

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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M & G POLYMERS USA, LLC

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

Docket No. NOR 42123

**REPLY OF M&G POLYMERS USA, LLC
TO CSX TRANSPORTATION, INC.'S
MOTION TO HOLD THE RATE REASONABLENESS
PHASE OF THIS CASE IN ABEYANCE PENDING
RESOLUTION OF CENTRAL ISSUES**

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I. SUMMARY OF ARGUMENT.

This proceeding has been pending for approximately 2½ years, and a final decision on rate reasonableness is still two or more years away. Despite the prolonged nature of this proceeding, CSXT now seeks additional delay with its Motion. Each delay is extremely prejudicial to M&G, as previously explained to the Board on several occasions and further explained below, while CSXT reaps significant financial benefits.

In any event, a significant portion of the Motion has been mooted by the joint procedural schedule filed earlier today in a separate pleading by M&G and CSXT. In that filing, the parties agreed that the procedural schedule for rate reasonableness would commence upon the Board's issuance of a final market dominance decision in this case. That procedural schedule reflects the fact that the Board previously held this case in abeyance pending resolution of market dominance, and thus the case would appear to remain in abeyance until issuance of a final decision, even if CSXT had never filed this Motion. Therefore, the Motion is moot as to the market dominance issue. Despite mootness, M&G shows herein that the Board should reject multiple CSXT assertions to justify additional delay.

CSXT also contends that this case should be held in abeyance pending completion of the pending rule making proceeding in EP715 so that the Board can apply any newly-adopted rules from that proceeding. CSXT asserts that the rate reasonableness standards are in "flux" and there is simply too much confusion and uncertainty for CSXT to be able to proceed. Contentions almost identical to CSXT's have already been rejected by the Board in its November 29th decision denying the motions of Norfolk Southern Railway Company ("NS") to hold the DuPont

and Sunbelt cases in abeyance.¹ Moreover, additional delay would be severely prejudicial to M&G due to the time, expense, and significant delay that has already plagued this proceeding. M&G also shows that CSXT fails in its efforts to distinguish this proceeding from the DuPont and Sunbelt cases.

II. BACKGROUND.

A. Procedural History of Case.

M&G filed its complaint on June 18, 2010, exactly two-and-a-half years ago. The parties engaged in mediation and discovery, and the case proceeded toward the contemporaneous submission of evidence on both market dominance and rate reasonableness. The procedural schedule established June 29, 2011 as the due date for M&G's opening evidence. *See* Decision served Feb. 24, 2011. Under that procedural schedule, this case would have been fully briefed by April 7, 2012, and a final Board decision due by January 7, 2013, which is less than four weeks away. *Id.* This case, however, has taken a detour that realistically will not produce a final decision for two more years, even under the best of circumstances.

The detour began on January 27, 2011, when CSXT filed a motion asking the Board to bifurcate the case such that market dominance would be evaluated and decided prior to submission of rate reasonableness evidence. Recognizing that bifurcation would delay the case by at least several months, and potentially longer, M&G vigorously opposed CSXT's motion. M&G pointed out that, for carload shippers like it, the length and cost of SAC cases already is a great deterrent to pursuing regulatory rate relief, and that the added cost and complexity of

¹ E.I. du Pont de Nemours and Company v. Norfolk Southern Railway Company, STB Docket No. 42125 (“DuPont”); and Sunbelt Chlor Alkali Partnership v. Norfolk Southern Railway Company, STB Docket No. 42130 (“SunBelt”).

bifurcation only would further deter such shippers from pursuing their regulatory remedies for unreasonable rates.

On April 5, 2011, the Board granted a nearly identical bifurcation request in a separate rate case also involving CSXT transportation of plastics. Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., Docket No. NOR 42121 (“TPI v. CSXT”). In light of the TPI v. CSXT decision, it was clear that a similar grant of bifurcation in the M&G case was inevitable. Consequently, M&G withdrew its opposition to bifurcation, rather than waste time waiting for the Board to issue a similar decision in this case, and seized the initiative to propose an expedited procedural schedule for market dominance to minimize as much as possible the resulting delay from bifurcation.² That schedule, which the Board adopted, provided the parties with just one month between the filings of opening, reply and rebuttal evidence on market dominance. All evidence was submitted to the Board by August 4, 2011.

Despite the expedited submission of market dominance by the parties, the Board did not issue a decision until September 27, 2012 (“Market Dominance Decision”), nearly 14 months later. The Board found that CSXT possessed market dominance with respect to 36 of the 42 challenged rates. In the Market Dominance Decision, slip op. at 6, note 9, the Board observed that the 69 issue movements are governed by 42 separate “rates.” Consequently, in the Board’s terminology, CSXT is market dominant over 36 “rates” (which apply to 60 of the 69 issue movements). CSXT did not contest market dominance for 26 of the issue movements.

² CSXT’s characterization of M&G’s decision to withdraw its opposition as “consenting to bifurcation of this case” is no more accurate than someone at gunpoint “consents” to any action that they otherwise would vigorously oppose. Motion at 3. CSXT concedes this point, on page 11, when it acknowledges that “the main substantive reason that M&G effectively conceded the motion appears to have been its recognition that its position was similar to that of the complainant in [TPI v. CSXT].”

