

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

TOTAL PETROCHEMICALS USA, INC.)	
)	
Complainant,)	
)	
v.)	Docket No. NOR-42121
)	
CSX TRANSPORTATION, INC, et al.)	
)	
Defendants.)	228611

MOTION TO MODIFY PROCEDURAL SCHEDULE

TOTAL PETROCHEMICALS USA, INC. ("TPI"), hereby submits this "Motion to Modify Procedural Schedule" in the above-captioned proceeding. TPI requests that the Board adopt the procedural schedule set forth in Exhibit A to this Motion. Counsel for defendants, CSX Transportation, Inc. ("CSXT") and New Hope and Ivyland Railroad ("NHRR"), have authorized counsel for TPI to represent that those defendants do not oppose this motion. Defendant, Carolina Piedmont Division ("CPDR"), has declined to consent. The remaining defendants, Madison Railroad ("CMPA"); Mohawk, Adirondack & Northern Railroad Corp. ("MHWA"); R.J. Corman Railroad Company (Memphis) ("RJCM"); and Sequatchie Valley Railroad Company ("SQVR") have not responded to TPI's requests for consent.¹

This motion is being filed simultaneous with separate motions for procedural schedules in M&G Polymers USA, LLC v. CSX Transportation, Inc., and E.I. du Pont de Nemours and Company v. Norfolk Southern Railway, in STB Docket Nos. 42123 and 42125, respectively.

¹ TPI has not sought the consent of the five defendants that TPI moved to dismiss from this proceeding on January 5, 2011. Those defendants are Georgia Woodlands Railroad, LLC ("GWRC"); Nashville and Eastern Railroad Corporation ("NERR"); Pioneer Valley Railroad ("PVR"); Seminole Gulf Railway L.P. ("SGLR"); and South Branch Valley Railroad ("SBVR").

Complaints in all three cases were filed within a six month period. All three dockets are complex stand-alone cost (“SAC”) cases involving anywhere from 60 to 140 lanes of carload traffic. All three Complainants are represented by the same counsel and consultants, and both CSXT and Norfolk Southern are represented by the same counsel and consultants. Therefore, careful coordination of procedural schedules is especially important to the fair and efficient prosecution of these cases. The dates in the proposed procedural schedules in all three dockets have been coordinated in order to minimize timing and resource conflicts; to provide the parties and the Board with adequate time to develop, present, and evaluate the evidence; and to produce timely decisions in these cases.²

BACKGROUND

On May 3, 2010, TPI filed its initial Complaint in this proceeding, which named CSXT as the sole defendant. On June 3, 2010, TPI and CSXT filed a “Joint Motion for Procedural Schedule,” which the Board granted in a decision served on June 23, 2010. That procedural schedule currently requires TPI to file its Opening Evidence on February 16, 2011, which is just over a month away.

On July 26, 2010, TPI filed a First Amended Complaint that removed some lanes and added other lanes for a total of 120 origin and destination pairs.

During the discovery process, TPI learned that various short line railroads participated in joint rates with CSXT over several of the complaint lanes, and thus were necessary parties to this proceeding. Therefore, TPI moved to amend its Complaint to add eleven short line railroad defendants, on October 4, 2010. TPI also reduced the number of lanes in its complaint to 104. The Board granted TPI’s motion in a decision served on November 19, 2010, and directed the short line defendants to file Answers within twenty days.

² For the convenience of the Board, Exhibit A sets forth the proposed procedural schedules in all three dockets.

On December 9, 2010, GWRC, SGLR, CPDR, and PVRR filed Answers, and NHRR filed a Motion to Dismiss.³ None of the other short line defendants filed any response to TPI's amended complaint.

Although TPI served discovery upon all eleven short line defendants contemporaneous with its amended complaint, not a single defendant served responses or objections to that discovery. TPI filed a motion to compel discovery on December 13, 2010.

In a decision served on December 30, 2010, the Board directed TPI to re-serve its complaint upon the short line defendants by January 4, 2010, which TPI has done. In addition, the Board ordered TPI to confer with the short line defendants regarding the procedural schedule and then seek to amend the schedule to extend the discovery period if TPI should still wish to seek discovery. In light of this decision, the Board declined to decide TPI's motion to compel at this time.

Just days prior to service of the December 30 decision, TPI and CSXT had reached agreement upon a new procedural schedule that TPI had requested in order to accommodate the delays caused, in part, by the failure of the short line defendants to respond to discovery.⁴ In order to minimize timing and resource conflicts, their agreement also encompassed procedural schedules for Docket Nos. 42123 and 42125.

