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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**M & G POLYMERS USA, LLC** )  
) )  
**Complainant,** )  
) )  
**v.** )  
) )  
**CSX TRANSPORTATION, INC.** )  
) )  
**Defendant.** )  
\_\_\_\_\_ )

**Docket No. NOR 42123**

**Reply of M&G Polymers USA, LLC To  
CSX Transportation, Inc.'s Reply to M&G Polymers USA, LLC Request to File Third  
Amended Complaint**

M&G Polymers USA, LLC ("M&G") submits this "Reply to CSX Transportation, Inc.'s Reply to M&G Polymers USA, LLC Request to File Third Amended Complaint," which CSXT Transportation, Inc. ("CSXT") filed on Friday, February 11, 2011. Although CSXT styles its pleading as a "Reply," it is in fact a Motion for Partial Dismissal of M&G's Third Amended Complaint, and will be referred to hereafter as "CSXT's Motion" to avoid any confusion with references to M&G's Reply. M&G did not file a "Request to File Third Amended Complaint," nor was it required to do so by the Board's rules or any decision in this proceeding.<sup>1</sup> Therefore, this pleading is a permissible reply to CSXT's Motion under 49 C.F.R. 1104.13(a).

CSXT objects to M&G's addition of Lanes 51 and 52 to Complaint Exhibit B. In the cover letter to the Third Amended Complaint, M&G explained that these two lanes represent significant new business that M&G recently acquired, and that this business was not known, and

<sup>1</sup> Despite CSXT's suggestion to the contrary, the Board's statement that "[a]ny amendments to the complaint sought in the future will be considered on a case-by-case basis," in its November 10, 2010 decision, did not impose any requirement that M&G submit a request to amend its complaint when the Board's rules do not require such a request. See 49 C.F.R. 1111.2(a) (no motion required for amended or supplemental complaints against defendants named in the original complaint).

could not have been known, by M&G at the time of filing the original Complaint or any of M&G's subsequent amended Complaints. M&G also represented that inclusion of these lanes would not require any additional discovery of CSXT, and that M&G would supplement its discovery responses to CSXT to include these lanes, where responsive information exists.<sup>2</sup>

CSXT attaches several exhibits to its Motion that purport to show that M&G did in fact know about this new business well before even the first Complaint was filed. These documents include internal budgets, forecasts, analyses, and contract rate requests to CSXT, dating back to 2008. The highly competitive market for PET means that M&G is constantly competing for business from the same customers year in and year out, and those customers are constantly changing PET suppliers. Both new lanes represent destinations that M&G supplied until 2009, did not supply in 2010, and has now regained in 2011. Because of this constantly changing dynamic, M&G asks all of its rail carriers to quote contract rates on a comprehensive list of destinations which include business that M&G currently has, *and hopes to obtain*, during the contract term. The various documents that CSXT cites as proof that M&G has known about the new business in these lanes for some time actually reflect M&G's attempts to keep one step ahead of the continuously evolving nature of this highly competitive PET market. M&G did not include Lanes 52 and 52 in its prior complaints because M&G did not have that business, and there was no guarantee that it would obtain that business.<sup>3</sup>

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<sup>2</sup> CSXT asserts that M&G has not yet provided additional discovery response for these new lanes. M&G has not done so because its resources have been tied up responding to CSXT's "Motion for Expedited Determination of Jurisdiction Over Challenged Rates," which was filed on January 27, 2011, without any advance notice. In order to respond to CSXT's Motion, M&G has had to commit significant resources to prepare market dominance evidence, in a period of just three short weeks, several months before it otherwise would be due.

<sup>3</sup> In Docket No. 42121, TOTAL Petrochemicals USA, Inc. v. CSX Transportation, Inc., CSXT filed a "Motion for Expedited Determination of Jurisdiction Over Challenged Rates" (Oct. 1, 2010), in which it has sought to dismiss various lanes from TOTAL's complaint because TOTAL was not moving traffic under the challenged rates. CSXT cannot have it both ways by criticizing TOTAL for including lanes in its complaint with no current traffic, but which represented business that TOTAL hoped to obtain, and criticizing M&G for not doing the very same thing.

CSXT's claims of prejudice do not bear up under scrutiny. First, CSXT claims that, despite M&G's representation that it will supplement its discovery responses to include the new lanes, CSXT has been deprived of the opportunity to submit lane-specific discovery requests. But, CSXT has not submitted a single lane-specific discovery request in this entire proceeding and has not explained why it would need to do so for these two lanes. Nevertheless, in order to address this objection, M&G will agree to waive a timeliness objection to additional discovery requests specific to these two lanes.

Second, CSXT claims that, if the Board permits M&G to add these new lanes, it also should give CSXT the opportunity to proffer additional market dominance evidence for those lanes in support of CSXT's "Motion for Expedited Determination of Jurisdiction Over Challenged Rates" ("Jurisdiction Motion"). This is not necessary because the purpose of CSXT's Jurisdiction Motion is not to present market dominance evidence, but to ask the Board to bifurcate the presentation of market dominance evidence from rate reasonableness evidence. CSXT has argued that "compelling evidence" of effective alternatives to CSXT in 32 of the 68 case lanes justifies bifurcation. CSXT's ability to now include 34 out of 70 lanes in its Jurisdiction Motion will not tip the scales.<sup>4</sup> Regardless how the Board decides the Jurisdiction Motion, CSXT will not be deprived of the opportunity to present market dominance evidence on those lanes in this proceeding.

The rate case experience of both CSXT and the Board has primarily been limited to unit train movements, which are much more predictable and typically for long terms. Car load shippers, such as M&G, do not have these types of shipments. Their transportation needs

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<sup>4</sup> M&G's Reply to CSXT's Jurisdiction Motion, which is due on February 18, 2011, will not rely upon the addition of Lanes 51 and 52 as grounds for denial.

encompasses dozens, if not hundreds, of lanes that are constantly changing. Indeed, this has been a major obstacle to car load shippers' ability to invoke the Board's remedies for unreasonable rail rates. If rate cases did not require three years to litigate, there would be less need to amend complaints during the proceeding. While M&G recognizes that there always will be a need to close a rate case to new lanes at some point for administrative efficiency and due process, the Board should not do so without demonstrable prejudice to the defendant. CSXT has not demonstrated such prejudice with respect to Lanes 51 and 52, which M&G has added to Complaint Exhibit B.<sup>5</sup> Therefore, the Board should deny CSXT's Motion to Dismiss those lanes from M&G's Third Amended Complaint.

Respectfully submitted,



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February 15, 2011

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<sup>5</sup> Indeed, CSXT's Jurisdiction Motion, by requiring M&G to prepare market dominance evidence several months prior to the due date of opening evidence in the procedural schedule, and in just three short weeks, is far more prejudicial to M&G than the Third Amended Complaint could possibly be to CSXT.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that, on this 15th day of February 2011, the foregoing has been served upon the following persons via the means described below:

**via electronic mail and first class mail to:**

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*Counsel for CSX Transportation, Inc.*

  
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Jeffrey O. Moreno