

BEFORE THE
SURFACE TRANSPORTATION BOARD

235245

TOTAL PETROCHEMICALS &
REFINING USA, INC.)
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Complainant,)
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v.)
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CSX TRANSPORTATION, INC.)
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)
Defendant.)

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Docket No. NOR 42121

REPLY TO PETITION FOR STAY

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December 30, 2013

REPLY TO PETITION FOR STAY

Pursuant to 49 CFR § 1115.5(a), complainant Total Petrochemicals & Refining USA, Inc. (“TPI”) hereby responds in opposition to the Petition for Stay (“Petition”)¹ filed by defendant CSX Transportation, Inc. (“CSXT”) on December 26, 2013. “A stay is an extraordinary remedy”² and CSXT has not met the extremely high burden required to justify one. As explained herein, the Petition should be denied.

I. Standard of Review.

Under the relevant four-part test, CSXT must show (1) likelihood of success on the merits; (2) it will be irreparably harmed absent a stay; (3) no interested parties would be substantially harmed by issuance of a stay; and (4) the public interest favors a stay.³ Some showing on each of the elements is necessary,⁴ and CSXT has the burden of persuasion on each one.⁵ CSXT’s Petition fails on all four elements.

II. Argument.

A. CSXT is Not Likely to Succeed on the Merits.

CSXT’s request for a stay is predicated on its putative appeal of the Board’s Market Dominance Decision⁶ to the U.S. Court of Appeals for the D.C. Circuit.⁷ Pet. at 1. But, the appeal is improper and premature, which means that CSXT cannot prevail on the merits at this

¹ The Petition does not contain page numbers. Nonetheless, TPI has included page number cites in this Reply, with page one of the Petition being the page that begins “Pursuant to 49 U.S.C.....”

² Eighteen Thirty Group, LLC – Acquisition Exemption – In Allegany County, MD, STB Docket No. 35438, slip op. at 3 (served Nov. 17, 2010) (“Eighteen Thirty”).

³ Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 842-843 (D.C. Cir. 1977) (citation omitted).

⁴ Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc., STB Docket No. 42110, slip op. at 4 (served Dec. 22, 2008) (“Seminole”).

⁵ The Bay Line Railroad, LLC – Acquisition and Operation Exemption – Rail Lines of Atlanta & St. Andrews Bay Railroad Company, STB Docket No. 32435 (Sub-No. 1), slip op. at 1 (served Oct. 1, 1997).

⁶ The Board’s Market Dominance Decision was served May 31, 2013 and confirmed on December 19, 2013 (hereinafter collectively referred to as Market Dominance Decision).

⁷ The Petition for Review at the D.C. Circuit, which has been assigned Docket No. 13-1313, was filed on the same day that CSXT filed its Petition for Stay at the Board.

time. Moreover, even if the appeal were proper, CSXT has not demonstrated its likely success on the merits.

The courts of appeal only have jurisdiction over “rules, regulations, or final orders” of the Board. 28 U.S.C. § 2342(5). Appeal from an agency decision is only proper where the decision “mark[s] the consummation of the agency’s decisionmaking process.”⁸ The Market Dominance Decision does not satisfy this requirement because TPI’s rate case against CSXT is still ongoing, and thus, no “final order” exists. Established precedent in the D.C. Circuit, authored by Justice Scalia prior to his elevation to the Supreme Court, confirms that this agency’s assertion of jurisdiction over a rail rate reasonableness complaint is not appealable as a final agency action. Aluminum Company of America v. U.S., 790 F.2d 938 (D.C. Cir. 1986) (“Alcoa”). Thus, the Board should reject the Petition because it is part and parcel of CSXT’s premature and improper appeal of the Market Dominance Decision, which does nothing more than establish the Board’s jurisdiction over the rates challenged by TPI. In other words, CSXT is not, and cannot be, “likely” to succeed on the merits because the merits will not even be addressed due to the premature nature of the appeal.

Even if its appeal were not premature, CSXT incorrectly asserts that it is likely to succeed on the merits of its objections to the Board’s Market Dominance Decision. “Congress has expressly delegated to the Board responsibility for determining whether a railroad has market dominance and...the Board is at the zenith of its powers when it exercises that authority, and therefore entitled to particular deference.”⁹ CSXT has not identified any facts or law to overturn

⁸ Bennett v. Spear, 520 U.S. 154, 177-178 (1997) (quotation and citation omitted).

⁹ Burlington Northern Railroad Company v. Surface Transportation Board, 114 F.3d 206, 210 (D.C. Cir. 1997) (internal quotation and citations omitted).

the Market Dominance Decision under the highly deferential ordinary Chevron standard of review,¹⁰ let alone the “particular deference” that applies in the market dominance context.

