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SERVICE DATE – LATE RELEASE DECEMBER 30, 2010

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: December 30, 2010

This decision directs Total Petrochemicals USA, Inc. (TPI) to serve a copy of the second amended complaint on all of the defendants in this proceeding, except CSX Transportation, Inc. (CSXT), in accordance with the Board's regulation at 49 C.F.R. § 1111.3, within 5 days of the service date of this decision. Any defendant that has not yet filed an answer to the second amended complaint will have 20 days from the date it is served with the second amended complaint to file an answer. This decision also instructs the parties that Board staff will conduct separate mandatory mediation between TPI and each of the 11 new defendants added under the Board's November 19, 2010 decision (November 19 decision).

BACKGROUND

On May 3, 2010, TPI filed a complaint challenging the reasonableness of rates established by CSXT for the transportation of polypropylene, polystyrene, polyethylene, styrene, and base chemicals between various 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, and tendered the 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 The 11 short line carriers that TPI sought to join as defendants under the second amended complaint are: Carolina Piedmont Division (CPDR); Georgia Woodlands Railroad, LLC (GWRR); Madison Railroad (CMPA); Mohawk, Adirondack & Northern Railroad Corp. (MHW); Nashville & Eastern Railroad Corp. (NERR); New Hope & Ivyland Railroad (NHRR); Pioneer Valley Railroad (PVRR); R.J. Corman Railroad Company (Memphis) (RJCM); Seminole Gulf Railway L.P. (SGLR); Sequatchie Valley Railroad Company (SQVR); and South Branch Valley Railroad (SBVR) (collectively, Short Line Defendants). The Board granted TPI's motion to file a second amended complaint in the November 19 decision.

On December 9, 2010: (1) CPDR, SGLR, and GWRR filed answers to the second amended complaint; (2) NERR filed a motion for extension of time to answer the second amended complaint; and (3) NHRR filed a motion to dismiss it as a defendant under the second amended complaint. On December 10, 2010, PVRR also filed an answer. On December 29, 2010, TPI filed a reply to NHRR's motion to dismiss.

On December 13, 2010, TPI filed a motion to compel discovery responses from 9 of the Short Line Defendants: CPDR, GWRC, CMPA, MHW, NHRR, RJCM, SGLR, SQVR, and SBVR.² TPI states that none of the Short Line Defendants has served TPI with responses or objections to its first set of discovery requests. TPI requests that the Board grant its motion to compel discovery responses and order the subject Short Line Defendants to respond to TPI's first set of discovery requests within 10 days of the Board's decision.

On December 23, 2010, NHRR replied in opposition to the motion to compel discovery responses, arguing that: (1) the discovery period under the adopted procedural schedule ended before NHRR and the other Short Line Defendants were added as parties; (2) no conferences involving the Short Line Defendants have been held under 49 C.F.R. §§ 1111.8(b) or 1111.10(b);³ and (3) TPI's discovery requests are overly broad and that requiring NHRR to respond would be unduly burdensome. NHRR also notes that it had not yet retained counsel when TPI first served its discovery requests before the Board accepted TPI's second amended complaint, and that the discovery requests were not re-served on NHRR's counsel when the

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 motions, will be ruled upon in a separate decision.

² The subject motion to compel discovery responses does not include defendants CSXT, PVRR, and NERR. By letter filed on December 14, 2010, TPI notified the Board that it had entered into an agreement governing the rates SBVR charges for its TPI-related traffic. Therefore, TPI requests that SBVR be removed as a subject to this motion to compel.

³ NHRR cites to 49 C.F.R. § 1110.10(b) in its filing. However, § 1110.10 relates to petitions for reconsideration in rulemaking proceedings. The Board assumes that NHRR intended to cite to § 1111.10(b), "Meeting to discuss procedural matters," instead.

Board accepted the second amended complaint or when NHRR's counsel entered an appearance in this proceeding on December 9, 2010. Lastly, NHRR requests that the Board impose a protective condition under 49 C.F.R. § 1114.21(c)(3), requiring TPI to reimburse and indemnify NHRR from all reasonable costs of responding to the discovery requests. On December 28, 2010, TPI filed a letter in response to NHRR's reply.

