

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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CONSUMERS ENERGY COMPANY

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

Docket No. NOR 42142

**CSX TRANSPORTATION, INC.'S REPLY TO
COMPLAINANT'S FIRST MOTION TO COMPEL**

The Motion to Compel filed by Consumers Energy Company (“Consumers”)¹ is unnecessary, premature, and meritless. Consumers filed its Motion without making any effort to discuss any of the claims in that motion with CSX Transportation, Inc. (“CSXT”). Consumers’ inexplicable decision to treat a motion to compel as a first resort for resolving discovery issues rather than a last resort is out of step with the Board’s practice. Consumers’ Motion should be dismissed for that reason alone. Indeed, nearly every claim raised in the Motion is predicated on a misunderstanding or misstatement of CSXT’s position. Most of these issues could have been resolved readily had Consumers discussed its alleged concerns with CSXT before racing to file a motion to compel.

In any event, Consumers’ Motion is utterly meritless. Its claims consist of trumped-up allegations that CSXT is somehow not providing information that CSXT instead made clear it

¹ See Complainant’s First Motion to Compel Discovery, *Consumers Energy Co. v. CSX Transp., Inc.*, STB Docket No. NOR 42142 (filed Mar. 16, 2015) (“Motion”).

would produce; glaring mischaracterizations of Consumers’ own discovery requests; and demands for information with no conceivable relevance to any issue in this case. First, Consumers claims that the discovery cutoff date proposed by CSXT is “arbitrary,” but fails to explain either why that date is arbitrary or to propose any alternative. Second, Consumers’ Motion effectively replaces several of the overbroad discovery requests to which CSXT objected with much narrower requests to which CSXT will respond. Third, Consumers’ claim that CSXT is refusing to search for certain requested traffic data is based on an utterly unreasonable reading of CSXT’s discovery responses, which said no such thing. Fourth, Consumers misrepresents its own discovery requests to “produce . . . computer programs”² with the jaw-dropping assertion that “a plain reading of the Requests show that they do not seek the production of computer models or software.” Motion at 10. Fifth, Consumers’ claims that CSXT is flatly objecting to production of SSI are based on a similarly obtuse misreading of CSXT’s discovery responses. Sixth, while CSXT continues to disagree with Consumers’ claims that certain of its discovery requests for information on CSXT affiliates are appropriate, CSXT will not object to production of responsive documents within its control.

I. BACKGROUND

This case had barely begun before Consumers filed its Motion to Compel. Consumers filed its Complaint on January 13, 2015 after CSXT and Consumers were unable to agree on terms for a renewed contract. The parties have engaged in mediation, including a joint mediation session on March 13, 2015, but they have not yet been able to resolve their differences.

² See Consumers Request for Production 8; *see also* Consumers Request for Production 11 (“provide all documents, including computer programs”); Consumers Request for Production 17 (“produce copies of all computer programs”); Consumers Request for Production 42(e) (“produce . . . any and all computer programs”).

On February 4, 2015, Consumers filed its first set of discovery requests, which included two requests for admission, 13 interrogatories, and 133 requests for production. The vast majority of those requests for production include multiple subparts—Request for Production 10 alone consists of 53 separate subparts—bringing the total number of discovery requests including subparts to 620. While some of Consumers’ requests are similar to requests made by complainants in prior Stand-Alone Cost (“SAC”) cases, a significant number ask for information that has never before been requested in rate reasonableness cases involving CSXT.

CSXT filed written Objections and Responses to Consumers’ discovery requests on March 6, 2014, in which CSXT indicated that it would begin to produce documents to Consumers as soon as the Board entered a protective order. CSXT began its rolling document production on March 19 (the day after the Board entered a protective order for this case).

Consumers filed its Motion on March 16, 2015. Before filing that Motion, Consumers did not indicate to CSXT that Consumers had any concerns or questions about CSXT’s discovery responses, and Consumers made no effort whatsoever to meet and confer with CSXT about any of the issues raised in this Motion.

II. THE MOTION SHOULD BE DISMISSED BECAUSE OF CONSUMERS’ FAILURE TO MEET AND CONFER.

Consumers’ decision to file the Motion without making the slightest effort to resolve any of its stated discovery concerns with CSXT is ample grounds for the Board to deny it. The Board only issues orders compelling production when the moving party demonstrates the need for such an order. Consumers plainly cannot demonstrate a need when it failed to even attempt to discuss its concerns with CSXT before filing a motion. Moreover, the discussion below in Section III shows that most of Consumers’ claims are predicated on misunderstandings and

misstatements. Most and perhaps all of these claims could have been resolved or narrowed if Consumers had chosen to discuss them with CSXT before filing its Motion.