The Market Dominance Decision, however, was not quite a final decision in one significant respect. Rather than apply traditional analyses to determine the effectiveness of truck and transload transportation alternatives, the Board relied extensively upon a newly-adopted refined approach, known as the “Limit Price” test, that neither M&G nor CSXT had advocated in their evidence. Therefore, the Board invited the parties to file comments within 30 days on this refined approach. See Market Dominance Decision at 21. The Board also requested that the parties propose a procedural schedule for rate reasonableness within 15 days after the end of the comment period for the Limit Price test. Id.

In response to the Market Dominance Decision, CSXT filed a motion requesting that the Board delay the due date for comments on the Limit Price method for nearly two months. See CSXT’s Motion to Modify Procedural Schedule (filed Oct. 2, 2012). M&G opposed any delay. See M&G’s Reply in Opposition to Motion to Modify Procedural Schedule (filed Oct. 9, 2012). During this time period, various third parties requested clarification from the Board regarding whether they, too, could file comments on the Limit Price method.

Fearing greater uncertainty and delay from the growing controversy surrounding the Limit Price test, M&G filed a Petition for Reconsideration of the Board’s Market Dominance Decision on October 17, 2012. M&G asked the Board to reconsider its extensive reliance upon this new test by including findings based upon a traditional market dominance analysis. Otherwise, M&G’s case could hinge upon this new and untested methodology, which could subject the case to additional delays beyond those it already has experienced.

In a decision served on October 25, 2012, the Board extended the due date for comments on the Limit Price test until November 28, 2012, and permitted interested third parties to file comments as *amicus curiae*. The Board also directed M&G and CSXT to “confer and submit a

proposed procedural schedule to govern the rate reasonableness phase of this proceeding by December 13, 2012.” See decision served Oct. 25, 2012 at p. 4. The Board stated that M&G’s Petition for Reconsideration would be addressed in a future decision. *Id.* at 3 (n. 9). M&G, CSXT, and eight *amici* filed comments regarding the Limit Price method on November 28, 2012.

In an entirely separate proceeding, the Board initiated a rulemaking in STB Ex Parte No. 715, Rate Regulation Reforms, by Notice served on July 15, 2012. The Notice, among other things, proposed certain restrictions upon the use of cross-over traffic in SAC analyses. However, the Board clearly stated that it would not apply any new cross-over traffic rules adopted in that rulemaking to pending cases. *Id.*, slip op. at 17 (n. 11). The Board confirmed that determination at pages 4-5 of a joint decision served on Nov. 29, 2012, in E.I. du Pont de Nemours and Company v. Norfolk Southern Railway Company, STB Docket No. 42125, and Sunbelt Chlor Alkali Partnership v. Norfolk Southern Railway Company, STB Docket No. 42130 (“DuPont/SunBelt”).

CSXT filed the instant Motion on December 4, 2012. CSXT seeks to hold this case in abeyance pending resolution of both the challenges to the Limit Price test and completion of the EP715 rulemaking. M&G and CSXT also filed a joint proposed procedural schedule for rate reasonableness earlier today.

B. This Proceeding Has Already Been Significantly Delayed By Bifurcation.

At the time the Board issued its decision bifurcating this proceeding into separate market dominance and rate reasonableness components, M&G was in the midst of preparing its opening evidence (on both market dominance and rate reasonableness), which was due June 29, 2011. Without bifurcation, the evidentiary record would have closed with filing of final briefs on April 7, 2012, and the Board’s final decision would be expected in just a few weeks – early January 2013. Although M&G anticipated that bifurcation could add 6-8 months to that procedural

schedule, the reality has been much longer. It now appears that a final decision is unlikely before the very end of 2014 or early 2015 – over two years from now – which assumes that the Board issues a final market dominance decision no later than February 2013. Clearly, bifurcation has caused significant delay in this proceeding, just as M&G warned in its initial opposition to the bifurcation request (filed February 18, 2011). The additional delay requested by CSXT's Motion is unwarranted and will compound the prejudice that already has accrued to M&G.

C. Delays In This Proceeding Have Caused Great Prejudice To M&G.

The significant delays in this proceeding mean that this proceeding will be nearly five years old by the time the Board issues a final decision.³ Those delays have caused severe prejudice to M&G, and now CSXT asks the Board to impose even more delay.

During the entirety of this proceeding, M&G has been paying CSXT tariff rates that amount to a premium of approximately \$60,000 per week. This is not a premium over what M&G believes to be reasonable rates; that premium would be much higher. Rather, it is a premium over the best contract offer that CSXT made, and M&G rejected, shortly before filing this case.⁴ M&G could have avoided this premium only by accepting CSXT's unreasonable contract offer, instead of pursuing this case. In other words, the tariff premium is a punitive upcharge for filing this rate case. M&G has paid this tariff premium every week since January 2010, which was nearly six months before M&G filed the Complaint, and the total premium paid

³ This will be far longer than the three year period provided by 49 U.S.C. §11701(c). In other rate cases, railroad defendants have argued that a rate complaint must be dismissed if the Board has not issued an administratively final decision within this three year period. Although M&G vehemently disagrees with such arguments, a railroad which seeks to delay a case should not then be permitted to argue that such delay requires dismissal under this statutory provision.

