

BEFORE THE
SURFACE TRANSPORTATION BOARD

TOTAL PETROCHEMICALS & REFINING USA, INC.)	
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)	
)	
Complainant,)	
)	
v.)	Docket No. NOR 42121
)	
CSX TRANSPORTATION, INC.)	
)	
)	
Defendant.)	

MOTION FOR PROCEDURAL SCHEDULE

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Consequently, TPI is filing this Motion for Procedural Schedule (“Motion”) to request that the Board adopt the procedural schedule described herein.

II. Proposed Procedural Schedule.

TPI hereby proposes the following procedural schedule to govern the rate reasonableness phase of this case:

Days since market dominance decision	Date	Event
0	May 31, 2013	STB’s final market dominance decision
90 (+90)	August 29, 2013	CSXT completes updating of discovery responses
195 (+105)	December 12, 2013	TPI Opening Evidence
315 (+120)	April 11, 2014	CSXT Reply Evidence
390 (+75)	June 25, 2014	TPI Rebuttal Evidence

TPI is submitting the same schedule that it originally proposed to CSXT with one exception. Upon further consideration, and for the reasons expressed in Part III.C., below, TPI has omitted Final Briefs from its proposed schedule altogether.

TPI and CSXT were unable to reach agreement on a procedural schedule because CSXT desired 30 additional days for both its Reply Evidence (150 days instead of 120) and Final Briefs (60 days instead of 30), and subsequently indicated that even that amount of time would be insufficient. CSXT also expressed the opinion that it should not be required to update its discovery responses until the Board resolves its Petition for Reconsideration of the Decision. TPI’s schedule is reasonable and the Board should adopt it as explained in this Motion.

III. Argument.

The procedural schedule proposed by TPI in Part II of this Motion is a reasonable accommodation of the various interests at stake in this proceeding. TPI filed its Complaint in this proceeding on May 3, 2010 – well over three years ago – and there is no reason to delay this case beyond what is sufficient for the parties to develop and file their evidence on rate reasonableness. In the following subparts, TPI demonstrates that:

- A. The Board should reject CSXT's attempts to delay the rate reasonableness phase of this case and, consequently, should require CSXT to begin updating its discovery responses immediately;
- B. The procedural schedule proposed by TPI includes sufficient time for CSXT to update its discovery responses and prepare Reply Evidence;
- C. Final Briefs are redundant and unnecessary, and would unjustifiably increase the time and expense of this case; and
- D. A prolonged procedural schedule is highly prejudicial to TPI, while benefitting CSXT.

A. The Board Should Reject CSXT's Attempt To Defer The Rate Reasonableness Phase Pending A Decision On CSXT's Petition For Reconsideration.

As TPI has informed the Board in the "Motion for an Expedited Decision on Complainant's Third Motion to Compel," which is being filed contemporaneously with this Motion, TPI and CSXT separately have discussed the issue of updated discovery. The parties have agreed upon the scope of CSXT's updated discovery responses, but they have not agreed upon timing. CSXT contends that it should not begin the process of updating its discovery responses until the Board has decided its Petition for Reconsideration. In contrast, TPI believes that updating should begin immediately so that TPI can begin preparing its rate reasonableness evidence even as the Board considers CSXT's Reconsideration Petition, because the process of updating discovery and processing the newly-produced information will require several months.

The Board's Decision was effective upon the date of service, which was May 31, 2013. Decision at 30. Although CSXT has sought reconsideration, that does not automatically stay the effect of the Decision, which determined the Board's jurisdiction over the challenged rates. See 49 C.F.R. § 1115.3(f). Moreover, CSXT's arguments for reconsidering the Decision mostly rehash the same arguments that it and other railroads made in STB Docket No. 42123, M&G Polymers USA, LLC v. CSX Transp., Inc., and that the Board addressed in the Decision. To the extent that any of CSXT's arguments were to change the Board's market dominance determination in a handful of lanes, the nature and scope of the updated discovery is not lane dependent. For example, traffic, revenue and density data; PTC information; and forecasts will be the same regardless whether a particular lane is in or out of the case based on market dominance. Therefore, TPI's schedule avoids an unnecessary and pointless delay to this case by enabling TPI to prepare and submit opening evidence on rate reasonableness far more quickly than CSXT's schedule would permit, thereby keeping this case on a forward trajectory.

