

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

TOTAL PETROCHEMICALS USA, INC.

Complainant,

v.

CSX TRANSPORTATION, INC.; CAROLINA
PIEDMONT DIVISION; GEORGIA
WOODLANDS RAILROAD, LLC; MADISON
RAILROAD; MOHAWK ADIRONDACK &
NORTHERN RAILROAD CORP.; NASHVILLE &
EASTERN RAILROAD CORP.; NEW HOPE &
IVYLAND RAILROAD; PIONEER VALLEY
RAILROAD; R.J. CORMAN RAILROAD
COMPANY (MEMPHIS); SEMINOLE GULF
RAILWAY L.P.; SEQUATCHIE VALLEY
RAILROAD COMPANY; AND SOUTH BRANCH
VALLEY RAILROAD

Defendants.

Docket No. NOR 42121

**CSX TRANSPORTATION, INC.’S REPLY TO TOTAL PETROCHEMICALS USA,
INC.’S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT**

Defendant CSX Transportation, Inc. (“CSXT”) respectfully submits this Reply to Complainant Total Petrochemicals USA, Inc.’s Motion for Leave to File a Second Amended Complaint (“Motion”). CSXT does not oppose the Motion, but files this Reply in order to correct several inaccurate characterizations of the record and to emphasize CSXT’s objection to any further amendments of TPI’s Complaint. If the Board grants TPI’s Motion, the Board should make clear that no further amendments will be allowed.

The Second Amended Complaint is TPI’s second substantial alteration of its complaint in this case. While the most obvious change to the Second Amended Complaint is TPI’s addition of eleven additional defendants, this is by no means the only change in the

Complaint. TPI counsel's cover letter details ten other changes, including adding a new lane to the case, dropping challenges to sixteen lanes,¹ and changing routings, origins, or commodities for another eight lanes. *See* J. Moreno Letter to C. Brown (Oct. 4, 2010). TPI proposed these significant alterations more than five months after filing its Initial Complaint and just eight business days before the close of discovery – and yet TPI's Motion offers no explanation for its substantial delay in seeking these amendments.

The only change in the Second Amended Complaint that TPI attempts to explain is its addition of eleven additional defendants, each of which provides line-haul rail service for a portion of one or more of the challenged movements. TPI's attempt to blame CSXT for TPI's own belated decision to cure a deficiency in its original Complaint cannot obscure the fact that TPI itself chose to wait until now to join defendants who are necessary parties to TPI's challenges to joint rates. As TPI concedes in the last sentence of its Motion, "proper adjudication of this case requires that all relevant parties be joined." Motion at 4.

TPI's original complaint was filed May 3, 2010, and challenged the reasonableness of CSXT's rates between 104 origin and destination pairs. Although CSXT was the only defendant named in the Complaint, CSXT was not the only line haul carrier involved in all the challenged movements. For example, Lane 8 in Exhibit B to TPI's Complaint purports to challenge the reasonableness of CSXT's rate for transporting plastic polypropylene pellets from New Orleans to Washington, GA. But there is no direct all-rail CSXT service from New Orleans to Washington. For TPI's traffic to be transported from New Orleans to Washington, CSXT must move shipments from New Orleans to Barnett, GA, where CSXT interchanges traffic with

¹ Fifteen of the lanes that TPI dropped from its Complaint on October 4 were among the lanes identified as having effective competitive options in CSXT's October 1 Motion for Expedited Consideration of Jurisdiction Over Challenged Rates.

the Georgia Woodlands Railroad (“GWRC”), which provides line-haul service to Washington. Importantly, CSXT’s tariff both publishes a rate from New Orleans to Barnett for the CSXT-only portion of this route and a rate from New Orleans to Washington in which GWRC participates. TPI’s Complaint challenged the rate for the full CSXT/GWRC movement from New Orleans to Washington, but only named CSXT as a defendant.² For this reason, CSXT’s Answer to TPI’s Complaint pointed out that TPI did not appear to have “joined all necessary parties to this litigation.” CSXT Answer to Initial Complaint at 1 (filed May 24, 2010).

On July 26, 2010 TPI filed its First Amended Complaint, which deleted two lanes from its initial Complaint and added eighteen lanes, for a total of 120 challenged lanes. CSXT did not object to this amendment, but reserved its rights to object to future amendments. *See* CSXT Answer to First Amended Complaint at 1-2 (filed Aug. 16, 2010). Once again, TPI’s Amended Complaint challenged lanes in which rail service is not provided by CSXT alone, but rather by CSXT in joint line service with another line haul carrier.³ CSXT’s Answer to TPI’s First Amended Complaint reiterated that TPI did not appear to have “joined all necessary parties to this litigation.” *Id.* at 1.

