

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**MOTION OF NEW HOPE & IVYLAND RAILROAD
TO DISMISS SECOND AMENDED COMPLAINT**

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Dated: December 8, 2010

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Pursuant to 49 CFR 1111.5, New Hope & Ivyland Railroad (“NHRR”) hereby moves the Board for an order dismissing it as a defendant in this proceeding.¹ In support of its motion, NHRR states as follows:

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,

¹ Because of the nature of this motion to dismiss, NHRR is not separately answering the Second Amended Complaint. If it were doing so, NHRR would deny all allegations relating to matters outside of its knowledge, including with respect to all lanes other than lane 42, would deny all claims against it, and would incorporate by reference all defenses raised by CSXT in its previous filings in this matter.

Pennsylvania. The route is described as CN – EFHAM – CSXT – IVYLD – NHRR. Although listed as a railroad in the interline move between origin and destination, Canadian National Railway (“CN”) is not named as a defendant, nor are there any allegations with respect to whether TPI has a contract with CN for its portion of the move.

Although a participant to the CSXT-TPI contracts which expired as of June 30, 2010, as a mere short line delivering carrier, NHRR was not party to and has no knowledge of the negotiations that took place prior to the expiration of the contracts or thereafter, and has no knowledge regarding the movements or rates in any of the lanes other than lane 42.

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 did not provide factors to CSXT for CSXT’s public rate document. Additionally, to the best knowledge of NHRR, there have been no movements of polystyrene for TPI since the CSXT-TPI contracts expired.

NHRR is a small Class III carrier that cannot afford to defend a stand-alone cost rate case. It has been further prejudiced in this case by the timing of its addition as a defendant. The opportunities to work with other parties to have the lane at issue dismissed and/or to limit the role and burden of short line defendants through the Board’s required mediation under 49 CFR 1109.4 and 49 CFR 1111.10 have passed.

Request for Dismissal

NHRR believes that the claims set forth in the Second Amended Complaint should be dismissed for the following reasons:

- (1) There is no established rate for NHRR’s portion of the route described in lane 42. Further, there have been no shipments over the route since the CSXT-TPI contracts expired.

Since there is no rate there is no way to challenge the reasonableness. Even if there were a rate, no traffic has moved over the lane in question. The Board does not have jurisdiction to determine the reasonableness rates that have not been used to move traffic since there has been no rate “charged or collected.” *See* 49 USC 10704(a)(1); CSXT Motion for Expedited Determination of Jurisdiction over Challenged Rates, pp.22-24 (filed October 1, 2010).²

(2) Based on the Second Amended Complaint, not all necessary parties have been joined as defendants. As noted by TPI in its motion to permit the filing of the Second Amended Complaint, all carriers participating in an interline movement must be included unless TPI has a separate contractual agreement with a carrier for its portion of the move. As described in the Second Amended Complaint, CN is a participant in the interline movement in lane 42. There are no allegations in the Second Amended Complaint that TPI has an agreement with CN for its portion of the move that precedes CSXT. Since CN was not included as a defendant in this action, the action should be dismissed as to lane 42, and consequently as to NHRR.

(3) The late joinder of NHRR will be prejudicial to its ability to defend itself in a timely and cost-effective manner. On the other hand, since (as discussed above in item 1) there have been no movements in lane 42 since the contracts expired, there would be no harm to TPI in dismissing NHRR as a defendant in this action.

² Although CSXT did not list lane 42 in the relevant section of its Motion, the same arguments apply and NHRR incorporates by reference the CSXT argument set forth in its Motion.

CONCLUSION

For all of the foregoing reasons, NHRR requests that NHRR be dismissed as a defendant in this action.

Respectfully submitted,



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VERIFICATION

I, Paul Nichini, President of New Hope & Ivyland Railroad, verify under penalty of perjury that statements contained in the foregoing Motion to Dismiss are true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on December 8, 2010.



Paul Nichini

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2010, I caused a copy of the foregoing answer of Seminole Gulf Railway, L.P.; to be served on the following parties by email where indicated, or by first class mail, postage prepaid:

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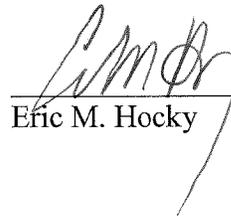
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