⁴ M&G previously informed the Board that, under the challenged tariffs, M&G is paying approximately \$60,000 per week above the last CSXT contract rate offer (which M&G considered unacceptably high). See correspondence to Chairman Elliott, dated March 22, 2012.

to date is now well over \$9 million. With each passing day while this case is pending, M&G must continue paying this tariff premium.

The crucial point about the tariff premium is that the entire \$9 million is “at risk” depending upon the ultimate outcome in this case. M&G does not receive a commensurately greater reward by putting more money at risk each week. With each additional delay to this case, the financial risk continues to grow, yet M&G’s potential recovery remains the same—a ten-year prescription of a lawful rate. Critically, if M&G loses the case, it is not returned to a “neutral” position; instead, M&G loses the entire multi-million dollar tariff premium that it has paid just for the opportunity to pursue this case. The tariff premium is M&G’s opportunity cost, a cost that grows by the week and that has now become far greater than M&G ever anticipated when it filed its Complaint due to the lengthy bifurcation of this case.

Conversely, CSXT risks nothing when this case is delayed. Indeed, CSXT receives a windfall. As the delays grow, so does the total premium paid by M&G. CSXT gets to keep the tariff premium as an unmerited financial windfall if it wins the case, and a loss in this case only means that CSXT has obtained a multi-year, virtually no-interest loan of several million dollars from M&G.⁵

Payment of the tariff premium also harms M&G’s competitiveness in the polyethylene terephthalate industry. M&G is significantly burdened by the deleterious effect on its strategic and business planning from having a major component of its cost structure – rail transportation rates from its only domestic production plant – remain uncertain for so many years. For example, M&G already has foregone a proposed expansion of its Apple Grove facility because of rail rates, and the continuing viability of that facility grows more doubtful with every delay to

⁵ The Board’s rules only require CSXT to pay interest on reparations at the 91-day T-Bill rate, which currently is 0.10%. 49 CFR § 1141.1(a).

this case. Furthermore, M&G has hundreds of customers which are constantly changing; some current customers may no longer be customers by the time the rate case ends, and M&G may have new customers that might not be covered by a rate prescription in this case. The longer the case, the more dramatic and damaging are these effects.

III. THE BOARD SHOULD REJECT CSXT'S MARKET DOMINANCE RATIONALE.

A. The Market Dominance Rationale For The Motion Is Moot.

In the Motion, CSXT asserted that the Board should hold the rate reasonableness phase of this case in abeyance until the Board finalizes its market dominance rules and applies them to this proceeding. See, e.g., Motion at 6-7. CSXT claimed that abeyance is appropriate because “the Board’s market dominance rules are now in a state of flux and uncertainty,” and the parties might be forced to later file “additional or substitute evidence” if the case moves into rate reasonableness now.⁶ See Motion at 6-7.

CSXT’s rationale, regardless of its merits, is moot. Earlier today, M&G and CSXT filed a “Joint Motion for Procedural Schedule,” which proposes a schedule that begins upon the Board’s issuance of a final market dominance decision. Moreover, the rate reasonableness phase

⁶ With respect to the latter point, CSXT incorrectly asserts that the jurisdictional nature of market dominance means that, if certain lanes drop out of this proceeding after the parties already have developed their SARR systems, then it is “back to the drawing board to...design a [new] SARR.” See Motion at 10. CSXT’s assertion ignores a key point about the SAC test – the SARR can be larger than is minimally necessary to move the issue traffic. See, e.g., Western Fuels Association, Inc. and Basin Electric Power Cooperative v. BNSF Railway Company, STB Docket No. 42088, slip op. at 10 (served Feb. 18, 2009). Some railroads have long argued that the SARR should be large enough to originate and terminate the entire traffic group, not just the issue traffic, thereby eliminating cross-over traffic. See, e.g., BNSF Railway Company v. Surface Transportation Board, 453 F.3d 473, 482 (D.C.Cir. 2006). In fact, one of the Board’s own proposals in EP715, which CSXT has supported, is to require that complainants design their SARR to originate and/or terminate any cross-over traffic. Thus, CSXT’s claim that the parties would have to design a new SARR if a lane were to drop out of the case is a red-herring. The same SARR still could be the basis for determining the reasonableness of the remaining issue movements.

of this case previously was held in abeyance when the Board bifurcated market dominance and effectively remains so until the Board completes the market dominance phase or otherwise takes some affirmative action to revoke its prior order.

B. CSXT's Motion Confirms The Fears Expressed In M&G's Petition for Reconsideration.

M&G previously explained to the Board that the growing controversy over use of the Limit Price methodology in the Market Dominance Decision would cause substantial additional delay to this already-lengthy proceeding. See Petition for Reconsideration at 2. M&G urged the Board to include a finding of market dominance supported by a more traditional analysis in its final market dominance decision. Id. Therefore, the Board need not definitively resolve the status of the Limit Price test in this proceeding in order to issue a final market dominance determination, if, as requested in M&G's Petition for Reconsideration, the Board includes a traditional market dominance analysis in the final decision that would provide an independent foundation for the decision.