Subsequently CSXT asked TPI to clarify its intentions as to the lanes in the Amended Complaint in which a short line railroad participates as a line haul carrier. *See* P. Hemmersbaugh Letter to J. Moreno (Sept. 10, 2010) (Mot. Ex. 1). CSXT asked TPI whether it intended to challenge CSXT’s rates to its interchange with the participating short line or if it instead intended to challenge the rate for the entire CSXT/short line rate to destination. *See* Mot.

² Nineteen other challenged lanes present similar situations in which a railroad other than CSXT is a line haul carrier that participates in the challenged movement. *See* Initial Complaint Ex. B Lanes 1, 8, 10, 12, 24, 25, 28, 34, 40, 41, 42, 47, 52, 61, 66, 74, 80, 92, 93 and 95.

³ *See* First Amended Complaint Ex. B Lanes 1, 8, 10, 12, 24, 25, 28, 34, 37, 40, 41, 42, 47, 52, 61, 66, 74, 80, 92, 93, 95 and 114.

Ex. 1 at 2. Puzzlingly, TPI responded by claiming that it could not answer CSXT's question about what rates TPI intended to challenge in its complaint without receiving further discovery. CSXT, which was in the midst of responding to hundreds of other detailed TPI discovery requests, nonetheless expedited production of the information TPI sought. In response, TPI demanded yet more documents and information.⁴ Although none of the information TPI sought was necessary for it to answer the simple question of what rates its complaint was intended to challenge, CSXT expeditiously provided additional requested information.⁵ TPI eventually answered the question in CSXT's September 10 letter (which CSXT previously raised in its Answers to the first two Complaints in May and August) by filing this Motion.

In short, TPI has been on notice since May – when CSXT filed its Answer to TPI's Initial Complaint – that it had failed to join all necessary parties to its Complaint. Nevertheless, while there is no justification for TPI's extended delay in correcting this problem (and while TPI offers no explanation or justification for the multiple other changes in the Second Amended Complaint), CSXT does not oppose the Motion. To ensure that the Board is aware of the relevant facts, however, CSXT below responds to several points made in the Motion.

First, TPI's claim that it does not believe the Short Line Defendants are necessary parties to rate challenges to movements in which those carriers participate is both contradicted by its actions and contrary to basic due process requirements. If TPI intends to challenge through

⁴ TPI has posed over 700 discovery requests (including subparts) in seven different sets of discovery requests. An apt example of the sweeping and unreasonably broad scope of TPI's discovery requests is found in the discovery requests TPI attaches as Exhibit 2 to its Motion – a five-part interrogatory and six-part request for production that TPI posed as to 145 different short line carriers, the overwhelming majority of which have no involvement in the issue movements.

⁵ TPI's Motion complains that CSXT had not produced certain contracts with the short line railroads it seeks to add. CSXT subsequently produced the additional requested documents for those short lines, although they are not necessary for TPI to determine what rates it is challenging in this case.

rates in which both CSXT and another rail carrier participate, it must bring its complaint against both carriers. It is well established that a complainant ordinarily may not challenge the reasonableness of a rate for a segment of a joint through route – rather, the complaint must challenge the reasonableness of the entire rate. *See Great Northern Ry. v. Sullivan*, 294 U.S. 458, 462-63 (1935).⁶ One natural corollary of the *Great Northern* rule – and a requirement of fundamental due process – is that a complainant challenging a rate for a joint movement may not sue only one of the carriers providing that service. Otherwise, if the complainant prevailed, the Board would be prescribing a rate for a rail carrier that was not a party to the proceeding.

Second, TPI’s suggestion that some of the short line defendants are subject to “restrictions” that prevent them from entering into contracts with TPI is not accurate. CSXT is not aware of any contractual obligations that preclude the short line defendants from negotiating separate rates for their portion of a TPI movement. If TPI and the short line defendants wish to negotiate separate rates for the short lines’ segments, they are free to do so.

Third, while CSXT does not oppose the Second Amended Complaint, the Board should not grant any additional amendments. This case was filed nearly six months ago, and discovery is now closed. More alterations to the challenged lanes at this late date – and particularly any attempts to add more lanes to the Complaint – would prejudice CSXT and potentially jeopardize the procedural schedule. If the Board grants TPI’s Motion, the Board should make clear that no further amendments will be permitted.

⁶ The Board has created a bottleneck exception to that general rule for instances where a complainant has a contract with one or more of the railroads. *See Central Power & Light Co. v. Southern Pac. Transp. Co.*, STB Docket No. 41242 (served Dec. 31, 1996), *aff’d on reconsideration* (Apr. 30, 1997). In those instances, a complainant may bring a challenge to the reasonableness of the rate for the segment of the movement not subject to contract.

Respectfully submitted,



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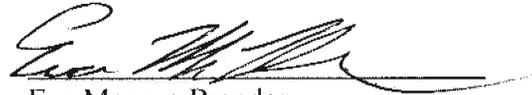
Counsel to CSX Transportation, Inc.

Dated: October 25, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2010, I caused a copy of the foregoing Reply to Motion for Leave to File Second Amended Complaint to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery:

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