On December 27, 2010, CPDR also replied in opposition to the motion to compel discovery responses, arguing that: (1) CPDR was not properly served with TPI's discovery requests; (2) CPDR is negotiating an agreement with TPI that would make discovery unnecessary; and (3) TPI's discovery requests are burdensome and overly broad.

On December 29, 2010, CMPA filed a request for an extension of time to file a pleading responsive to both the second amended complaint and the motion to compel discovery. CMPA requests an extension until January 4, 2011, and states that TPI consents to the request.

As discussed below, TPI will be directed to re-serve the second amended complaint on the Short Line Defendants, and to propose an amended procedural schedule that would extend the discovery period should TPI wish to proceed with discovery requests.

DISCUSSION AND CONCLUSIONS

There is concern that service of the second amended complaint and the first set of discovery requests directed at the Short Line Defendants may not have been adequate. The Board has yet to receive any filings in this proceeding from 5 of the Short Line Defendants. Moreover, none of the Short Line Defendants has responded to TPI's first set of discovery responses, and 2 of those defendants have raised concerns about whether the service of the discovery requests was proper. Out of an abundance of caution and to ensure that all of the defendants that were added to this proceeding by the Board's November 19 decision are properly served, TPI will be directed to re-serve the second amended complaint on each of the Short Line Defendants' chief legal officers pursuant to 49 C.F.R. § 1111.3.

Each of the Short Line Defendants that has not yet filed an answer with the Board shall do so within 20 days of being served, id. § 1111.4(c), and must include a certificate of service indicating that the answer has been served on all parties, id. §§ 1104.12(a), 1111.4(c). Defendants are advised that, pursuant to 49 C.F.R. § 1111.4(e), allegations in a complaint are deemed admitted when not denied in an answer to the complaint. Answers should be responsive to the complaint and should fully advise the Board and the parties of the nature of the defense. Id. § 1111.4(a). A motion to dismiss may accompany an answer to a complaint, id. § 1111.5, but the filing of a motion to dismiss does not relieve the defendant of its obligation to answer the complaint or to comply with other procedural requirements, see PCI Transp., Inc. v. Forth Worth & W. R.R. Co., NOR 42094 (Sub-No. 1) (STB served Feb. 5, 2007).

As a result of 11 defendants being added to this proceeding pursuant to the November 19 decision, Board staff will now engage in non-binding mediation between TPI and each of the Short Line Defendants. See 49 C.F.R. § 1109.4(a). The Board will send letters to TPI and the Short Line Defendants, within 10 days of the service date of this decision, assigning a mediator. The mediator will contact the parties to discuss ground rules and the time and location of any meeting.

Because of the concerns about whether service of discovery requests on the Short Line Defendants was proper and in view of this order directing TPI to re-serve the second amended complaint on the Short Line Defendants, the Board will not rule on TPI's motion to compel discovery responses at this time.⁴ Under the current procedural schedule, the discovery period ended on October 15, 2010. Should TPI wish to seek discovery from the Short Line Defendants, it should first confer with the defendants regarding the procedural schedule and then seek to amend the procedural schedule to extend the discovery period. Once the discovery period is extended, TPI may proceed with requesting discovery from the Short Line Defendants in this proceeding.

The Board will address NHRR's December 9, 2010 motion to dismiss in a separate decision. Also, because under this decision NERR and CMPA will receive more time to file an answer than they had requested in their respective motions for extension of time, those motions are moot.

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

It is ordered:

1. TPI shall serve a copy of the second amended complaint on each of the Short Line Defendants by January 4, 2011.
2. CMPA, MHW, NHRR, RJCM, SQVR, SBVR, and NERR shall file an answer to the second amended complaint within 20 days of being served with the second amended complaint.
3. This decision is effective on the date of service.

By the Board, Eric S. Davis, Acting Director, Office of Proceedings.

⁴ As such, TPI's request to remove SBVR from the motion to compel discovery responses will not be considered here.