CSXT suggests that the Limit Price Methodology adopted by the Board should have been subject to notice and comment rulemaking (Pet. at 7), but ignores the fundamental fact that the Board has broad discretion whether to proceed by adjudication or rulemaking.¹¹ In light of this broad discretion, CSXT is clearly not “likely” to succeed on the merits of its procedural claims.¹² CSXT also claims that it has made “a strong showing on the equities,” thereby supporting the likelihood of success element. Pet. at 7. CSXT could not be more wrong here. If there was ever a case where the equities were against the movant, this is it. See Section II.C below.

CSXT perhaps recognizes that it is unlikely to succeed on the merits, because it ultimately downplays its success chances – relying instead on the assertion that “difficult or novel questions” are presented by its attempted appeal. Pet. at 7. Merely labelling the market dominance analysis a “difficult” or “novel” question does not make it so. The remaining substance of CSXT’s position on the merits consists of self-serving characterizations of its “strong arguments,” unsupported claims that the Board “offered no meaningful response” to its expert witnesses,¹³ and reference to filings made in a separate proceeding that the Board considered and addressed in the Market Dominance Decision. Pet. at 6-8. These assertions are nothing more than a further expression of CSXT’s disagreement with the outcome of the Market

¹⁰ Chevron USA, Inc. v. NRDC, 467 U.S. 837, 842-843 (1984).

¹¹ SEC v. Chenery Corporation, 332 U.S. 194, 203 (1947) (“the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency”). See also Time Warner Entertainment Co., LP v. FCC, 240 F.3d 1126, 1141 (D.C. Cir. 2001) (citation omitted).

¹² Even Vice Chairman Begeman, in her dissent, acknowledges that the procedural question is not whether the agency must proceed by rulemaking, but rather whether it should do so. Market Dominance Decision at 31 (served May 31, 2013).

¹³ The Board thoroughly addressed the statements of CSXT’s expert witnesses at pages 9-12 of the December 19, 2013 Market Dominance Decision.

Dominance Decision. The Board should reject those assertions as insubstantial and wholly insufficient to show a likelihood of success on the merits.

B. CSXT Will Not Be Irreparably Harmed Absent a Stay.

Issuance of a stay requires that the petitioner “will suffer” irreparable harm in the absence of a stay. Eighteen Thirty, slip op. at 3. Although this is the “threshold consideration” in deciding whether a stay is appropriate, *id.* at 4, CSXT has not presented any germane evidence of irreparable harm to it. CSXT’s principal allegation of irreparable harm is that stand-alone cost (“SAC”) evidence may need to be submitted twice if it prevails on appeal, thereby putting CSXT, TPI and the Board to unnecessary expense and effort. Pet. at 3-6. It is well-established, however, that the expense and effort of defending oneself in litigation is not irreparable harm.¹⁴

CSXT’s worry that the parties’ SAC evidence will be “wasted” if CSXT prevails on appeal also is baseless. Pet. at 5. Just because some case lanes no longer might be market dominant would not necessarily vitiate SAC evidence that includes that traffic. Board precedent acknowledges that SAC evidence can extend to line segments not used by the issue traffic.¹⁵ Consequently, if a revised market dominance determination results in fewer lanes at issue, there is no inevitable bar on use of previously-developed SAC evidence to evaluate the reasonableness of rates for the remaining lanes.

Even if there were some possible risk of cognizable future injury, CSXT has not shown that the injury is “actual and imminent”¹⁶ to warrant a stay; nor has CSXT shown that it “will” suffer irreparable harm in the absence of a stay. Accepting CSXT’s assertions as true, the most

¹⁴ See, e.g., FTC v. Standard Oil Company of California, 449 U.S. 232, 244 (1980) (“Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury”), quoting Renegotiation Board v. Bannerkraft Clothing Company, 415 U.S. 1, 24 (1974).

¹⁵ Otter Tail Power Company v. BNSF Railway Company, STB Docket No. 42071, slip op. at 9-10 (served Jan. 27, 2006).

¹⁶ Eighteen Thirty, slip op. at 3.

CSXT has shown is that absence of a stay means that the parties will continue litigating a case that already has been pending for over three and a half years, and that some uncertain portion of their future SAC efforts might turn out to have been unnecessary if the Court of Appeals accepts CSXT's Petition for Review as an interlocutory appeal, and if the Court of Appeals agrees that the Board's Market Dominance Decision was arbitrary, and if the market dominance result in this case is altered on remand, and if the SAC work previously done by the parties turns out to have been unnecessary and not usable. This highly speculative and contingent scenario is inadequate to meet the standard required to support the draconian step of a stay.¹⁷ Conjecture about possible future scenarios is not "actual and imminent harm."