M&G's concerns about possible additional delay have been realized in the CSXT Motion. CSXT relies upon assertions of "flux" and uncertainty to distract attention from the main issue – CSXT's market power over M&G's rail traffic – in an attempt to delay the establishment of reasonable and lawful rail rates for the M&G traffic. The Board should not be swayed by CSXT's arguments, or condone its continuing efforts to extend this case even further, thereby increasing the tariff premium and the hardship to M&G.

The Board can and should resolve the confusion, and put an end to the distracting claims of CSXT, by issuing a final market dominance decision that relies upon traditional analyses to show that CSXT possesses market dominance. A traditional market dominance decision can be issued regardless whether the Board retains, modifies, or discards the Limit Price method. The

Board, therefore, should expeditiously issue a final market dominance decision that either (1) utilizes both the Limit Price and traditional approaches as independent bases for its market dominance conclusions, or (2) utilizes solely a traditional approach that will permit this case to proceed without the baggage of the Limit Price test.

IV. CSXT’S RELIANCE UPON EP715 ALREADY HAS BEEN REJECTED BY THE BOARD.

A. CSXT presents the same arguments that were previously rejected in the Sunbelt and DuPont cases.

CSXT asserts that the ongoing rulemaking proceeding in EP715 warrants holding this case in abeyance. See Motion at 12-17. In particular, CSXT points to the proposed rule changes affecting cross-over traffic and the revenue allocation methodology for dividing revenue between the Stand-Alone Railroad (“SARR”) and the residual incumbent for cross-over traffic. See Motion at 12 (“The new rules proposed in that proceeding include those governing permissible cross-over traffic and allocation of cross-over traffic revenues.”). CSXT reasons that, if adopted by the Board in EP715, new rules on cross-over traffic and cross-over revenue allocation would be “very important” to the ultimate result in this case. See Motion at 14. Consequently, CSXT claims that the Board should hold this case in abeyance until the end of EP715. CSXT’s reasoning has already been rejected twice by the Board and should be rejected yet again.

First, in issuing the Notice of Proposed Rulemaking in EP715, the Board stated:

We do not propose to apply any new [cross-over traffic] limitation retroactively...to any pending rate dispute that was filed with the agency before this decision was served. We do not believe it would be fair to those complainants, who relied on our prior precedent in litigating those cases.

Slip op. at 17 (n. 11) (served July 25, 2012).

Second, the Board rejected similar motions filed by NS to hold two other pending rate cases in abeyance, pending completion of EP715, just one week prior to the filing of the instant

Motion by CSXT. See NS motions in DuPont (filed Aug. 6, 2012) and Sunbelt (filed Sept. 21, 2012). The Board noted that it “has no established practice of holding cases in abeyance pending the resolution of ongoing rulemakings.” DuPont/Sunbelt, slip op. at 4 (joint decision served Nov. 29, 2012). From a fairness point of view, the Board determined that it was not “appropriate to put a hold on these long-pending cases.” Id. at 6. The Board also rejected NS’s arguments regarding alleged confusion and waste that could only be avoided with an abeyance order. Id. at 6-7. Finally, the Board stated that NS’s claim regarding the applicability of the Administrative Procedure Act (“APA”) to the method used for allocating revenue from cross-over traffic was irrelevant to the issue of abeyance. Id. at 7-8.

In its Motion, CSXT has simply reiterated many of these same arguments previously put forth by NS and rejected by the Board.⁷ See Motion at 12-17. Among other things, CSXT asserts that the Board’s reasoning in the DuPont/Sunbelt decision is flawed because the Average Total Cost (“ATC”) cross-over revenue allocation method is a legislative rule that was adopted in notice-and-comment rulemaking and, according to CSXT, can only be amended or repealed in a similar rulemaking. See Motion at 16. In the DuPont/Sunbelt cases, NS made the same argument, and the Board rightly responded by stating that it is irrelevant to whether the proceedings should be held in abeyance. DuPont/Sunbelt at 7-8. The same reasoning applies to CSXT’s Motion.