After receiving the Board's decision, TPI added specific deadlines for shortline discovery and asked each shortline defendant whether it would consent to that schedule. TPI asked for a response by January 7, 2011, because of the looming deadline for filing opening evidence in the existing procedural schedule and the need to coordinate with procedural schedules in the other

³ TPI has since moved to dismiss GWRC, SGLR and PVRR.

⁴ In addition, the discovery process in general has turned out to be more complex and time-consuming than TPI originally projected. Because this is the first major SAC case involving over 100 lanes of carload shipments, the time needed to obtain, review and evaluate discovery materials and to develop the stand-alone railroad ("SARR") based upon that information has been greater than anticipated.

rate case dockets. The NHRR consented; CPDR refused consent; and the other short line defendants failed to respond.

ARGUMENT

When adopting a procedural schedule, the Board must carefully balance the interests and concerns of all parties to the proceeding. TPI has proposed a schedule that would do precisely that. TPI has provided the short line defendants nearly a month from the date that TPI *re-served* its amended complaint just to serve objections to TPI's discovery requests, and another full month to serve responses. TPI would then have two months to review and incorporate those responses into its opening evidence. Indeed, TPI may have less time if it is forced to pursue a motion to compel in response to any objections.

In reality, the short line defendants have had much more time to review and determine their responses to TPI's discovery requests. TPI served its discovery requests over *five months* ago.⁵ Even if one only considers the discovery to have been served on January 5, 2011, TPI's schedule still provides two months for discovery. The entire discovery window for CSXT and TPI, which carry much greater discovery burdens in this case, was just six months. Whereas discovery of CSXT and TPI included all 104 lanes in this case, the responses of each short line defendant are limited to just one, or at most two, complaint lanes. Furthermore, TPI served less than half the number of discovery requests on the short line defendants than it served on CSXT and it has not requested information in any format other than how it is maintained by each shortline defendant in the ordinary course of business. Although TPI, in its discovery requests, expressed its willingness to work with each shortline defendant to facilitate expeditious

⁵ Although CPDR, in response to TPI's Motion to Compel, suggested that TPI's service of discovery was deficient, CPDR, by virtue of having filed a timely Answer in this case, clearly received that discovery, which was served upon CPDR contemporaneous with TPI's amended complaint. TPI nevertheless disagrees that it improperly served CPDR or that discovery is subject to the same service requirements as a complaint.

production with minimal burden, no shortline defendant approached TPI to discuss any aspect of TPI's discovery requests. Thus, any delay in the ensuing five months has been due to choices made by the shortline defendants to ignore TPI's discovery, choices for which TPI should not be penalized.

The harm to TPI of a longer delay than is provided for in the proposed procedural schedule is substantial. TPI is the first-filed of three SAC cases currently pending before the Board where the counsel and consultants for the complainants and defendants are the same. DuPont and M&G also have filed procedural schedule motions today that have been carefully coordinated with TPI, NS, and CSXT to allow all three cases to proceed in a timely manner while minimizing resource conflicts for both the parties and the Board. If TPI's proposed procedural schedule is extended any further, there will be significant conflicts with these other cases that could push TPI to the back of a long procedural queue, because the only way to avoid such conflicts would be to extend TPI's procedural schedule by almost a full year. This would be an untenable situation for TPI, which would bear the risk of having to pay the challenged rates throughout that extended period, without any assurance of receiving reparations at the end of the case. Moreover, such a lengthy delay would subject a final Board decision in this proceeding to a possible challenge under 49 U.S.C. 11701(c), because there would be a substantial risk that this case could not be concluded with administrative finality within three years.

This situation is all the more egregious, because any one of the short line defendants could have extricated itself from this proceeding as far back as July 2010. Since before filing its amended complaint in July, a period of six months, TPI has attempted to secure contracts from each short line defendant. In every communication, TPI has stressed that, absent a contract, TPI would have no choice but to join the shortline defendants in this proceeding. Until very recently,

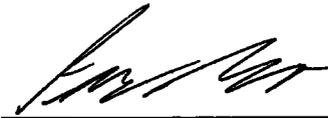
TPI was either refused or ignored by each shortline defendant. When TPI filed its amended complaint, several short line defendants expressed interest in a contract, but drug their heels when it came to actually quoting a contract rate. It was not until TPI filed its motion to compel discovery that those defendants began to negotiate with more urgency, leading to TPI's recent dismissal of five defendants.