In fact, CSXT's "wasted work" argument could just as easily support denial of a stay under at least two other possible scenarios. First, during the eventual SAC phase of the case, the challenged CSXT rates could be found reasonable. In such a scenario, any appeal on the market dominance issue would have been "wasted work."¹⁸ Second, CSXT's rates may be found unreasonable by the Board during the SAC phase, a finding that may prompt CSXT to seek judicial review. The "finality" requirement for appeals of agency decisions is intended precisely to avoid this piecemeal approach.¹⁹

C. TPI Would Be Harmed By a Stay.

CSXT has utterly failed to show that TPI would not be harmed by a stay. This case has been pending for nearly 44 months and the parties have not even submitted SAC evidence yet. During this entire time, TPI has been paying a tariff premium of approximately \$110,000 per

¹⁷ See, e.g., Seminole, STB Docket No. 42110, slip op. at 3-4 (rejecting injunction request premised on conjecture of future scenarios).

¹⁸ An analogous scenario was posited by then-Circuit Judge Scalia in Alcoa, 790 F.2d at 942.

¹⁹ Id.

week, or a cumulative total of \$20 million.²⁰ The tariff premium represents the amount by which the challenged tariff exceeds the last contract proposal of CSXT, which TPI rejected as unreasonably high in order to pursue this rate case.²¹

Ignoring the tariff premium, CSXT asserts that a stay nonetheless would benefit TPI because it would allow the market dominance issue to be appealed “before” the parties develop their SAC evidence. Pet. at 9. This remark could hardly be more wrong. TPI’s opening SAC evidence is due in just six weeks and TPI already has completed a substantial portion of that evidence. Indeed, TPI has already come close to finalizing its SAC evidence once before, in April 2011, when the Board bifurcated this case less than four weeks prior to the due date for TPI’s opening evidence.²² As a consequence of that delay, TPI suffered the substantial extra cost of obtaining, reviewing, and incorporating updated discovery into its SAC analysis. Now, with its Petition, CSXT seeks again to prevent TPI from filing its opening SAC evidence at the eleventh hour. CSXT disingenuously asserts that a stay is warranted in order to “protect TPI” from having to develop SAC evidence twice. Pet. at 9. But TPI already has developed SAC evidence twice and CSXT now wants to force a third time. CSXT can be sanguine about further delay in this case because that delay increases the harm and risk to TPI but has no comparable negative consequences for CSXT.

Delay harms TPI in at least two ways. First, delay is extremely prejudicial to TPI because it increases TPI’s litigation risk. The tariff premium, not to mention the legal and consultant fees required to litigate a rate case, represents a huge risk for TPI. If TPI wins its case, then the tariff premium will be returned and rates will be prescribed at a reasonable level;

²⁰ The challenged rates went into effect on July 1, 2010. See Complaint (filed May 3, 2010) at page 1.

²¹ See TPI letter to the Board (filed June 6, 2011).

²² See Board decisions served February 4, 2011 (approving procedural schedule with opening evidence due date of April 29, 2011) and served April 5, 2011 (bifurcating the proceeding).

but if TPI loses, CSXT retains the tariff premium. A loss does not return TPI to a neutral position – TPI would irretrievably lose the tariff premium in the event of a negative outcome in this case. The tariff premium and consequent risk increase with each passing day. In contrast, CSXT does not experience a similar risk. A loss for CSXT means only that TPI has provided a multi-year, multi-million dollar loan to CSXT with virtually no interest.

CSXT downplays the risk inherent in the tariff premium by citing to the reparations that TPI will obtain if the challenged rates are found unreasonable. Pet. at 9. But reparations cannot compensate TPI for the business disruption caused by the high tariff rates and the delay in this proceeding, which leads to the second major harm to TPI from delay – the deleterious commercial implications arising from both the tariff premium and the uncertainty about the lawful rates.

Unlike most other rate case complainants, who have been coal shippers with a relatively constant traffic volume cycling repeatedly between a few origins and one power plant destination, TPI is a carload shipper with hundreds of customers that are constantly changing. Some of TPI's current customers may no longer be customers by the end of this case, and TPI has been and will be faced with many new business opportunities during the pendency of this case. Hence, it is not just reparations that are crucial to determining if harm to TPI exists. The value of a prospective prescribed rate is also crucial, because it will inform and, indeed, enable TPI to seek new business based on certainty regarding the level of the reasonable rate. The CSXT Petition would force the end date of this case further into the future, continuing to eviscerate the potential value of a prescribed rate for business planning purposes. In short, the level of transportation rate affects not just reparations that TPI might get, but affects TPI's

attempt to obtain new business. As this proceeding continues to drag on, TPI is at a severe disadvantage compared to its competitors – who know exactly what their transportation costs are.