However, even if the Board were to reconsider the merits of CSXT’s argument regarding ATC and the APA, the Motion still should be denied. “[A]gencies possess the authority in some instances to clarify...existing rules without issuing a new NPRM and engaging in a new round of notice and comment.” Sprint Corporation v. FCC, 315 F.3d 369, 373 (D.C. Cir. 2003). ATC

⁷ In both the DuPont and Sunbelt cases, NS is represented by the same counsel that represents CSXT in this proceeding.

was adopted in the Major Issues rulemaking proceeding. Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 31 (served Feb. 27, 2006). In the first application of ATC, the Board clarified the correct application. Western Fuels Association, Inc. and Basin Electric Power Cooperative v. BNSF Railway Company, STB Docket No. 42088, slip op. at 11-14 (served Sept. 10, 2007) (“WFA I”). The clarification of ATC (sometimes called “Modified ATC”) was consistent with the original purpose and objectives of ATC when it was adopted in Major Issues. The clarification was also designed to avoid cross-subsidization, a key tenet of the Guidelines and the SAC test. See, e.g., Coal Rate Guidelines, 1 ICC2d 520, 523-524 (1985). A clarification made in order to fulfill the original purpose of a rule can be made outside notice and comment rulemaking. Marseilles Land and Water Company v. FERC, 345 F.3d 916, 920 (D.C. Cir. 2003); National Organization of Veterans’ Advocates, Inc. v. Secretary of Veterans Affairs, 260 F.3d 1365, 1375-1377 (Fed. Cir. 2001); Central Texas Telephone Co-Operative, Inc. v. FCC, 402 F.3d 205, 212-214 (D.C. Cir. 2005).

“[N]otice is not required before every clarification or extension of an agency’s principles to novel scenarios.” PPL Montana, LLC v. Surface Transportation Board, 437 F.3d 1240, 1247 (D.C. Cir. 2006). The Board was well within its authority to make a minor clarification to ATC in WFA I. United States Telecom Association v. FCC, 400 F.3d 29, 38 (D.C. Cir. 2005), citing Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, 96 (1995); Orengo Caraballo v. Reich, 11 F.3d 186, 195 (D.C. Cir. 1993). See also American Mining Congress v. MSHA, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (“A rule does not...become an amendment merely because it supplies crisper and more detailed lines than the authority being interpreted.”). Of course, agencies are given great latitude in determining whether to proceed by rulemaking or adjudication. National

Labor Relations Board v. Bell Aerospace Company, Division of Textron, Inc., 416 U.S. 267, 293 (1974) (citation omitted).

B. CSXT's Attempt To Distinguish This Proceeding From The DuPont/Sunbelt Decision Is Unpersuasive.

Recognizing that the weight of recent precedent is against it, CSXT makes an unconvincing attempt to distinguish the M&G case from the DuPont/Sunbelt decision. See, e.g., Motion at 2, 5, and 17-20. CSXT claims that a significant difference between this case and the DuPont/SunBelt decision is that “here, no party has yet filed any rate reasonableness evidence and no party would be substantially prejudiced by application of the new rules that the Board may promulgate.” Id. at 17 [footnote omitted]. But nothing could be further from the truth.

M&G's case has been pending nearly four months longer than the DuPont case and well over a year longer than the Sunbelt case. The length of the proceeding is directly proportional to the cumulative tariff premium and monetary risk that M&G must endure just for the right to obtain lawful rates. See Section II.C above. Hence, abeyance is even less appropriate in M&G's case than in either DuPont or Sunbelt.

Furthermore, as CSXT surely knows, it is entirely disingenuous to imply that no work on rate reasonableness occurs prior to the date evidence is filed. At the time the Board issued its decision bifurcating this case, the due date for M&G's opening evidence on market dominance and rate reasonableness was less than eight weeks away. M&G had selected a SARR traffic group and was in the process of developing SAC evidence for that group. Given the complexity of a SAC analysis, especially one with the scope of M&G's SARR, M&G already had expended significant time and resources to develop rate reasonableness evidence – which was based on the current rules.

Of even greater significance, the entire conduct of this case to date by M&G, including the critical decision to file the Complaint in the first place, has been based upon the current rate reasonableness standards. Although CSXT claims that M&G has not yet “selected traffic” (Motion at 2), this is not true; M&G long ago selected the most important traffic for the case – the issue traffic. M&G elected to pursue this case in 2010 under the then-current (and still-current) rules. M&G has “relied on [the Board’s] prior precedent in litigating” this case for the past 2½ years no less than DuPont or Sunbelt have done so for an even shorter period of time. See EP715 at 17 (n. 11). Therefore, CSXT’s Motion should be rejected on the same grounds as the NS motions in the DuPont/SunBelt decision. But for the bifurcation of M&G’s case, it would have been procedurally far ahead of the DuPont and SunBelt cases; indeed, it would have been on the eve of a final rate reasonableness decision due January 7, 2013. Therefore, it is particularly perverse to suggest that CSXT’s Motion should be treated differently from the NS motions because M&G’s case has been subjected to a much longer delay than the DuPont and SunBelt cases.

C. CSXT Wrongly States That It Is Unclear Which Cross-Over Traffic Rules Apply.

Despite unequivocal statements from the Board, CSXT alleges that “it is unclear what cross-over traffic rules the Board will apply” in this case. See Motion at 16. Again, CSXT’s transparent attempt to inject uncertainty into this proceeding should be rejected. In the EP715 NPRM, the Board very clearly stated that the proposed limitation on cross-over traffic, if adopted, would not apply to any “pending rate dispute.” EP715 at 17 (n. 11). The Board also sought comment on whether the proposed change to ATC should apply to “all *future* SAC and Simplified-SAC proceedings.” Id. at 18 (emphasis added). Obviously, the Board is not proposing that new rules adopted in EP715, if any, would apply to the M&G case or other

pending rate cases. In the recent DuPont/SunBelt decision, the Board did not retract its intent to apply the existing rules and standards to all pending cases.

