

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42121

TOTAL PETROCHEMICALS & REFINING USA, INC.

v.

CSX TRANSPORTATION, INC.

Digest:¹ This decision grants multiple motions filed by Total Petrochemicals & Refining USA, Inc. to compel the production by CSX Transportation, Inc. (CSXT) of updated discovery responses. CSXT must produce the updated responses no later than October 17, 2013.

Decided: July 19, 2013

This decision: (1) grants Total Petrochemicals & Refining USA, Inc.'s (TPI) motion for partial dismissal of its third motion to compel discovery; (2) grants, in part, TPI's motion for an expedited decision on its third motion to compel discovery; and (3) grants, as amended by the motion for an expedited decision and the motion for partial dismissal, TPI's third motion to compel discovery. Under 49 C.F.R. § 1115.3(f), the filing of a petition for reconsideration does not automatically stay the rate reasonableness phase of this proceeding. CSX Transportation, Inc. (CSXT) must begin providing supplemental discovery responses for the rate reasonableness phase of this proceeding and must complete the supplemental discovery process no later than October 17, 2013.

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 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. Following that decision, TPI amended its complaint four times. The fourth amended complaint was filed February 3, 2011.

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).

On October 1, 2010, CSXT filed a motion for expedited determination of jurisdiction over the challenged rates (motion to bifurcate). CSXT argued that its service over 97 of the 120 lanes that were challenged in the first amended complaint were subject to effective competition from rail, truck, or rail-truck transportation alternatives, and, therefore, not subject to the Board's rate reasonableness jurisdiction. On October 21, 2010, TPI replied in opposition to the motion to bifurcate.

In Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc. (Bifurcation Decision), NOR 42121 (STB served Apr. 5, 2011), the Board determined that it was appropriate to bifurcate this proceeding into separate market dominance and rate reasonableness phases, holding the rate reasonableness portion of the proceeding in abeyance and postponing the submission and consideration of rate reasonableness evidence, if necessary, until after the Board made a determination on the issue of market dominance.

TPI filed its third motion to compel discovery on August 3, 2012. Because the motion sought discovery relating only to rate reasonableness, a phase of this proceeding that was held in abeyance pursuant to the Bifurcation Decision, the Board held the third motion to compel discovery in abeyance pending further order of the Board. On May 31, 2013, the Board issued a decision determining the issue of market dominance for each lane (Market Dominance Decision) and found that CSXT is market dominant over certain lanes, requiring the rate reasonableness phase to proceed.

TPI and CSXT filed petitions for reconsideration of the Market Dominance Decision on June 20, 2013. TPI also filed on June 21, 2013 a motion for an expedited decision on its third motion to compel and a motion for a procedural schedule. On July 1, 2013, CSXT filed a consolidated reply to the motions for an expedited decision and procedural schedule. On July 9, 2013, the parties participated in a discovery conference with Board staff. TPI filed a reply to CSXT's proposed procedural schedule on July 10, 2013.² On July 12, 2013, TPI filed a motion for partial dismissal of its third motion to compel, and CSXT filed a reply to the motion for partial dismissal.

DISCUSSION AND CONCLUSIONS

TPI explains that the parties have resolved the dispute regarding the scope of supplemental discovery responses by CSXT, but TPI asks that the Board order CSXT to begin producing responsive information immediately and establish a deadline for completion of those

² We will address the motion for a procedural schedule, petitions for reconsideration, and any related pleadings in subsequent decisions.

discovery responses.³ TPI proposes August 29, 2013, as that deadline.⁴ TPI argues that even if the Board's decision on the petitions for reconsideration changes the lanes at issue, in general the updates are not lane dependent.⁵ TPI claims that delaying discovery would effectively stay the Market Dominance Decision in violation of 49 C.F.R. § 1115.3(f).⁶

CSXT argues that the deadline to update its discovery responses should be 90 days after the Board decides both parties' petitions for reconsideration.⁷ CSXT claims that the Board's decision on the parties' petitions for reconsideration could significantly affect the scope of the case, the extent of necessary discovery updates, and the development of SAC evidence.⁸ Therefore, CSXT argues, the Board should spare it the significant and potentially unnecessary burden of updating its discovery responses until the Board has decided both petitions for reconsideration.⁹ CSXT also claims that a reviewing court may eventually remand the case, rendering the update of discovery responses and the rate reasonableness phase of the proceeding a waste of the parties' and the Board's resources.¹⁰ CSXT argues that its objection to TPI's proposed discovery deadline does not amount to a stay because the Market Dominance Decision was merely a jurisdictional determination with no effects that could be stayed.¹¹