After the Board's December 30 decision, several other short line defendants also suddenly expressed interest in a contract. Of the six short line defendants that remain in this case, TPI is in active contract negotiations with NHRR, CPDR, CMPA and SQVR, and believes that the parties can conclude deals within the next 1-2 weeks. If successful, any objections by those defendants to TPI's proposed procedural schedule will become moot.

The RJCM and MHWA, however, still have not indicated their willingness to negotiate; nor did they respond positively or negatively to TPI's proposed procedural schedule. TPI made new overtures to both defendants when it re-served its amended complaint and is hopeful that they are now focused upon this proceeding and also will agree to contracts. However, for all the reasons stated in this motion, TPI cannot afford to wait and see if they will agree to a contract before filing this motion.

WHEREFORE, for the foregoing reasons, TPI respectfully requests that the Board modify the procedural schedule in Docket No. 42121 as set forth in Exhibit A to this Motion.

Respectfully submitted,



Jeffrey O. Moreno
David E. Benz
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036
(202) 331-8800

*Counsel for TOTAL Petrochemicals USA,
Inc.*

January 10, 2011

Exhibit A
Proposed Procedural Schedules

<u>Action</u>	<u>Docket No. 42121: TPI v. CSXT</u>	<u>Docket No. 42123: M&G v. CSXT</u>	<u>Docket No. 42125: DuPont v. NSR</u>
Shortline Railroad Discovery Objections Due	Feb. 1, 2011		
Shortline Railroad Discovery Responses Completed	March 1, 2011		
TPI Opening Evidence	April 29, 2011		
M&G/CSXT Joint Operating Characteristics Due		May 11, 2011	
M&G Opening Evidence		June 29, 2011	
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DuPont/NSR Joint Operating Characteristics			Sept. 14, 2011
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DuPont Opening Evidence			Oct. 31, 2011
TPI Rebuttal Evidence	Dec. 20, 2011		
TPI/CSXT Briefs	Jan 31, 2012		
M&G Rebuttal Evidence		March 7, 2012	
NS Reply Evidence			March 7, 2012
M&G/CSXT Briefs		April 7, 2012	
DuPont Rebuttal Evidence			June 29, 2012
DuPont/NSR Briefs			Aug. 17, 2012

CERTIFICATE OF SERVICE

I hereby certify that this 10th day of January 2011, I served a copy of the foregoing upon CSX Transportation, Inc., in the following manner and at the addresses below:

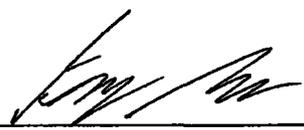
Via e-mail and first-class mail to:

<p>G. Paul Moates Paul Hemmersbaugh Sidley Austin LLP 1501 K Street, NW Washington, DC 20005</p> <p>pmoates@sidley.com phemmersbaugh@sidley.com</p> <p><i>Counsel for CSX Transportation, Inc.</i></p>	<p>Eric Hocky Thorp Reed & Armstrong LLP One Commerce Square 2005 Market Street, Suite 1000 Philadelphia, PA 19103</p> <p>ehocky@thorpreed.com</p> <p><i>Counsel for New Hope & Ivyland Railroad; Seminole Gulf Railway, LP;</i></p>
<p>Louis E. Gitomer Law Offices of Louis E. Gitomer 600 Baltimore Avenue Suite 301 Towson, MD 21204</p> <p>Lou_Gitomer@verizon.net</p> <p><i>Counsel for Carolina Piedmont Division, South Carolina Central Railroad Company</i></p>	<p>Thomas J. Litwiler Fletcher & Sippel LLC Suite 920 29 North Wacker Drive Chicago, IL 60606-2832</p> <p>tlitwiler@fletcher-sippel.com</p> <p><i>Counsel for Pioneer Valley Railroad Company, Inc.</i></p>
<p>David W. Lawrence Suite A 501 Park Avenue Lebanon, TN 37087</p> <p>615.444.5304 (fax)</p> <p>davelawrence@birch.net</p> <p><i>Counsel for Nashville & Eastern Railroad Corporation</i></p>	<p>Karl Morrell Matthew Hoyer Ball Janik LLP Suite 225 1455 F Street, NW Washington, DC 20005</p> <p>kmorrell@dc.bjllp.com</p> <p><i>Counsel for Georgia Woodlands Railroad, LLC</i></p>

