

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

TOTAL PETROCHEMICALS, INC.)	
)	
Complainant,)	
)	
)	Docket No. NOR 42121
)	
CSX TRANSPORTATION, INC., et al)	
)	
Defendants)	
)	

**REPLY OF NEW HOPE & IVYLAND RAILROAD
TO MOTION TO COMPEL RESPONSES TO DISCOVERY**

New Hope & Ivyland Railroad (“NHRR”) hereby replies to the motion of TOTAL Petrochemicals USA, Inc. (“TPI”) to compel responses to Complainant’s First Discovery Requests to Short Line Defendants:

Background

By decision served November 19, 2010, the Board permitted TPI to file a Second Amended Complaint in this proceeding. The Second Amended Complaint joins 11 short lines as defendants. The Second Amended Complaint includes reference to a single lane in which NHRR participates, identified in Exhibit B as lane 42 from Effingham, Illinois to Warminster, Pennsylvania. NHRR filed a motion seeking dismissal of the Complaint against it because NHRR does not have a published or established public tariff rate for moves of polystyrene (STCC 2821140) from its interchange with CSXT at Ivyland to Warminster or any other points

on NHRR's line, and because there have been no movements of polystyrene for TPI since the CSXT-TPI contracts expired.

TPI asserts that it served its first set of discovery on short line defendants at the time that it filed its motion for leave to file its second amended complaint. According to TPI's certificate of service, the discovery would have been received by NHRR on October 5, 2010. At that time, NHRR was not a defendant in this proceeding, and did not have counsel. The discovery requested responses by October 25, despite the fact that the Board had not yet allowed the filing of the second amended complaint and had not allowed the short lines to be added as defendants.

NHRR retained counsel to respond to the Second Amended Complaint, but did not provide counsel with the discovery it had received before being added as a defendant. The discovery was not re-served either at the time the Board allowed the Second Amended Complaint to be filed, nor at the time counsel entered an appearance by filing NHRR's Motion to Dismiss. There has been no conference under 49 CFR 1110.10(b) involving the short line defendants to discuss discovery and procedural matters, since either responses to the Second Amended Complaint were due, or since the Board permitted the filing of the Second Amended Complaint. Additionally, there was no conference under 49 CFR 1111.8(b) before the motion to compel was filed.

Discussion

1. The discovery requests are not timely.

The Board did not permit the filing of the Second Amended Complaint until November 19, 2010, and accordingly NHRR did not become a defendant until that time. Under the Procedural Schedule adopted by the Board for this proceeding, discovery closed on October 15, 2010. Decision served June 23, 2010. NHRR and the other short lines were not parties at the

time the procedural schedule was established, and they should not be penalized because TPI did not seek to add them as defendants until the discovery period was ending. Accordingly, since the discovery period closed before the short lines were added as defendants, the Board should find that NHRR is not required to respond to the discovery.

2. The motion to compel should be dismissed as premature.

There have not been conferences under either 49 CFR 1110.10(b) or under 49 CFR 1111.8(b) involving the short lines to discuss the appropriate scope of discovery for short lines. Accordingly, the motion to compel should be dismissed as premature.

3. The discovery is overly broad and requiring NHRR to respond would be unduly burdensome.

The discovery requests directed to NHRR and the other short lines are extensive and burdensome. As the Board has recognized, short lines are not required to maintain their accounting records in accordance with the Board's Uniform System of Accounts ("USOA") or to file annual reports and other cost and operational data. *Calculation of Variable Costs in Rate Complaint Proceedings Involving Non-Class I Railroads*, STB Ex Parte No. 589, 2003 STB LEXIS 145 (served March 28, 2003), at *4. Indeed, the Board has found that the imposition on short lines of USOA data collection and development requirements generally, and in connection with an individual rate case specifically, would be unduly burdensome both in terms of the time it would take as well as the costs that would be involved. *Id.* at *10-11. Yet, the discovery propounded by TPI here is just such an attempt to force NHRR to produce the type of data, information, accounting and other reports that Class I railroads are required to maintain. As such, the discovery is clearly over broad.

The potential costs and burdens of responding are accentuated in the case of NHRR when compared to revenues it earns from the traffic at issue (\$0.00) – as noted NHRR has no rate for

the traffic in place, and no traffic has moved to NHRR since July 1, 2010. Thus, it would be particularly burdensome for NHRR to have to respond when the existence of any affected shipment is only theoretical.

- 4. If NHRR is compelled to respond, then NHRR requests that the Board impose a protective condition that would require TPI to cover the costs of responding.**

If the Board requires NHRR incur the burden of responding to the discovery, then NHRR will need to expend significant efforts to assemble and produce documents and analyze data which is not maintained in the same manner as Class I railroads. Because it has limited staff to be able to do such work, NHRR would be required to retain lawyers and outside consultants and experts at considerable expense. All of this in regards to a route that has not handled any of the subject traffic since July 1, 2010. To protect NHRR from the adverse financial impact that responding would require, NHRR requests that, pursuant to 49 CFR 1114.21(c)(3), the Board insure NHRR's financial condition by requiring TPI to reimburse and indemnify NHRR from all reasonable costs of responding to the discovery, including the costs of employees, attorneys, consultants and experts that would need to be retained.

Conclusion

For all of the foregoing reasons, NHRR requests that the TPI motion to compel be denied, or that TPI be required to pay for the cost of responding.

Respectfully submitted,



Eric M. Hocky
Thorp Reed & Armstrong, LLP
Once Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103
215.640.8500
ehocky@thorpreed.com

Counsel for New Hope & Ivyland Railroad

Dated: December 23, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 2010, I caused a copy of the foregoing Reply of New Hope & Ivyland Railroad to be served on the following parties by email where indicated, or by first class mail, postage prepaid:

Via email:

Jeffrey O. Moreno
Jeffrey.Moreno@thompsonhine.com
David E. Benz
David.Benz@thompsonhine.com
Thompson Hine LLP
1920 N Street, NW, Suite 800
Washington, DC 20036

G. Paul Moates
pmoates@sidley.com
Paul A. Hemmersbaugh
pammersbaugh@sidley.com
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005

Louis E. Gitomer
Suite 301
600 Baltimore Avenue
Towson, MD 21204
Lou_Gitomer@verizon.net

Karl Morell
Ball Janik LLP
1455 F. Street, NW
Washington DC 20005
kmorell@dcbjllp.com

Thomas J. Litwiler
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, IL 60606
tlitwiler@fletcher-sippel.com

David W. Lawrence, Esq.
501 Park Avenue
Suite A
Lebanon, TN 37087
davidlawrence@softek.net

Via first class mail:

G.R. Abernathy, President
Sequatchie Valley Railroad Company
120 Souldard Square
Bridgeport, AL 35740

Jeff Collins, General Manager
Mohawk Adirondack & Northern Railroad
Corp.
1 Mill Street, Suite 101
Batavia, NY 14020

Cathy S. Hale, Chief Executive Officer
Madison Railroad
City of Madison Port Authority
1121 W. JPG Woodfill Road #216
Madison, IN 47250

Joe Martin, Division Manager
R.J. Corman Railroad Company (Memphis)
P.O. Box 337
145 East 1st Street
Guthrie, KY 42234



Eric M. Hocky