For TPI to effectively compete in various industry sectors and plan for the future, it must know the level of its current costs, but the extended nature of this proceeding has left TPI in a fog about the lawful transportation costs that apply to its business. TPI does not know, and has not known for over three and a half years, whether the transportation rates that it is paying are the actual rates on which it should plan its finances. TPI strongly believes that the current rates are unreasonably and unlawfully high, but the continuing uncertainty about whether this belief is correct, with no end in sight, hampers TPI's ability to plan for the future and compete in the marketplace. This is not a hypothetical possible future harm that might come to pass in one specific scenario of future events – this is a real detrimental effect right now on TPI's ability to engage in its business on a day-to-day basis in a competitive market environment. The Board has previously recognized that a shipper's loss of business constitutes a serious, irreparable harm.²³ This sort of commercial harm cannot be and will not be compensated by reparations.

Ironically, the precedent upon which CSXT most heavily relies in the Petition is predicated upon asserted harms that more clearly resemble those faced by TPI in the event of a stay rather than those faced by CSXT without a stay. The precedent relied upon “operational disadvantage[s]” that would exist without a stay, as well as “unduly disruptive” commercial consequences absent a stay.²⁴ This precedent supports denial of the requested stay.

Congress has stated that TPI is entitled to a reasonable rate (see, e.g., 49 U.S.C. § 10701), but the continuing and growing risk involved in asserting TPI's rights have made it unclear

²³ Railroad Salvage & Restoration, Inc. and G.F. Weideman International, Inc. – Petition for Investigation and for Emergency Relief under 49 U.S.C. 721(B)(4) – Security Deposit for Demurrage Charges, Missouri & Northern Arkansas Railroad Company, Inc., STB Docket No. 42107, slip op. at 4 (served June 30, 2008).

²⁴ Stagecoach Group PLC and Coach USA, Inc., et al. – Acquisition of Control – Twin America, LLC, STB Docket No. MC-F-21035, slip op. at 2 (served March 9, 2011).

whether the reasonable rate is worth it. Regardless of the rate that the Board eventually prescribes in this case, if the process of obtaining that rate requires five or six years of litigation at enormous expense, as CSXT's Petition would require, then that rate can hardly be said to be "reasonable." CSXT's Petition is yet another effort to increase the litigation risk for shippers like TPI, and make the rate case process that much less accessible to captive shippers.

Congress has clearly expressed its desire for "fair and expeditious regulatory decisions" and the "expeditious handling and resolution of all proceedings required or permitted." See 49 U.S.C. §§ 10101(2) and (15). Similarly, the Board has recognized that "the path envisioned by Congress" involved "more expeditious resolution of large rate disputes."²⁵ The delay sought by CSXT in the Petition would be contrary to this clearly-expressed intent of Congress.

D. The Public Interest Does Not Warrant a Stay.

CSXT asserts that a stay is warranted because of the regulatory "instability" due to "uncertainty" generated by the Board's market dominance determination in this case. Pet. at 10. There is no "uncertainty" about what rules will apply in future cases because the Board has not repealed the traditional market dominance factors used for decades in rail rate cases. Because the Limit Price Methodology is additive to those factors, parties must continue to address them, just as TPI and CSXT did in this proceeding. Therefore, even if CSXT's appeal were successful, the Board still would have ample evidence upon which to determine market dominance.

CSXT also invokes flawed logic when it asserts that pending and future rate case decisions will be at risk until a lawful rule is established and upheld on judicial review. *Id.* If such logic justified a stay of agency proceedings, it would require an agency to stay all pending and future cases whenever it adopts a new legal standard, either by adjudication or rulemaking,

²⁵ Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 3 (served Oct. 30, 2006).

until all appeals have been exhausted, thereby bringing the entire regulatory process to a grinding halt.

Finally, the complexity of the rate case process means it is inevitable that each new case results in novel scenarios that the Board must address on a case-by-case basis.²⁶ As just one example, the rail industry survived for years with no “preferred procedure for developing revenue divisions for cross-over traffic.”²⁷ The alleged instability, if any exists, is simply a result of the Board’s right to proceed either by adjudication or by rulemaking.

III. Conclusion.

TPI filed its Complaint on May 3, 2010, well over three-and-a-half years ago, and has yet to present any rate reasonableness evidence with no decision likely until late 2015. Now CSXT seeks to further delay the forward progress of this proceeding. CSXT has not met the high burden required to justify a stay, and the Petition is predicated on an improper and premature appeal. The Petition should be denied.

Respectfully submitted,



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²⁶ BNSF Railway Company v. STB, 453 F.3d 473, 485 (D.C. Cir. 2006).

²⁷ PPL Montana, LLC v. Burlington Northern & Santa Fe Railway Company, 6 STB 286, 293 (n. 14) (2002).

CERTIFICATE OF SERVICE

I hereby certify that this 30th day of December 2013, I served a copy of the foregoing upon counsel for defendant CSXT via electronic mail, and first-class mail postage pre-paid at the address below:

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