

integrity, restraints at Apple Grove, and myriad other issues on a lane-by-lane basis. The limit price approach is simply a starting point for the fact-specific qualitative analysis, not a replacement for it. See Decision at 12 (describing feasibility step) and 14 (stating that intangible feature can require ignoring the limit price rate comparison).

II. DELAY IS PREJUDICIAL TO M&G, AND A FINANCIAL WINDFALL TO CSXT.

A. Delay is extremely prejudicial to M&G.

This case has been delayed long enough, and “[j]ustice delayed is justice denied.”¹ As M&G has previously informed the Board, delay is harmful to M&G in numerous ways. First, M&G must pay the extremely high tariff rates during the pendency of the case, which amount to a tariff premium of approximately \$60,000 per week.² This tariff premium has been paid every week since January 2010, which was 6 months before M&G filed the Complaint, and has now grown to approximately \$8 million, an amount that is entirely at risk depending upon the ultimate outcome in this case. Despite the daily increase in the amount at risk, M&G’s potential recovery in this case remains the same; M&G is not rewarded by putting more money at risk. In other words, if this proceeding had been completed in 24 months, M&G would have had to risk “only” \$7 million in tariff premium to obtain ten years of a rate prescription. However, this case now seems destined to last, at a minimum, four years, meaning that M&G will have to risk at least \$13 million for the same ten years of a rate prescription. With each additional delay, the risk continues to grow, yet M&G’s potential recovery remains the same—a ten-year rate prescription. If M&G loses the case, it is not returned to a “neutral” position; instead, it loses the

¹ Rohr Industries, Inc. v. Washington Metropolitan Area Transit Authority, 720 F.2d 1319, 1327 (D.C. Cir. 1983).

² 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.

entire multi-million dollar tariff premium that M&G has had to pay just for the right to bring this case.

The delay is all the more damaging to M&G because a large proportion of the tariff premium that M&G must pay results from traffic that is covered by CSXT tariffs not at issue in this case. It is manifestly unjust for M&G to be forced to pay these tariff premiums, where there is not even the possibility of reparations, simply for the opportunity to obtain a reasonable rate from the Board in the 69 lanes at issue (which have been reduced to 60 lanes by the Decision).

Payment of the tariff premium puts a severe strain on M&G's cash flow and, consequently, harms M&G's competitiveness in the polyethylene terephthalate industry. The harm to M&G is not simply payment of the tariff premium. M&G is significantly burdened by the deleterious effect on its strategic and business planning from having a major component of M&G's cost structure – rail transportation rates – 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 the facility grows more doubtful with every delay to 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 these effects.

B. Delay is a financial windfall to CSXT.

From CSXT's viewpoint, delay is, at worst, a neutral proposition, and in all likelihood highly desirable. CSXT risks nothing comparable to the tariff premium that M&G must pay on a daily basis to participate in this case. Indeed, 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.³

Theoretically, if this case were delayed for ten years, M&G would have to risk the tariff premium for the entire ten-year rate prescription period.

III. HISTORY SHOWS THAT CSXT CAN EASILY PROVIDE COMMENTS WITHIN THIRTY DAYS.

A. CSXT's actions in this proceeding show that additional delay is not necessary.

The unreasonable nature of the 85-day time period sought by CSXT is highlighted in comparison to the procedural schedule proposed by CSXT for the market dominance phase of this case. CSXT proposed a schedule that gave CSXT a mere 28 days to develop its entire reply to M&G's market dominance evidence on every lane in the case. See CSXT's "Motion for Expedited Determination of Jurisdiction Over Challenged Rates" (filed Jan. 27, 2011) at p. 4.

Ultimately, the Board granted CSXT 30 days for its Reply Evidence on market dominance, a deadline that CSXT apparently had no trouble meeting.⁴ CSXT successfully completed its Reply Evidence in the 30-day period, submitting voluminous narrative text, exhibits, videos, photographs, maps, expert witness support, electronic work papers, and other support. If CSXT can provide its entire evidentiary submission on market dominance in 30 days, surely it can comment upon the limit price approach in the Decision in an equal time period.

This example indicates that CSXT does not truly believe it lacks the ability to comment upon the limit price rate comparison in the Decision in 30 days; instead, the Motion appears to be simply an opportunistic attempt to delay this proceeding and possibly to garner extra time to devise a result-oriented alternative to the STB's new approach that might justify CSXT's high

³ The Board's rules only require CSXT to pay interest on reparations at the 91-day T-Bill rate, which currently is 0.09%. 49 CFR § 1141.1(a). In contrast, CSXT recently issued 10-year debt at a rate of 4.25%. See CSXT 2011 Annual Report at p. 93.

⁴ See Board decision served May 6, 2011.

tariff rates. Every additional delay increases the harm to M&G and the financial benefit to CSXT. See Part II above. Months are not required simply to comment upon the limit price approach to determining market dominance.

B. CSXT’s counsel has the demonstrated ability to comment in less than thirty days.

The Board should reject CSXT’s attempt to characterize the limit price rate comparison as so complex that months of study are needed. As CSXT itself admits, the limit price rate comparison consists of three simple parts. See Motion at 3. Crucially, CSXT already has access to all three parts. There is no need to engage in complex calculations or hire special expert consultants. The three parts of the limit price rate comparison are: (1) determination of the limit price (which is based on the price for alternative transportation, a figure that both CSXT and M&G offered into evidence); (2) comparison of the limit price to CSXT’s variable costs (which is based upon CSXT’s own evidence in this case); and (3) consideration of intangible features (again, CSXT and M&G have already spent hundreds of pages of evidence arguing about the intangible features applicable to each lane). See Decision at 13-14. See also Motion at 3. “[S]ubstantial investigation and study” are simply not needed. See Motion at 5.

