was that parties were spared the time and expense of filing rate reasonableness evidence where the carrier was not found market dominant. The current dual-track procedural schedule has the benefit of faster completion of the record in most instances,⁸ but parties must incur the additional expense of filing rate reasonableness evidence even if the Board subsequently determines that it does not have jurisdiction over the challenged rates because the defendant railroad does not have market dominance over the movements.

⁷ CSXT's Mot. to Bifurcate 5 n.3.

⁸ Denying a request to bifurcate a dual-track procedural schedule, the Board stated that "while we will not exercise our authority to prescribe a rate to a facility that has effective competitive alternatives, we will not conduct an initial and separate market power inquiry Our experience in the rail area has shown that bifurcation of the market power and rate reasonableness phases can unnecessarily prolong a proceeding." CF Indus., Inc. v. Koch Pipeline Co., 2 S.T.B. 257, 263-4 (1997).

However, the Board has departed from the dual-track procedural schedule where the defendant carrier “made a strong argument that there is effective . . . competition for the traffic at issue.” Sierra Pacific, slip op. at 4. The Board stated:

We are committed to processing maximum rate reasonableness complaints promptly and we recognize that bifurcating cases into separate market dominance and rate reasonableness phases can extend the time it takes to resolve a rate complaint in some instances. Here, however, given the substantial weight of UP’s position in its motion to dismiss, we have considerable doubts as to complainants’ ability to demonstrate market dominance. Accordingly, to minimize the administrative burdens on the parties, we will bifurcate the market dominance and rate reasonableness phases of this proceeding and postpone the submission and consideration of rate reasonableness evidence until we have resolved the issue of market dominance.

Sierra Pacific, slip op. at 5 (emphasis added); see also Gov’t. of the Terr. of Guam v. Sea-Land Serv., Inc., WCC 101, slip op. at 6 (STB served Feb. 2, 2007) (noting that while bifurcation can unnecessarily prolong a proceeding because the complainant can typically demonstrate that the defendant is market dominant, this is not an inflexible practice).

After considering the parties’ arguments, we conclude that CSXT has met the burden set out in Sierra Pacific, and the Board should first determine whether CSXT is market dominant over the subject movements before hearing evidence on the reasonableness of its rates.

Motion to Bifurcate. In this case, the challenged movements do not originate on CSXT’s system. The movements are initially transported from TPI’s facilities in Texas and Louisiana via western-based Class I carriers BNSF Railway Company (BNSF), Union Pacific Railroad Company (UP), and Canadian National Railroad Company (CN) to gateway terminals and interchanged with CSXT. CSXT argues that direct rail competition exists because TPI could alternatively direct BNSF, UP, or CN to interchange with another eastern-based Class I carrier, Norfolk Southern Railroad Company (NSR), at the same gateway or another nearby gateway. For rail shipments to transload facilities, CSXT argues that NSR could, in some instances, deliver the issue commodities to the same transload facility, and for the majority, deliver the issue commodities to a nearby transload facility. CSXT also argues that TPI could, for some deliveries, use truck transportation to move the issue commodities from the CSXT or NSR gateway point to the final destination. CSXT also presents evidence that truck transportation competes with CSXT for these movements, and that in many instances, TPI and TPI’s customers use trucks to transport the issue commodities.

TPI disputes CSXT's claims that the railroad does not possess market dominance. TPI argues that CSXT has oversimplified TPI's distribution network, and that CSXT's proposed alternatives are not economically or logistically feasible. TPI states that of the 8 origin and destination pairs identified by CSXT as having direct rail competition, 2 were removed from the case in the second amended complaint, and 5 do not have the alleged 2-carrier rail service.⁹

TPI concedes that the commodities that are the subject of CSXT's motion can be transported by truck, at least for a portion of the move.¹⁰ TPI argues, however, that its customers, whether end-users or brokers who sell to smaller end-users, limit TPI's ability to utilize transportation alternatives for the origin and destination pairs identified by CSXT that involve rail-truck transloading.¹¹ TPI states that CSXT possesses market dominance at transload bulk terminals because TPI's customers select the terminal.¹² TPI argues, therefore, that CSXT's assertions that TPI could engage other rail carriers to deliver the issue commodities to nearby transload facilities are incorrect. TPI states that particular transload facilities are selected for a variety of reasons, including terminal capacity, proximity to a broker's customers, and the ability of a broker to contract motor carrier access to that terminal.

CSXT's motion is not the appropriate vehicle to consider the substantive matter of market dominance. But the motion has presented complicated factual disputes between the parties that raise considerable doubt that it possesses market dominance over some of the traffic at issue. TPI has utilized truck transportation for some of the commodities at issue and can utilize trucks for some issue traffic, which increases the likelihood that CSXT faces effective competition for that traffic. Moreover, the fact that CSXT serves as one leg of a transportation movement and does not exclusively serve either the origin or destination on some lanes also casts considerable doubt on market dominance.

The specific factual arguments raised by the parties will be addressed after the Board has a full record on the issue of market dominance before it. TPI has not yet been afforded the opportunity to make its full market dominance presentation. Accordingly, this decision in no way makes a determination on the presence or absence of market dominance. The Board has merely determined that, based on the bifurcation motion arguments, considerable uncertainty exists regarding some traffic lanes, warranting bifurcating the market dominance and rate reasonableness portions of this proceeding.

⁹ One origin and destination pair, which was removed in the second amended complaint, was asked to be restored by TPI as part of the fourth amended complaint.

¹⁰ TPI's Reply 8-12.

¹¹ TPI's Reply 31.

¹² See TPI's Reply 30-31.

We acknowledge TPI's concerns that bifurcation will prolong this proceeding. However, as currently pled, this rate case is extraordinarily complicated. With over 100 separate rates being challenged, the expected rate reasonableness inquiry will be very complex. Yet, if the railroad does not have market dominance over a substantial number of the lanes, the complexity of the rate reasonableness inquiry can be significantly reduced. Moreover, if the Board allowed stand-alone cost evidence to be filed now and later found some number of lanes of traffic to be outside our jurisdiction, the result could be an evidentiary record inconsistent with the assumptions underlying the complainant's selection of a traffic group and the facilities necessary to serve that group. That could warrant supplemental rounds of evidence that would ultimately drag out resolution of this case.

Balancing the competing interests of an expedited procedural schedule to reach a decision on the merits against the doubts raised by CSXT about a substantial number of the challenged lanes, we conclude bifurcation to be warranted here. We will adopt a bifurcated procedural schedule and establish a schedule for the submission of market dominance evidence (both quantitative and qualitative) on all lanes contained in the fourth amended complaint.¹³ 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.

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. This proceeding is bifurcated for separate determinations of the market dominance and 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:

¹³ CSXT, in its motion to bifurcate, did not argue that the challenged rates generated R/VC ratios below the 180% quantitative market dominance threshold for Board jurisdiction, and reserved the right to address quantitative market dominance issues at a later date. We, however, will require all market dominance arguments (i.e., qualitative and quantitative), regardless of product type, to be addressed at the same time in this proceeding.

Complainant's opening market dominance evidence is due by May 5, 2011;

Defendant's reply market dominance evidence is due by June 6, 2011;

Complainant's rebuttal market dominance evidence is due by July 5, 2011;

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

By the Board, Chairman Elliott and Commissioner Mulvey.