CSXT attempts to divine a contrary conclusion from a single sentence fragment in the DuPont/Sunbelt decision, at page 8, that states: “the parties are free to address appropriate methods for costing and allocating revenues within the context of the individual SARRs presented in those dockets....” Motion at 16. CSXT reads far more into this statement than is warranted. The Board has simply stated the obvious fact that parties are free to raise any non-frivolous arguments that they so choose in their pleadings and that it would be arbitrary for the Board to reject those arguments out-of-hand before it has even seen them in the context of each individual case. Indeed, the Board expanded upon this principle earlier in DuPont/Sunbelt:

NSR’s arguments go to the merits of this case, and NSR is free to proffer such arguments in its reply evidence. The parties should have been, and continue to be, on notice that use and application of cross-over traffic, as well as ATC revenue allocation methodologies, are potential issues in these individual cases, and that parties are entitled to raise and respond to substantive arguments regarding those methodologies within those proceedings.

See DuPont/Sunbelt at 5. There is nothing remarkable in the foregoing statement, which merely states what is, has been, and always will be, true for all rate cases. It does not retract or otherwise undermine the Board’s clear intent not to apply the proposed rules in EP715 to pending cases.

Thus, CSXT is free to make whatever arguments it wants in its defense of this proceeding. Like other parties in recent SAC cases, CSXT can assert non-frivolous arguments for overturning precedent and/or changing existing law. See, e.g., Xcel v. BNSF, 7 STB at 600-603 (BNSF argues that the Board should limit use of cross-over traffic). But CSXT’s arguments will have to overcome the fairness assessment that the Board has made regarding retroactive

application of new cross-over traffic rules that may be adopted in EP715. The Board is obliged neither to accept or reject those arguments before they have been presented to the Board as evidence in this case.

Crucially, CSXT also ignores the fact that there is no certainty that any of the proposals in EP715 will be adopted. These “proposed rules” are merely that – proposals. Comments filed thus far in the rulemaking proceeding have included significant concerns about the proposals, as well as the rationale underlying them. In short, there is no guarantee that any of the proposals will be adopted. Furthermore, even if adoption does occur, CSXT’s suggestion that new rules are imminent is pure conjecture. See Motion at 5. Given the controversy surrounding EP715, it is possible, even likely, that any new rules adopted would be challenged on appeal, thereby extending the regulatory “flux” that CSXT invokes to justify holding this case in abeyance. It would be manifestly unjust to subject M&G’s long-delayed case to such a scenario. See Section II.C above.

D. Time And Money Would Not Be Saved By Additional Delay.

In support of its Motion, CSXT asserts that time and money would be saved by delay. This certainly is not true for M&G.

First, CSXT contends that application of “multiple different revenue allocation methodologies” would consume valuable “time and resources.” See Motion at 16. This contention is a red herring. Application of different revenue allocation methodologies can be accomplished without significant time or expenses, especially relative to the millions in tariff premiums that M&G is paying to merely participate in this case. Both DuPont and Sunbelt applied all three variants of ATC (Original, Modified, and Alternate) to their opening evidence in just a 20-day period as part of their replies to NS’s motions to hold their proceedings in abeyance

during EP715. See DuPont Reply to Motion at p. 30 in STB Docket No. 42125 (filed Aug. 27, 2012); Sunbelt Reply to Motion at p. 28 in STB Docket No. 42130 (filed Oct. 11, 2012).

Second, CSXT asserts that delay now would save the parties time in the future (Motion at 19), but recent experience indicates the exact opposite is true. The Western Fuels case suffered through an arduous 8-year journey that was initially set in motion by the Board's decision to hold that proceeding in abeyance during Major Issues. If anything, the Western Fuels case is a stark reminder of the harmful and cascading delays that can occur when an adjudication is held in abeyance pending completion of a pending rulemaking. Creating dependency between separate proceedings tends to compound delays and result in extreme hardship for the complainant. The M&G case already has experienced a lengthy delay as a result of bifurcation. The Board should fulfill its statutory mandate under 49 USC §§ 10101(2) and (15), and move expeditiously to the rate reasonableness phase.

Third, in a deliberate and gross mischaracterization, CSXT claims that holding this proceeding in abeyance is appropriate because M&G "is seeking additional discovery, demonstrating that in its view discovery is not yet complete." See Motion at 18. See also Motion at 2. As the Board already knows, M&G has requested that CSXT update its previous discovery responses due to the significant passage of time since discovery closed, which was caused by the long-delayed market dominance decision. See, e.g., Second Motion to Compel of M&G Polymers USA, LLC (filed Aug. 2, 2012). M&G has not made any new requests to CSXT; the requests for which updating was sought are the same requests to which CSXT has already responded. The only difference is the time period covered by the requests. The purpose of updating discovery responses is to increase the accuracy of the SAC analysis and to replace projections with actual historical data that now exists due to the passage of 2½ years.