The assertion of CSXT counsel that a comment period of 30 days is insufficient to address the rate comparison used by the Board in the Decision is all the more baffling due to its counsel’s ability to file similarly-requested comments in a mere ten (10) days in a prior rate case. In the prior case, the Board proposed three “modifications and refinements” to its small rate case guidelines, and requested comments from the parties within ten (10) days, and reply comments within five (5) days. BP Amoco Chemical Company v. Norfolk Southern Railway Company, STB Docket No. 42093, slip op. at 2 (served June 6, 2005). The counsel for Norfolk Southern in that case was the same counsel that is representing CSXT in the current proceeding. The NS

counsel had no difficulty in meeting the deadlines for comments and reply comments. See Comments of NS (filed June 16, 2005) and Reply Comments of NS (filed June 21, 2005) in BP Amoco.

CSXT claims that substantial delay is warranted because the Board previously allowed three months for commenting in Ex Parte No. 646 (Sub-No. 1) and Ex Parte No. 715. See Motion at 4-5. However, neither of those proceedings is comparable to the Board's request for comment in this case. Those were broad, industry-wide proceedings where the public was invited to comment on multiple complex proposals. The EP 715 proceeding contains six separate proposals, some of which are complete reversals of long-standing precedent with substantial implications for the outcome of future cases. The EP 646-1 proceeding created an entirely new Simplified SAC standard and procedure, while also substantially modifying the Three-Benchmark standard and procedure. In this proceeding, the Board has not changed any substantive market dominance standard. Rather, it has proposed an objective threshold measure for determining whether a physically feasible transportation alternative provides effective competition for the issue movement. That threshold measure establishes only a presumption of market dominance that can be rebutted by all the same factors that have been relevant to the market dominance determination for nearly 30 years. Evaluation of this new threshold measure is a single issue that can easily be addressed in 30 days.

C. CSXT has already had years to develop other approaches.

CSXT alleges that additional delay is needed in this case so that it can devise other approaches or benchmarks that could be used instead of the limit price rate comparison. See Motion at 4-5. The undeniable fact, however, is that CSXT has had years to consider how to address whether alternative transportation provides "effective" competition in this case. M&G

filed its Complaint in June 2010. CSXT was clearly focused on market dominance early, as evidenced by its motion for bifurcation.

CSXT also has had the opportunity to reply to M&G's market dominance evidence, which included lengthy arguments and voluminous evidence to demonstrate that potential transportation alternatives for the issue movements do not provide "effective" competition. It was CSXT's strategic decision to ignore governing authority expressed in cases such as McCarty Farms v. Burlington Northern, Inc., 3 ICC2d 822 (1987); Arizona Public Service Company v. United States, 742 F.2d 644 (D.C. Cir. 1984); and E.I. du Pont de Nemours and Company v. CSX Transportation, Inc., STB Docket No. 42101, slip op. at 5 (served June 30, 2008). Instead, CSXT elected to simply compare the challenged tariff rates to the prices for alternative transportation. CSXT Reply Ev. at II-36 to II-44. Now that its short-sighted argument has been rejected, CSXT calls for a time-out. The issue of how to determine whether a transportation alternative provides "effective" competition has been prevalent throughout this proceeding and CSXT should not require more than 30 days to evaluate the solution adopted by the Board.

D. CSXT has not shown that its in-house personnel need access to confidential information.

Finally, CSXT asserts that the highly confidential nature of part of the Decision also warrants delay. This assertion is unfounded. The limit price approach is amply described in the public version of the Decision, at pages 3-5 and 12-21. CSXT claims that its in-house personnel need access to the "intangible features" discussed in the highly confidential appendix, but these are the same intangible features that have been the subject of the parties' voluminous market dominance pleadings so far in this case (most of which were available to CSXT's in-house personnel). More to the point, however, the intangible features have nothing to do with the new limit price approach for establishing a presumption of market dominance, which is the subject of

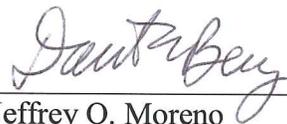
the Board's request for comments. And, even if they were relevant, CSXT has not explained why the expertise of its outside counsel and experts is inadequate to evaluate that methodology.

Nevertheless, to remove this issue from the table, M&G provided to CSXT a redacted version of the highly confidential appendix on October 3rd, within 24 hours after receiving the Motion. This redacted version is designated "Confidential" pursuant to the Protective Order in this case, and it can be shared with CSXT's in-house personnel pursuant to that Protective Order. Thus, the vast majority of the highly confidential appendix is now available to CSXT's in-house personnel. Indeed, the "Confidential" version that M&G has provided to CSXT reveals more information than the public version that the Board has instructed the parties to prepare.

IV. CONCLUSION.

For the foregoing reasons, the Board should deny CSXT's Motion to Modify Procedural Schedule.

Respectfully submitted,



Jeffrey O. Moreno
David E. Benz
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036
(202) 331-8800

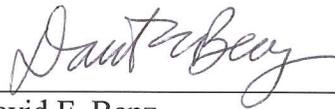
October 9, 2012

CERTIFICATE OF SERVICE

I hereby certify that this 9th day of October 2012, I served a copy of the foregoing upon counsel for defendant CSXT via e-mail and first class mail, postage pre-paid, at the address below:

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

Counsel for CSX Transportation, Inc.



David E. Benz