Federal courts impose a formal requirement for parties to meet and confer before filing motions to compel. *See* Fed. R. Civ. Proc. 37(a)(1).³ To date, the Board has not needed such a requirement, for practitioners before the Board typically attempt to resolve discovery disputes amongst themselves before burdening the Board with a motion to compel.⁴ But even without a formal regulatory “meet and confer” requirement, the Board has made clear that motions to compel will only be granted when a moving party can “demonstrate a real, practical need” for an order compelling production of the information requested. *Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121, at 2 (served Nov. 24, 2010) (“*TPI/CSXT*”). At a bare minimum, this standard requires a complainant to demonstrate that it requires an order from the Board because it cannot otherwise resolve its disputes. Consumers cannot possibly demonstrate such a “real, practical need,” for it did not even attempt to discuss its alleged discovery concerns with CSXT before demanding that the Board issue an order compelling production.

Consumers does not explain why it failed to meet and confer with CSXT before filing its motion, and it is not clear what justification it may claim for not doing so.⁵ What is clear,

³ *See also, e.g., Parsi v. Daiouleslam*, 778 F.3d 116, 126 (D.C. Cir 2015) (“Under Rule 37(a), a party can move for an order to compel disclosure or discovery after first attempting in good faith to confer with its opponent.”).

⁴ While the Board does not have an explicit meet and confer requirement, there is a preference for such a procedure. *See, e.g., AEP Texas North Co. v. BNSF Ry. Co.*, STB Docket No. 41191 (Sub-No. 1), at 3 (served Nov. 22, 2006) (“Following the normal practice, parties are required to meet and confer on any discovery requests, and a discovery conference with staff may be held (if necessary) to discuss any discovery disputes that might arise.”).

⁵ The fact that Consumers filed its Motion ten days after CSXT served its Discovery Responses suggests that the timing of the Motion may have been motivated by 49 C.F.R. § 1114.31(a). That regulation provides no excuse for Consumers’ failure to meet and confer. First, even if Consumers were bound by § 1114.31(a) to file a motion to compel within ten days, that provides no excuse for Consumers’ failure to meet and confer or to ask CSXT to waive the time limits of

however, is that meeting and conferring is a historically effective way for parties to settle discovery differences (or at least to narrow the issues that the Board must ultimately decide).⁶

And as the following discussion demonstrates, many of the issues in this Motion likely never would have been brought to the Board had Consumers contacted CSXT to discuss them in advance. The Board should not approve Consumers' break with this established practice by reaching the merits of this Motion, and instead should deny the Motion and instruct Consumers to meet and confer with CSXT before filing any future motions to compel. CSXT notes that Consumers chose to title this Motion its "First" Motion to Compel, suggesting that Consumers is anticipating filing more. This is all the more reason for the Board to make clear that parties should attempt to resolve discovery disputes themselves before involving the Board.

III. CONSUMERS' MOTION SHOULD BE DENIED FOR EACH RESPONSE IT SEEKS TO COMPEL.

A. December 31, 2014 Is a Reasonable Cutoff Date for Gathering Discovery Data.

Consumers first complains that CSXT "arbitrarily" established a discovery cutoff date of December 31, 2014. Motion at 5. But Consumers does not deny the need for a discovery cutoff, does not suggest a date that it thinks would be more appropriate, and does not explain why December 31, 2014 is an unreasonable date. There is nothing "arbitrary" about setting an end

§ 1114.31(a) until the parties could meet and confer. Second, virtually none of the issues raised in Consumers' motion are implicated by § 1114.31(a)'s time limits, which do not apply to requests for production and only apply to interrogatories in the narrow circumstance where a party "fails to answer or gives evasive or incomplete answers to written interrogatories."

⁶ The Board recently admonished a party who included sweeping discovery requests in a motion to compel without first narrowing those requests to what it was ultimately willing to accept, thereby increasing the burden on the Board. The Board cautioned that "[p]arties that fail to heed this warning" to "reduce the burden of discovery" may "run the future risk that the Board will deny the motion to compel." *Appl. of the Nat'l R.R. Passenger Corp. under 49 U.S.C. § 24308(a)—Canadian Nat'l Ry. Co.*, STB Docket No. FD 35743, at 10-11 (served Sept. 23, 2014).

point for data gathering that is virtually contemporaneous with the filing of Consumers' complaint. Consumers' failure either to explain why CSXT's date is unreasonable or to propose any alternative requires denial of its Motion on this point.

