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November 25, 2015
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Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

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TOTAL PETROCHEMICALS &)
REFINING USA, INC.)
	Complainant,)
	v.)
CSX TRANSPORTATION, INC.)
	Defendant.)
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Docket No. NOR 42121

MOTION TO STRIKE, OR IN THE ALTERNATIVE,
FOR LEAVE TO REPLY

Complainant, Total Petrochemicals & Refining USA, Inc. (“TPI”) hereby moves to strike portions of the “Reply to Total Petrochemicals & Refining USA, Inc.’s Compliance Evidence and Supplemental Opening Evidence,” filed by CSX Transportation, Inc. (“CSXT”) on November 20, 2015 (“CSXT Supp. Reply”). In the alternative, TPI requests leave to submit a reply to CSXT’s reply. Specifically, TPI asks the Board to strike pages 5-18 of CSXT’s Supplemental Reply,¹ because it is beyond the scope of supplemental evidence permitted by the Board.

In the July 24, 2015 order requesting supplemental evidence in this docket (“*Supplemental Evidence Order*”), the Board stated that “the parties may not revise their evidence beyond the scope that we describe here.” *Supp. Evid. Order* at 9. In response to TPI’s Petition to Reconsider, served on September 4, 2015, the Board clarified that “[t]he intent of these instructions was to advise the parties that they could make changes to their evidence that

¹ This Motion covers page 18 only to the end of the carry-over paragraph that begins on page 17.

follow from the supplemental evidence that the Board ordered, but that they should not take this as an opportunity to redesign their SARR or make other unrelated changes.” *Recon. Decision* at 11.

CSXT impermissibly has used its supplemental evidence as an opportunity to present new analyses and arguments in response to TPI’s Opening and Rebuttal Evidence, filed on February 18, 2014 and November 5, 2014, respectively. Moreover, CSXT waited until its supplemental reply evidence to do so, which precludes TPI from responding. As the party with the burden of proof in this very complex proceeding, TPI is significantly prejudiced by CSXT’s submission of new analyses in a supplemental reply to which TPI has no opportunity to respond.²

Beginning at the top of page 5 and extending through the top of page 18 of its Supplemental Reply, CSXT presents 14 pages of new arguments and analyses in response to TPI’s (original) Opening and Rebuttal Evidence on yard jobs and locomotives that extends well beyond responding to TPI’s Supplemental Opening. That 14-page narrative plus multiple workpapers ostensibly is in reply to just two paragraphs at pages III-C-9 to 10 of TPI’s Supplemental Opening. *See* CSXT Supp. Reply at 5.³ But those paragraphs do not contain any new arguments or evidence concerning yard jobs. Those paragraphs are part of a section in which TPI has argued that the Board “should evaluate and choose between the parties’ yard jobs evidence instead of referring to supplemental ‘Y’ train evidence based upon data that is not suited for that purpose” and that “[t]he only issue the Board should decide as it relates to ‘Y’ train evidence is which parties’ yard jobs matrix is superior.” TPI Supp. Op. at III-C-8 to 9, 12.

² TPI cannot respond effectively in its Final Brief because its response requires the submission of additional evidence, which is prohibited, and TPI would be required to expend a disproportionate number of pages in its page-limited Brief to reply to 14 pages of narrative in CSXT’s Supplemental Reply on this single subject.

³ Although CSXT never cites another page of TPI’s Supplemental Opening on pages 5-18, it cites extensively to TPI’s Opening and Rebuttal evidence.

Nevertheless, CSXT has used that as an excuse to present new evidence in its Supplemental Reply in response to TPI's (original) Opening and Rebuttal yard jobs evidence.

CSXT may contend that it was responding to TPI's Supplemental Opening Scenario #1, which was based upon TPI's Rebuttal evidence. But Scenario #1 only "restore[d] TPI Opening intermodal costs that TPI had removed from its Rebuttal evidence...[b]ecause the Board denied TPI's Petition to Supplement the Record as to these intermodal costs." TPI Supp. Op. at I-4. In other words, the sole purpose of Scenario #1 was to modify TPI's Rebuttal evidence to capture the effect of restoring those intermodal costs upon the SAC analysis. As TPI explained, "the only change in Scenario #1 occurs to road property investments, which TPI then flows through the DCF and MMM analyses. *Id.* Scenario #1 made no adjustments whatsoever to yard jobs or locomotives that would entitle CSXT to submit new evidence on those subjects. The only adjustment that either party made to yard jobs in their supplemental evidence was to remove the double-count created by modeling industrial yard trains in their RTC simulations.⁴ If CSXT can rely upon TPI's Scenario #1 to justify its new yard jobs evidence, then there effectively was no limit at all upon supplemental evidence.

CSXT's Supplemental Reply analysis even includes responses to TPI's original February 18, 2014 Opening evidence. Specifically, the argument and analyses presented at pages 13-16 of the CSXT Supplemental Reply critique TPI's original Opening workpapers and the code used to develop them.⁵ CSXT has used its Supplemental Reply inappropriately to alter, expand, and supplement its original Reply, not to respond to TPI's Supplemental Opening.

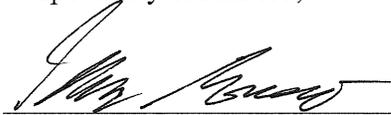
Due to the protracted duration of this proceeding and the clear impropriety of CSXT's supplemental yard jobs evidence, TPI asks the Board to strike pages 5-18 of CSXT's

⁴ Compare TPI Supp. Op. at III-C-15 to 18 with CSXT Supp. Op. at 17, 39-40, and 42.

⁵ See CSXT Supp. Reply at 13 (notes 38 and 39).

Supplemental Reply. However, if the Board denies TPI's motion to strike, TPI requests, in the alternative, that the Board grant it the opportunity to reply to that evidence within 15 days after the Board serves its decision in response to this motion. TPI also asks that the Board not make any changes to the due date for final briefs, which currently is December 14, 2015, so as not to cause any further delay to this proceeding.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that this 25th day of November 2015, I served a copy of the foregoing upon counsel for defendant CSXT via electronic mail and first class mail at the address below:

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