Even more significant, after the Board's Market Dominance Decision, M&G contacted CSXT to renew its discovery update request. See Exhibit 1 (J.Moreno letter dated Nov. 15, 2012). M&G offered CSXT a choice: in lieu of updating its discovery responses, CSXT could agree with M&G that neither of them would use private information that has not been produced in discovery. See id. CSXT rejected that money and time-saving proposal. See Exhibit 2 (P. Moates letter dated Dec. 3, 2012). Thus, it is quite clear that M&G does not *need* additional discovery to present SAC evidence. M&G merely needs assurances that CSXT will not sandbag M&G in its rate reasonableness reply evidence by using data that was not produced in discovery. CSXT is the party that has chosen the more costly and time-consuming route.⁸

V. **CONCLUSION.**

For the reasons set forth herein, the Board should deny CSXT's Motion.

Respectfully submitted,



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December 13, 2012

⁸ In a separate motion filed contemporaneous with this Reply, M&G has moved to dismiss its Second Motion to Compel because it has reached agreement with CSXT on updating its discovery responses. That agreement added 60 additional days to the procedural schedule, which the parties also have jointly submitted in another separate filing today.

CERTIFICATE OF SERVICE

I hereby certify that this 13th day of December 2012, I served a copy of the foregoing upon counsel for defendant CSXT via electronic mail and first class mail at the address below:

G. Paul Moates
Paul Hemmersbaugh
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005

Counsel for CSX Transportation, Inc.



Jeffrey O. Moreno

Exhibit 1

November 15, 2012

via electronic mail

G. Paul Moates
Paul A. Hemmersbaugh
Matthew J. Warren
Sidley Austin LLP
1501 K Street, N.W.
Washington D.C. 20005

RE: Docket No. NOR 42123, *M&G Polymers USA, LLC. v. CSX
Transportation, Inc.*

Dear Paul:

I am writing with regard to the Board's September 27, 2012 decision in this proceeding, as subsequently modified by its October 25, 2012 decision. Specifically, the Board has directed M&G Polymers USA, LLC ("M&G") and CSX Transportation, Inc. ("CSXT") to "confer and submit a proposed procedural schedule to govern the rate reasonableness phase of this proceeding by December 13, 2012." Oct. 25 Decision, p. 2 A very important predicate to developing a procedural schedule, however, is the resolution of M&G's request for updated discovery responses by CSXT.

In a letter dated July 13, 2012, M&G requested that CSXT update certain of its discovery responses related to the Stand-Alone Cost ("SAC") analysis. CSXT rejected M&G's request as premature and overbroad in a letter dated July 23, 2012. However, CSXT also stated that:

After the Board rules and the parties have had a chance to review the Board's decision and consider the nature and scope of any rate challenge that may remain, CSXT is willing to discuss with M&G whether and to what extent any additional discovery may be necessary or appropriate.

M&G subsequently filed a Motion to Compel, which the Board held in abeyance, in an August 23, 2012 decision, because the Motion pertained to rate reasonableness and the Board previously had held the rate reasonableness portion of this case in abeyance. Now that the Board has directed the parties to propose a procedural schedule for rate reasonableness, it is both necessary and appropriate for us to address this unresolved discovery issue. However, in lieu of reviving its Motion to Compel, M&G seeks to determine, in light of CSXT's above-quoted statement, whether and to what extent CSXT is in fact willing to supplement its discovery responses.

In its reply to M&G's Motion to Compel, CSXT invoked the following objections to M&G's request for supplementation:

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1. M&G's supplementation requests are burdensome because they would require CSXT to go through the entire traffic data generation process for an additional two years of data, without any attempt to narrow the scope or burden. Reply at 12-14, 20.
2. M&G requested that CSXT supplement responses to requests to which CSXT objected, to which CSXT did not produce responsive information, or which M&G did not pursue. Reply at 16-17.
3. M&G requested supplementation of responses that would not change over time. Reply at 17-18.
4. M&G requested supplementation of responses for information that does not exist or is publicly available. Reply at 18-19.
5. M&G requested supplementation of responses for information to which it is not entitled. Reply at 19-20.

Most of the foregoing objections refer to information that is beyond the scope of what M&G intended for CSXT to supplement. By asking CSXT to supplement its discovery responses, M&G was not seeking information to which CSXT had objected and not produced, that had not changed since CSXT's original production, or that did not exist or was publicly available. Rather, M&G only intended that CSXT supplement the actual information that it previously had produced to M&G, to the extent such information existed and had changed, from June 2010 through the present. In other words, the scope of M&G's request to supplement was intended to be the same scope as CSXT's prior responses, but for the extended time period.

Traffic data, of course, is the single largest component of M&G's supplementation request. Over 2 years of additional SAC-related information, beyond June 2010, now exists. For example, CSXT now has actual traffic and revenue data for the balance of 2010, all of 2011, and a part of 2012, which would obviate the need to rely upon forecasts for those time periods. In addition, CSXT would have more recent internal forecasts that include years not covered by its forecasts that were available in June 2010. Although M&G recognizes that there is a burden associated with the production of such data, this also is among the most critical data to a SAC analysis, and it would be fundamentally unfair to deny this information to M&G.