Consumers has posed 620 different discovery requests, which will require scores of employees from across CSXT to gather historical data from a variety of sources. It is therefore essential to establish a date range for that historical data collection, both to guide the discovery effort and to ensure that the parties and the Board have a uniform data set for the SAC analysis. As Consumers admits, discovery cutoff dates are "appropriate" in SAC cases and essential to create "a defined record." Motion at 5.

In this case, Consumers' discovery requests did not establish any cutoff date for its discovery requests other than "the present." Because the data-intensive discovery production that CSXT is undertaking requires an actual defined end date—not the constantly-changing "present"—CSXT's responses proposed that it produce data for "the period from 2012 to 2014." CSXT Discovery Responses at 7. December 31, 2014 would thus be the discovery cutoff date. Such a cutoff date has the benefits of both being nearly contemporaneous with the complaint and corresponding to the end of the 2014 annual reporting period.

Consumers' claims that December 31, 2014 is "arbitrary" are therefore nonsense; December 31, 2014 is the most logical cutoff date in light of the timing of Consumers' complaint. Moreover, Consumers never explains why it thinks December 31, 2014 is an arbitrary or unreasonable cut-off date, and it never identifies any other date as being more appropriate. Nor has Consumers explained what "real, practical need"⁷ it has for information during the indeterminate period between December 31, 2014 and whatever cutoff date it thinks is

⁷ *TPI/CSXT* at 2.

more appropriate. Consumers has thus failed to meet its burden, and its Motion on this point should be denied.

B. Consumers’ Motion Substantially Narrows the Scope of Interrogatories 1 and 2, and CSXT Will Respond to the Narrowed Interrogatories.

Consumers’ Motion fails to respond to CSXT’s fundamental objection to Consumer Interrogatories 1 and 2, and instead argues that one subpart of those interrogatories constitutes an appropriate request for “historic information.” Motion at 6. CSXT will respond to that narrowed request.

Consumers Interrogatories 1 and 2 asked CSXT to “describe in detail” its arguments relating to the existence of competition for the issue movement. CSXT objected that such interrogatories effectively would require CSXT to detail its litigation position on market dominance prior to the submission of evidence. At the same time, CSXT indicated that it would produce “studies, analyses, or other documents” related to intramodal and/or intermodal competition for the issue movement. *See* CSXT Response to Consumers’ Request for Production 2. CSXT’s responses thus made clear that it would be producing historic information in CSXT’s possession related to competitive options for the Consumers movement. But Consumers is not entitled to a “detailed” preview of whatever arguments CSXT might offer in its market dominance evidence—any more than CSXT would be entitled to pose interrogatories asking Consumers to detail its proposed SARR network or traffic group.⁸

Consumers’ Motion does not contest that the essential thrust of Interrogatories 1 and 2 was for CSXT to “detail” its future market dominance evidence, and Consumers does not defend

⁸ *See, e.g., Capitol Materials Inc. – Pet. for Declaratory Order – Certain Rates and Practices of Norfolk S. Ry. Co.*, STB Docket No. 42068, at 4 (served Apr. 19, 2002) (denying a motion to compel responses to discovery requests that were “designed to identify and limit the scope of [the] case-in-chief in advance of [the] opening statement”).

these aspects of its interrogatories. Instead, Consumers exclusively focuses on one subpart of its interrogatories asking for information on “rate reductions or other consideration . . . offered . . . in response to threats of alleged transportation competition,” and Consumers asserts that it is only interested in “historic information” on this point. Motion at 6. CSXT does not object to producing historic, nonprivileged information in response to this narrowed interrogatory. Consumers’ Motion on this point is therefore moot.

C. Request for Production No. 1 Seeks Information That Is Irrelevant, and the Only Relevant Information that Consumers Claims that RFP Reaches Will Be Produced In Response to Other Requests.

Consumers next attempts to justify a plainly overbroad request for documents on CSXT’s internal ratemaking process on the grounds that such documents might include historic information on competitive options for the issue movement. However, CSXT has already agreed to produce all documents related to competitive options for the issue movement, and there is no justification for Consumers’ attempted foray into CSXT’s internal ratesetting decisions.