Finally, CSXT's proposal is tantamount to staying the Board's market dominance Decision pending resolution of the Petition for Reconsideration. That would be an impermissible end-run around the Board's rules for granting a stay. At 49 C.F.R. § 1115.3(f), the Board states that "[t]he filing of a petition [for reconsideration] will not automatically stay the effect of a prior action...." Moreover, "[a] petition to stay...shall be filed within 10 days of service of the action." Id. Thus, if CSXT desired to request a stay of the Decision, it was required to do so by June 10, 2013, which it did not do. The Board should not permit CSXT to use the Board's request for submission of a joint procedural schedule to trump the Board's clearly-defined rules of procedure for requesting stays.

B. TPI's Procedural Schedule Provides Sufficient Time For CSXT To Update Its Discovery Responses And Prepare Its Reply Evidence.

The procedural schedule proposed by TPI is clearly sufficient for CSXT because the time for Reply Evidence included therein is nearly identical to the time provided in an earlier procedural schedule to which CSXT agreed. See Board decision at 2 (served Feb. 4, 2011). In that earlier procedural schedule, prior to the bifurcation of market dominance, CSXT agreed that 122 days was sufficient for it to develop its Reply Evidence for both market dominance and rate reasonableness. Now, however, facing an unfavorable market dominance decision, CSXT has suddenly determined that it cannot develop just its rate reasonableness evidence in virtually the same amount of time.

CSXT's agreement to a similar procedural schedule earlier in this case was no fluke. Just six months ago, in M&G Polymers USA, LLC v. CSX Transportation, Inc., STB Docket No. 42123, CSXT agreed to the exact same schedule that TPI has now proposed, with the exception of TPI's omission of Final Briefs.² In fact, compared to the schedule to which CSXT agreed in the M&G case, the schedule proposed by TPI would give CSXT 30 additional days for updating its discovery responses. Otherwise, the time periods in the TPI and M&G procedural schedules are identical.

Given that market dominance is now resolved in this proceeding, the TPI proposal is even more reasonable and sufficient. In TPI's proposed schedule, CSXT is given 120 days for Reply Evidence, even though it will be able to focus exclusively on rate reasonableness. Unlike other rate reasonableness cases, CSXT will not need to spend any time or analysis on evaluation of TPI's market dominance evidence, nor will CSXT be required to develop its own market dominance evidence.

² See Joint Motion for Procedural Schedule (filed Dec. 13, 2012) in M&G Polymers USA, LLC v. CSX Transportation, Inc., STB Docket No. 42123.

Certainty about the market dominance issue also means that CSXT will not need to consider variations of its Stand-Alone Cost (“SAC”) evidence based on which lanes may or may not be found within the Board’s jurisdiction. In light of the Board’s May 31st Decision, both TPI and CSXT know exactly which lanes to include in their SAC evidence, thereby eliminating that uncertainty. Indeed, rate reasonableness efficiency was one of the main reasons why CSXT moved to bifurcate this case. In its motion to bifurcate, CSXT stated:

In light of the substantial likelihood that any SAC evidence submitted by the parties will be significantly altered in scope, if not rendered moot altogether, by a ruling that CSXT lacks market dominance over the transportation to which the challenged rates apply, CSXT believes that the most prudent and efficient course of action is for the Board to consider the parties’ market dominance evidence – and determine whether the Board has jurisdiction – before the parties submit SAC evidence.

See CSXT Motion for Expedited Determination of Jurisdiction Over Challenged Rates at p. 4 (filed Oct. 1, 2010). It is highly ironic that, after persuading the Board to bifurcate this case for greater efficiency, CSXT now contends that it cannot address the rate reasonableness phase of this case within the same time frame that it previously agreed was sufficient for both market dominance and rate reasonableness.