Our rule states that "filing of a petition [for reconsideration] will not automatically stay the effect of a prior action," § 1115.3(f). Under the circumstances of this case, we will not delay discovery updates until after we decide the petitions for reconsideration. The effect of a prior action may be stayed on a party's motion (which must be filed within 10 days of service of the action) or on the Board's own motion. Id. CSXT did not file a motion for a stay, and in this instance we will not order one on our own motion. Here, the potential for unnecessary discovery burdens on CSXT is smaller relative to the costs of delaying the proceeding. The rate reasonableness phase of the proceeding will go forward regardless of our decision on the petitions for reconsideration because CSXT has effectively conceded market dominance on

³ Motion for Partial Dismissal 2.

⁴ Motion for Expedited Decision on Third Motion to Compel 4.

⁵ Motion for Expedited Decision on Third Motion to Compel 4.

⁶ Id. at 4-5.

⁷ Reply to Motion for Partial Dismissal 2-3.

⁸ Reply to Motion for Partial Dismissal 1-2; Reply to Motion for Procedural Schedule and Motion for Expedited Decision 3-5.

⁹ Reply to Motion for Partial Dismissal 2.

¹⁰ Id.

¹¹ Reply to Motion for Procedural Schedule and Motion for Expedited Decision 5.

certain lanes.¹² In addition, much of the supplemental discovery does not depend on the particular lanes at issue in the rate reasonableness phase of the proceeding.

We are not persuaded by CSXT's argument that the Market Dominance Decision was merely jurisdictional and delay of discovery would not amount to a stay of the proceeding. In fact, the Market Dominance Decision specifically required the parties to submit a procedural schedule to govern the rate reasonableness phase of the proceeding.¹³ CSXT's failure to begin its discovery updates would effectively place that phase of the proceeding on hold again. The parties can begin to prepare their SAC evidence while we consider the petitions for reconsideration.¹⁴ In any event, the August 23, 2012, decision simply held TPI's motion to compel discovery in abeyance pending further order of the Board, which is now being issued. The Board will grant TPI's motion for partial dismissal of the third motion to compel and will grant, in part, TPI's motion for an expedited decision on the third motion to compel. CSXT must start updating certain discovery responses as agreed to by the parties and as described in TPI's motion for partial dismissal, produce updates as they become available, and complete its updates by October 17, 2013 (90 days from service of this decision, the length of time CSXT claimed it would need to update discovery¹⁵). Therefore, TPI's third motion to compel, as amended by the motion for an expedited decision and the motion for partial dismissal, will be granted.

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 for partial dismissal of its third motion to compel is granted.
2. TPI's motion for an expedited decision on its third motion to compel discovery is granted, in part.
3. TPI's third motion to compel, as amended by the motion for an expedited decision and the motion for partial dismissal, is granted.

¹² Market Dominance Decision, slip op. at 28.

¹³ Id. at 30.

¹⁴ We expect to issue a decision on the petitions for reconsideration as soon as practicable.

¹⁵ Reply to Motion for Partial Dismissal 3.

4. CSXT shall immediately begin producing the supplemental discovery responses agreed to by the parties, and CSXT shall complete supplemental production no later than October 17, 2013.

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

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey. Vice Chairman Begeman dissented in part with a separate expression.

VICE CHAIRMAN BEGEMAN, dissenting in part:

Having dissented in the Board's May 31, 2013 decision on the market dominance portion of this proceeding, I cannot support today's decision requiring CSX Transportation, Inc. (CSXT) to update its discovery responses at this time.

Both the plaintiff and the defendant in this case have filed petitions for reconsideration of the Market Dominance Decision, and replies to those motions are due on July 24, 2013. In my view, the Board should decide both parties' petitions for reconsideration expeditiously, thereby determining the scope of the proceeding, before requiring CSXT to expend resources to update its discovery responses.