Consumers Request for Production 1 asked CSXT to “produce all documents related to establishment of the Challenged Rates, including but not limited to all documents used and/or relied upon in determining any formula or other methodology used for calculating the rates.” As such, the Request explicitly seeks discovery on CSXT’s internal ratemaking process. As CSXT explained in its Objection, such information is not relevant, because how a railroad arrived at its rates is irrelevant to whether those rates are reasonable under the *Coal Rate Guidelines*. Consumers does not dispute this point. Instead, Consumers claims that it is only interested in “historic information” related to “market dominance” that may have been considered by CSXT in the ratemaking process. Motion at 6-7.

There is no merit to Consumers’ claim that Request for Production 1 is relevant because it encompasses historic information on CSXT’s consideration of competitive options. As

discussed above, in response to Request for Production 2, CSXT has already agreed to produce historic, nonprivileged documents relating to transportation alternatives to the issue movement. Request for Production 1 thus does not reach any information relevant to market dominance that would not be covered by CSXT's response to Request for Production 2. Because Consumers has not given any justification for its request for ratemaking documents that do not relate to competitive options, its Motion with respect to Request for Production 1 should be denied.

D. Consumers' Claim That CSXT Is Limiting Its Search For Traffic and Revenue Data Is Nonsense.

Consumers' claim that CSXT is wrongly refusing to search all available databases for responsive traffic and revenue data is utter nonsense, and yet another consequence of Consumers' decision to file a motion to compel without even mentioning its purported concerns to CSXT.

Consumers' requests for data on each individual CSXT movement (Requests for Production 8, 9, and 10) include a number of subparts seeking additional detail that CSXT has not encountered in prior SAC cases. During CSXT's initial evaluation of Consumers' discovery requests, it determined that some of the new requested data details may not be available. While CSXT is still evaluating and preparing traffic data for production, it chose to alert Consumers to the potential unavailability of these data details.

Consumers' assertion that these warnings of data unavailability are the result of a CSXT decision to "limit[] the production or search to specific databases" is meritless. Motion at 8. Simply put, telling Consumers that certain fields may not be available in CSXT's "traffic and revenue data," "car movement data," and "train movement data" was not some subterfuge indicating that the requested fields were maintained in some other database. CSXT meant exactly what it said: some portion of the 148 subparts of Requests for Production 8, 9, and 10

might not be available. CSXT will make every effort to identify responsive information from whatever source may be available, and there is no basis for Consumers' wild allegations to the contrary.

E. Consumers Mischaracterizes Its Discovery Requests for Computer Models.

A significant number of Consumers' discovery requests ask CSXT to produce computer programs or software. CSXT objected to these requests both because a request for computer software is not reasonably calculated to lead to the discovery of admissible evidence and because CSXT's software programs typically are subject to licensing agreements that would restrict CSXT from sharing the license with Consumers.

Consumers does not contest either point. Instead, it claims that "a plain reading of the Requests show that they do not seek the production of computer models or software, only the *identification* of the computer models and software used by CSXT." Motion at 10. This is simply not true, as the examples below demonstrate:

- **Consumers Request for Production 8:** "[P]roduce the databases, data warehouses and computer programs";
- **Consumers Request for Production 11:** "[P]rovide all documents, including computer programs";
- **Consumers Request for Production 17:** "[P]roduce copies of all computer programs";
- **Consumers Request for Production 42:** "[P]roduce . . . any and all computer programs."

None of Consumers' requests for production of software merely asks for identification (and indeed no request for production could reasonably be read as a mere request to "identify" responsive information).⁹ Consumers' Motion on this point is based on a bald mischaracterization of its own discovery requests and should be denied.

⁹ The one exception is Interrogatory 9, to which CSXT will respond by identifying the requested program (but not by producing it).

F. Consumers Misstates CSXT's Position on Sensitive Security Information ("SSI").

Consumers' claim that CSXT has flatly "objected to providing . . . SSI data" is wrong and based on another plain misreading of CSXT's discovery responses. Motion at 4. CSXT's responses made clear that it will produce SSI data to the extent that such production is authorized by law. Consumers' ill-conceived and unnecessary Motion on this point should be denied.