As shown above, the procedural schedule proposed by TPI provides ample time for CSXT to update its discovery responses and prepare Reply Evidence. CSXT itself has twice agreed to a nearly identical schedule, including once in this case. There would be no prejudice to CSXT from the Board’s adoption of the schedule proposed by TPI.³

³ CSXT undoubtedly will devise numerous reasons why TPI’s procedural schedule might be inadequate. But the Board should not build extra time into the schedule based upon such speculation. Rather, the Board should adopt a schedule that is reasonable under the present circumstances. If and when circumstances dictate otherwise, the Board can always extend the schedule as appropriate for the circumstance. While rate case procedural schedules are sometimes extended, they are rarely if ever shortened.

C. Final Briefs Are Unnecessary And Redundant.

TPI has omitted final briefing from its proposed schedule because final briefs would prolong this 3-year old case unnecessarily and impose additional costs without adding much, if any, benefit to the process. Final briefs were not always an automatic part of rate cases. In the early years, they were used only upon the request of a party.⁴ As those requests were routinely granted, the parties themselves began to include final briefs in their joint procedural schedules. Over time, however, the automatic inclusion of final briefs led to a departure from the Board's original rationale for permitting such briefs in the first place.

Although the purpose of Final Briefs ostensibly is "to focus the issues and thereby contribute to greater efficiency in analyzing the record,"⁵ they have morphed into voluminous restatements of the complete evidentiary record. For the complainant, final briefs are repetitive restatements of their rebuttal evidence. For the defendants, they have become surrebuttals to which the complainants are not afforded any opportunity to respond.

For example, the record recently closed in Docket No. 42130, E.I. du Pont de Nemours and Company v. Norfolk Southern Ry. Co., with the filing of final briefs on June 14, 2013. At 170 pages of narrative, plus 8 exhibits, the NS final brief was more than double DuPont's brief and was a point-for-point response to the DuPont rebuttal SAC evidence.⁶ The NS Brief also was more than double the length of the "Counsel's Argument and Summary of Evidence" for

⁴ E.g., McCarty Farms v. Burlington Northern, Inc., ICC Docket No. 37809, 1987 ICC Lexis 94 (Oct. 21, 1987) ("McCarty"); West Texas Utilities Company v. Burlington Northern Railroad Company, ICC Docket No. 41191, 1995 ICC Lexis 236 (served Sept. 8, 1995) ("WTU"); Wisconsin P & L v. Union Pac. R.R. Co., Docket No. 42051, (served Nov. 15, 2000) ("WPL"); FMC Wyoming Corp. v. Union Pac. R.R. Co., Docket No. 42033 (served July 2, 1999) ("FMC"); Ariz. Pub. Serv. Co. v. The Atchison, Topeka and Santa Fe Ry. Co., Docket No. 41185 (served March 15, 1996).

⁵ WPL, slip op. at 1.

⁶ NS was more general in its final brief discussion of market dominance.

NS's entire Reply Evidence. That is counter-indicative to the concept of the final brief as a narrowly-focused summary document that is targeted to select issues. Even accepting the fact that the DuPont proceeding was the largest SAC case litigated before the Board to date, 170 pages that address nearly every contested SAC issue illustrates just how far final briefs have strayed from their original objective. Because complainants know that defendants are going to abuse final briefs in this way, they are forced to prepare longer and more detailed briefs than they otherwise would submit. CSXT's insistence upon at least 60 days to submit final briefs clearly signals that it intends to follow the same strategy as NS in the DuPont case.

In the early days of final briefs, before they became rote, the agency maintained some control over their scope by imposing page limits and even defining the issues to be addressed.⁷ The agency also enforced reasonable time limits on the submission of briefs.⁸ But once final briefs became automatic fixtures in a rate case, the Board no longer played any role in establishing their length or scope. Without this focus, final briefs no longer serve their intended purpose.