However, in recognition of this burden and the extended duration of this case, M&G would be willing to forego the supplementation of CSXT's discovery responses, if we can agree that neither CSXT nor M&G will use, in their SAC evidence, any private information that has not previously been produced by them in this case. Thus, for example, this agreement would preclude CSXT from using actual 2011 and 2012 traffic data to rebut forecasted 2011 and 2012 traffic levels for the stand-alone railroad. Since CSXT would be the only party with access to this 2011 and 2012 traffic data, it would be unfair for CSXT to use this data unless it has produced the data to M&G.

November 15, 2012

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If CSXT declines to enter into the type of agreement described above, M&G hereby renews its request that CSXT supplement its discovery responses. M&G is willing to meet with CSXT to discuss its supplementation requests and to answer any questions about their scope. It is imperative, however, that we resolve this discovery issue promptly in order to meet the Board's December 13 deadline for proposing a procedural schedule for rate reasonableness, because this issue will affect the timing of every other procedural deadline.

Therefore, M&G requests that CSXT propose meeting dates between now and December 5th to address the supplementation of its discovery responses. Alternatively, if CSXT desires to enter into an agreement that would avoid the need for supplemental discovery, as described herein, please let M&G know as soon as possible so that we can promptly memorialize such agreement.

Sincerely,



Jeffrey O. Moreno

Exhibit 2



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FOUNDED 1866

December 3, 2012

Jeffrey O. Moreno
Thompson Hine LLP
1919 M Street, N.W.
Washington, DC 20036

Re: Docket No. NOR 42123, *M&G Polymers USA, LLC v. CSX Transportation, Inc.*

Dear Jeff:

This is in response to your letter in the above-referenced proceeding in which you proposed that CSXT either agree to supplement its discovery production, or agree that neither party will use any private information that has not been previously produced. See J. Moreno Letter to P. Moates (Nov. 15, 2012) ("Discovery Letter"). CSXT is not prepared to agree to either of those proposals at this time.

We recognize the concerns expressed in your letter about the desire to update traffic and revenue information for our respective SAC submissions. However, as you acknowledge, "there is a burden associated with the production of such data" (Discovery Letter at 2). In fact it is a significant burden and effort that CSXT declines to undertake unless and until it is clear that this case is in a posture to move to the rate reasonableness phase. Given the uncertainty of how the Board may respond to the numerous comments (many with supporting evidence in the form of verified statements of experts) that it received from interested persons on November 28, 2012 regarding the entirely new proposed "limit price test" for market dominance determinations announced in its September 27, 2012 Decision in this case, as well as the uncertainty relating to its disposition of M&G's Petition for Reconsideration of that Decision (filed on October 17, 2012), the scope of any rate reasonableness phase of this case (including the number of traffic lanes that may remain after a final market dominance decision from the Board) has not yet been finally determined. To say the least, the Board's market dominance rules are in a state of considerable flux, and the case cannot proceed further until the Board makes a final determination of which of the challenged rates are within its jurisdiction. In short, CSXT

Jeffrey O. Moreno
December 3, 2012
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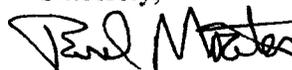
believes that it is premature for it to commit significant resources to developing more than two years worth of traffic and revenue data (in a form in which CSXT does not maintain them in its regular course of business) when it is not certain when or in what form this proceeding may move to the rate reasonableness phase; and indeed the possibility exists that CSXT might be asked to develop and produce a third set of traffic and revenue records and data, depending on how and when the Board ultimately decides the market dominance issues.

Accordingly, in recognition of the existence of the uncertainties surrounding the state of the record on market dominance in this case, CSXT plans to file a Motion to hold this proceeding in abeyance until the Board has reached a final resolution of the market dominance issues, including any modifications that it may choose to make to its September 27, 2012 Decision following consideration of the many comments filed on that Decision, as well as disposition of M&G's Petition for Reconsideration.

In recognition of the fact that the Board has ordered the parties to submit a proposed procedural schedule for the rate reasonableness phase of this case (September 27 Decision at 21), CSXT suggests that the parties agree on a procedural schedule that would be based off of the Board's final resolution of the market dominance issues. In other words, CSXT is prepared to agree upon a schedule with a date for its supplementation of traffic and revenue data for the remainder of 2010, the entirety of 2011, and for the first three quarters of 2012 (or, depending on when the Board resolves the market dominance issues, possibly all of 2012), as well as for updating internal forecasts. CSXT would require a minimum of 60 days from the date of a Board Decision to produce such supplemental discovery, and we are prepared to negotiate specific dates for the completion of such discovery, and for the filing of opening, reply and rebuttal evidence on rate reasonableness, and for the filing of final briefs.

Please let us know whether you are prepared to proceed along these lines, and if so feel free to suggest possible filing dates for the evidence and briefs. And should M&G not be prepared to proceed in the manner we suggest, each of us will have to submit separate responses to the Board's September 27 Decision by December 13.

Sincerely,



G. Paul Moates