CSXT's position on the disclosure of SSI data is clearly stated in General Objection 9 (which Consumers tellingly fails to cite in its Motion). In General Objection 9 CSXT indicated that "CSXT will only produce SSI information to the extent authorized by law and in the manner authorized by law, including the procedures set forth in FRA SSI Order 2011-06-FRA-01." See CSXT Discovery Responses at 3. CSXT has therefore made clear that it will produce SSI information to the extent such production is authorized by law. For example, CSXT will produce "rail traffic information" that FRA has designated SSI pursuant to a July 29, 2011 FRA Memorandum authorizing "[d]isclosure of the rail traffic information determined to be SSI under DOT's SSI Order 2011-06-FRA-01 to parties, their legal counsel, and their technical consultants who have a need to know in order to advocate a case before the STB."¹⁰

It is important to note, however, that FRA has not authorized disclosure of all SSI information that potentially could be requested in rate cases. The aforementioned July 29, 2011 FRA memorandum held only that certain "rail traffic information" could be shared with parties to STB proceedings—not that all SSI was freely discoverable. Some of Consumers' discovery requests potentially reach into SSI that is not covered by existing FRA orders authorizing disclosure, and CSXT remains legally prohibited from producing such SSI. CSXT believes that

¹⁰ Memorandum by FRA Administrator Joseph C. Szabo, "Authorization to Share Sensitive Security Information (SSI) With Complainants and Other Parties Involved in Surface Transportation Board (STB) Administrative Proceedings," at 2 (July 29, 2011).

any potentially responsive SSI is of such marginal relevance to the issues in this case that the parties will be able to agree that production of SSI is not necessary (or, in other words, that non-SSI information will fully satisfy Consumers' request). If the parties cannot reach such an agreement, then Consumers may seek a ruling from the responsible agencies seeking authorization for disclosure.¹¹

G. CSXT Will Produce Responsive Information In Its Possession For Requests for Production 115 and 116

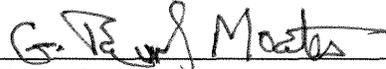
Finally, Consumers seeks to compel production of documents in response to Requests for Production 115 and 116. Request for Production 115 asks for documents sufficient to show the amount of dividends from affiliated companies reported in CSXT's R-1, and Request for Production 116 asks for certain financial statements from the Belt Railway Company and from TTX. Both of these requests are unprecedented in SAC cases, and CSXT objected to them because it was not clear how they relate to any potentially relevant issue. Consumers claims in its Motion that these requests are potentially relevant because its Stand-Alone Cost Railroad may operate over or use services from a CSXT affiliate. While CSXT does not concur with Consumers' arguments, in the spirit of compromise CSXT is willing to produce documents, in response to Request for Production 115, to the extent they exist. CSXT also withdraws its relevance objection with respect to Request for Production 116 and agrees to produce the requested financial reports of the Belt Railway Company and TTX to the extent that such documents are within CSXT's control and to the extent that CSXT has permission to produce them.

¹¹ As the Board knows, a similar process was used to resolve an SSI issue in *E.I. du Pont de Nemours & Co. v. Norfolk Southern Railway Co.*, STB Docket No. NOR 42125, and *South Miss. Electric Power Assn v. Norfolk Southern Railway Co.*, STB Docket No. NOR 42128.

IV. CONCLUSION.

For the reasons stated above, Consumers's Motion to Compel should be denied in its entirety.

Respectfully submitted,



G. Paul Moates
Raymond A. Atkins
Paul A. Hemmersbaugh
Matthew J. Warren
Hanna M. Chouest
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

Peter J. Shudtz
Paul R. Hitchcock
John P. Patelli
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

Counsel to CSX Transportation, Inc.

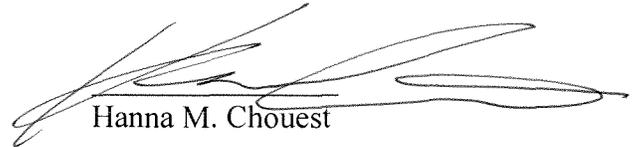
Dated: March 26, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 2015, I caused a copy of CSX Transportation, Inc.'s foregoing Reply in Opposition to Consumers Energy Company's First Motion to Compel to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery:

Catherine M. Reynolds
Senior Vice President and General Counsel
Kimberly C. Wilson
Supervisory Assistant General Counsel
Consumers Energy Company
One Energy Plaza
Jackson, Michigan 49201

Kelvin J. Dowd
Daniel M. Jaffe
Christopher A. Mills
Slover & Loftus LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036



Hanna M. Chouest