<p>David F. Rifkind Leonard, Street and Deinard 1350 I Street, NW, Suite 800 Washington, DC 20005</p> <p>david.rifkind@leonard.com</p> <p><i>Counsel for Madison Railroad</i></p>	<p>Byron Clinton, General Manager Sequatchie Valley Railroad Company 2235 Fairfield Pike Shelbyville, TN 37160</p> <p>bclintonsqvr@bellsouth.net</p>
<p>Ronald A. Lane Fletcher & Sippel LLC 29 N. Wacker Drive, Suite 920 Chicago, Illinois 60606-2832</p> <p>rlane@fletcher-sippel.com</p> <p><i>Counsel for R.J. Corman Railroad Company (Memphis)</i></p>	<p>John Herbrand General Counsel Mohawk, Adirondack & Northern Railroad Corp. 1 Mill Street, Suite 101 Batavia, NY 14020</p> <p>jsh@herbrandlaw.com</p> <p><i>Counsel for Mohawk, Adirondack & Northern Railroad Corp.</i></p>

Via first class mail to:

<p>Lucinda K. Butler, Director South Branch Valley Railroad 120 Water Plant Drive Moorefield, WV 26836</p>	
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Respectfully submitted,



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*Counsel for TOTAL Petrochemicals USA,
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January 10, 2011

Exhibit A
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CERTIFICATE OF SERVICE

I hereby certify that this 10th day of January 2011, I served a copy of the foregoing upon CSX Transportation, Inc., in the following manner and at the addresses below:

Via e-mail and first-class mail to:

<p>G. Paul Moates Paul Hemmersbaugh Sidley Austin LLP 1501 K Street, NW Washington, DC 20005</p> <p>pmoates@sidley.com phemmersbaugh@sidley.com</p> <p><i>Counsel for CSX Transportation, Inc.</i></p>	<p>Eric Hocky Thorp Reed & Armstrong LLP One Commerce Square 2005 Market Street, Suite 1000 Philadelphia, PA 19103</p> <p>ehocky@thorpreed.com</p> <p><i>Counsel for New Hope & Ivyland Railroad; Seminole Gulf Railway, LP;</i></p>
<p>Louis E. Gitomer Law Offices of Louis E. Gitomer 600 Baltimore Avenue Suite 301 Towson, MD 21204</p> <p>Lou_Gitomer@verizon.net</p> <p><i>Counsel for Carolina Piedmont Division, South Carolina Central Railroad Company</i></p>	<p>Thomas J. Litwiler Fletcher & Sippel LLC Suite 920 29 North Wacker Drive Chicago, IL 60606-2832</p> <p>tlitwiler@fletcher-sippel.com</p> <p><i>Counsel for Pioneer Valley Railroad Company, Inc.</i></p>
<p>David W. Lawrence Suite A 501 Park Avenue Lebanon, TN 37087</p> <p>615.444.5304 (fax)</p> <p>davelawrence@birch.net</p> <p><i>Counsel for Nashville & Eastern Railroad Corporation</i></p>	<p>Karl Morrell Matthew Hoyer Ball Janik LLP Suite 225 1455 F Street, NW Washington, DC 20005</p> <p>kmorrell@dc.bjllp.com</p> <p><i>Counsel for Georgia Woodlands Railroad, LLC</i></p>

<p>David F. Rifkind Leonard, Street and Deinard 1350 I Street, NW, Suite 800 Washington, DC 20005</p> <p>david.rifkind@leonard.com</p> <p><i>Counsel for Madison Railroad</i></p>	<p>Byron Clinton, General Manager Sequatchie Valley Railroad Company 2235 Fairfield Pike Shelbyville, TN 37160</p> <p>bclintonsqvr@bellsouth.net</p>
<p>Ronald A. Lane Fletcher & Sippel LLC 29 N. Wacker Drive, Suite 920 Chicago, Illinois 60606-2832</p> <p>rlane@fletcher-sippel.com</p> <p><i>Counsel for R.J. Corman Railroad Company (Memphis)</i></p>	<p>John Herbrand General Counsel Mohawk, Adirondack & Northern Railroad Corp. 1 Mill Street, Suite 101 Batavia, NY 14020</p> <p>jsh@herbrandlaw.com</p> <p><i>Counsel for Mohawk, Adirondack & Northern Railroad Corp.</i></p>

Via first class mail to:

<p>Lucinda K. Butler, Director South Branch Valley Railroad 120 Water Plant Drive Moorefield, WV 26836</p>	
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 Jeffrey O. Moreno