Final briefs have become an unfocused and expensive part of rate cases that serve no purpose other than to make an already lengthy and expensive process longer and more costly. Thus, briefs should not be an automatic part of any rate case. The "Counsel's Argument and Summary of Evidence" that is Part I of all evidentiary submissions in rate cases serves that role today. Final briefs have simply become a redundant and repetitious exercise.

⁷ McCarty (imposing 20 page limit); WTU (imposing 50 page limit and prohibiting "appendices or attachments"); WPL, slip op. at 2 (imposing 25 page limit); FMC, slip. op. at 2-5 (imposing 25 page limit and posing specific questions to each party); PPL Montana LLC v. The Burlington Northern and Santa Fe Railway Company, Docket No. 42054, slip op. at 2 (served Dec. 12, 2001) (imposing 25 page limit).

⁸ McCarty (briefs due 20 days after decision); WTU, (briefs due 21 days after decision).

The omission of final briefs is especially justified for this proceeding, which already has been pending for over 3 years because of the Board's decision to bifurcate market dominance from rate reasonableness.⁹ As discussed in the next section, an unnecessarily prolonged procedural schedule has significant financial consequences for TPI, and therefore, absent a compelling need for such briefs, the Board should omit final briefs from the procedural schedule.

D. TPI Is Prejudiced By A Prolonged Procedural Schedule.

A prolonged procedural schedule would result in substantial and unjustified prejudice to TPI. This proceeding has already been delayed extensively, with accompanying prejudice to TPI. Despite pending for nearly 38 months, the parties have not yet submitted rate reasonableness evidence and will not do so for nearly six more months even under TPI's proposed schedule. Furthermore, under that schedule, a decision from the Board on rate reasonableness would not likely come before late March 2015 – nearly five years after the Complaint – and this assumes that there would be no additional delays. CSXT would add many more months to that schedule waiting for a Board decision on reconsideration, granting CSXT several more months to prepare reply evidence, and then requiring several additional months for final briefs.

Delay in this proceeding is prejudicial to TPI in several ways. For each day that this case continues, TPI must pay a tariff premium. The tariff premium is the amount by which the challenged tariff exceeds the last contract proposal of CSXT, which TPI rejected as unreasonably high. In other words, it is TPI's opportunity cost for pursuing regulatory relief. As TPI previously informed the Board, the tariff premium is more than \$110,000 per week.¹⁰ The total

⁹ It is worth noting that the Board did not request final briefs in the market dominance phase of this case.

¹⁰ See TPI letter to the Board (filed June 6, 2011).

tariff premium paid by TPI is now in excess of \$17 million and growing every day.¹¹ 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; but if TPI loses, then 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 the 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. Thus, while TPI has a strong interest in obtaining an expeditious decision so as to minimize its exposure to the tariff premium, CSXT benefits from prolonging this case.¹²

Delay is also severely prejudicial to TPI beyond the tariff premium. TPI operates in a competitive global marketplace, and transportation costs often determine whether or not TPI can successfully compete for business. For TPI to effectively compete in various industry sectors and plan for the future, it must have some idea regarding both its current costs and the legal framework in which it operates. The delays in this proceeding have caused an extended period of uncertainty on both fronts. TPI does not know, and has not known for three years, whether the transportation rates that it is paying are the actual rates on which it should plan its finances. Moreover, TPI remains in the dark about whether CSXT's pricing practices are lawful under governing statutes. TPI strongly believes that the current rates are unreasonable, 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 global marketplace.

¹¹ The challenged rates went into effect on July 1, 2010. See Complaint (filed May 3, 2010) at page 1.

¹² Every 30 days that CSXT seeks to add to TPI's procedural schedule increases the tariff premium by \$471,500 (30 days / 7 days per week * \$110,000 weekly premium).

IV. Conclusion.

For the foregoing reasons, TPI respectfully requests that the Board adopt the procedural schedule set forth in Section II above.

Respectfully submitted,



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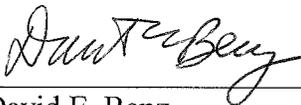
June 21, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June 2013, I served a copy of the foregoing upon counsel for defendant CSXT via electronic mail and U.S. first-class mail, postage prepaid, at the address below:

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