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SERVICE DATE – DECEMBER 23, 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

Digest:² This decision denies the appeal filed by M&G Polymers USA, LLC, of the decision of the Director of the Office of Proceedings, served November 24, 2010. The November 24 decision denied the shipper's motion to compel discovery.

Decided: December 22, 2010

On November 24, 2010, the Board served a decision of the Director of the Office of Proceedings in this proceeding denying a motion to compel discovery filed by M&G Polymers USA, LLC (M&G). This decision denies M&G's appeal of that decision.

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 various origin and destination pairs.³ M&G alleges that CSXT possesses 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.

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. On November 24, 2010, the Board granted M&G's motion for leave to file its second amended complaint, which added the South Carolina Central Railroad Company (SCRF) as a defendant.

² 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).

³ 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 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 sought from CSXT: (1) all documents, studies, or analyses pertaining to the profitability of the revenue generated by the transportation 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.

On November 24, 2010, the Board served a decision of the Director of the Office of Proceedings denying the motion to compel discovery because the discovery requests ran "contrary to well-established Board precedent and have not been shown to be justified." M&G Polymers USA, LLC v. CSX Transp., Inc., NOR 42123, slip op. at 2 (STB served Nov. 24, 2010) (November 24 Decision). Specifically, the November 24 Decision explained that the Board has consistently denied motions to compel internal costing information because the Board uses its Uniform Rail Costing System (URCS) to determine costs in rate-reasonableness cases.⁴ M&G argued that FMC Wyoming Corp. v. Union Pacific Railroad, 4 S.T.B. 699 (2000) stands 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, and, therefore, internal costing data would be relevant to an argument on that issue. However, the November 24 Decision explained, among other things, that M&G had not cited to any part of FMC to demonstrate that the Board relied on internal costing data, as opposed to URCS data.

On November 30, 2010, M&G filed an appeal of the November 24 Decision pursuant to 49 C.F.R. §§ 1114.31(a)(4) and 1115.9, arguing that it was seeking internal costing data because, among other things, CSXT could claim that transload transportation options are an effective competitive constraint on its rail rates. M&G argues that the question of whether a transload alternative is an effective constraint on CSXT's rates, or merely an "outer limit" under which CSXT may still exercise considerable market power, is one in which URCS costs cannot be used; rather, CSXT's internal costs must be used. M&G argues that the qualitative market dominance test asks whether there is effective competition in the "real world," and therefore it needs the real world costs used by the railroads to decide if the shipper's alternative is a true competitive threat.

On December 3, 2010, CSXT filed its reply arguing that M&G did not meet the standard for granting an interlocutory appeal. Further, CSXT argues that M&G provided no coherent justification to overturn the Board's precedent that railroad internal costing systems are not

⁴ November 24 Decision, slip op. at 3 n.3 (citing Kan. City Power & Light Co. v. Union Pac. R.R., NOR 42095, slip op. at 2, (STB served Feb. 15, 2006); 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); Potomac Elec. Power Co. v. CSX Transp., Inc., 2 S.T.B. 290, 292-94 (1997)).

relevant to qualitative market dominance, nor did it provide any reason to deviate from Board policy that variable costs in rate reasonableness proceedings are to be determined by URCS.

For the reasons set forth below, the Board will deny M&G's interlocutory appeal of the November 24 Decision.

DISCUSSION AND CONCLUSIONS

Interlocutory appeals, including appeals of a Director Order ruling on a motion to compel in a SAC case, are governed by 49 C.F.R. § 1115.9. The Board applies a highly deferential standard of review to such appeals. Wisc. Power & Light Co. v. Union Pac. R.R., NOR 42051, slip op. at 2 (STB served June 21, 2000). Under § 1115.9(a), a decision may be appealed "only if:

- (1) The ruling denies or terminates any person's participation;
- (2) The ruling grants a request for the inspection of documents not ordinarily available for public inspection;
- (3) The ruling overrules an objection based on privilege, the result of which ruling is to require the presentation of testimony or documents; or
- (4) The ruling may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party."

M&G has failed to allege any of these four bases for appeal of the November 24 Decision, much less explain how the November 24 Decision meets this highly deferential standard. First, the November 24 Decision did not terminate any particular individual's participation, grant inspection of any documents not ordinarily available for public inspection, or overrule an objection based on privilege. Moreover, M&G's appeal fails to address how denying a motion to compel production of CSXT's internal costing data causes either substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to M&G. There is no irreparable harm or undue prejudice given that M&G may use URCS, just as the Board does, for any costing determinations in this proceeding. *See, e.g., Kan. City Power & Light*, slip op. at 2 ("costs in Board proceedings are to be determined using [URCS]"); Tex. Mun. Power, slip op. at 3 n.8 ("[URCS] is the exclusive methodology for developing costs in a rail rate complaint proceeding"). M&G will still be able to argue about cost differentials in its market dominance discussion; but it will need to do so using URCS. Furthermore, it has not demonstrated that the public interest would be harmed by not compelling the production of CSXT's internal costing information, especially considering that the November 24 Decision followed longstanding Board policy and precedent.

Internal costing models have not been shown to be relevant in rate cases. The November 24 Decision correctly explained that the Board has consistently ruled against motions to compel internal costing data because, for regulatory purposes, including rate reasonableness cases, costs are determined by URCS. November 24 Decision, slip op. at 3. M&G asserts that it needs CSXT's internal costing data to "prove that transload alternatives are not an effective

competitive constraint upon CSXT's rates."⁵ We disagree. It is true that the question of whether a transload alternative is an effective competitive constraint on a railroad's rates lies at the very heart of a qualitative market dominance determination. But to the extent that CSXT's variable costs are relevant to that inquiry, the Board would use URCS for that analysis. See 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, 894 n.2 (1989) (adopting URCS as our general purpose costing model for all regulatory costing purposes, including, specifically, maximum rate cases and the jurisdictional threshold determination). Accordingly, we will deny M&G's appeal of the November 24 Decision.

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 interlocutory appeal of the November 24, 2010 decision in this proceeding is denied.
2. This decision is effective on its date of service.

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

⁵ Appeal at 3.