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evidence and new argument can be perfectly proper on rebuttal, and are often accepted, as long as it is responsive to issues raised on reply. For example, in a recent case, the Board denied a motion to strike complainant Western Fuels' fuel hedging argument, even though fuel hedging was a new argument, because it responded to BNSF's reply evidence. Western Fuels Association, Inc. and Basin Electric Power Cooperative v. BNSF Railway Company, STB Docket No. 42088, slip op. at 5-6 (served Sept. 10, 2007) ("WFA"). Moreover, the rule regarding rebuttal statements "has been broadly interpreted and does not bar the introduction in rebuttal of new, but responsive, evidence and argument." Potomac Electric Power Company v. CSX Transportation, Inc., STB Docket No. 41989, slip op. at 3 (served Nov. 24, 1997) ("PEPCO").¹

II. TPI's Discussion of DMIR and the Bottleneck Decisions Was Proper Rebuttal Evidence.

CSXT objects to TPI's Rebuttal Evidence because therein TPI showed that some of the transportation alternatives proposed by CSXT in its Reply Evidence did not constitute true competition for the issue movement under controlling law. Once stripped of its rhetorical flourish, the Motion reveals that CSXT is upset that it did not conduct its own legal research to ensure that its own litigation position and evidence met all applicable governing legal standards.

¹ CSXT also cites to Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company – Control – Chicago and North Western Transportation Company and Chicago and North Western Railroad Company, ICC Docket No. 32133, Decision No. 20, slip op. at 15-16 (served Sept. 12, 1994) ("UP-Control-CNW"), to show that a "theory not previously advocated" should be stricken. Motion at 9. That proceeding, however, was in a very different procedural posture from TPI's case, which is a critical distinction. It concerned acquisition of the Chicago and North Western ("CNW") by Union Pacific Railroad ("UP"). Responsive applications seeking conditions were filed by Southern Pacific ("SP") and Chicago, Central & Pacific ("CCP"), to which UP/CNW replied. Separately, SP and CCP had filed replies to the control application of UP and CNW. After SP and CCP filed rebuttals in support of their responsive applications, UP/CNW filed a motion to strike. In considering the motion to strike, the dispositive issue was whether the rebuttal evidence filings of SP and CCP in support of their responsive applications improperly addressed the primary control application filed by UP/CNW, rather than the UP/CNW reply to the responsive applications. Id. at 9 ("SP cannot put on its opposition to the primary application now."); Id. at 11 (evidence stricken where UP and CNW "have the right to close the record"). Id. at 7, 8, 10-13, 15-20, and 25. The TPI case does not involve a similar confluence between two related and simultaneous proceedings, where TPI has used its rebuttal in one proceeding to respond to a different proceeding in an attempt to deprive CSXT of its right to close the record in that proceeding.

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If CSXT believed that effective competition exists in any particular lane(s), then it should have refuted TPI's evidence under governing law. CSXT has not done this, and incredibly blames TPI for its failure to do so. The fact that CSXT's evidence has failed is not TPI's responsibility. TPI's citation to Board precedent and federal statutes was entirely in response to the transportation alternatives proposed by CSXT. Hence, TPI's rebuttal was permissible.

A. TPI responded directly to CSXT's Reply Evidence.

In its Rebuttal Evidence, TPI did not alter the basic configuration of its evidence or offer new facts, studies, analyses, or other types of new evidence. Instead, TPI cited to 49 USC § 10707, DMIR,² and the Bottleneck Decisions³ in direct response to specific transportation alternatives proposed by CSXT. See TPI Reb. Ev. at II-B-78-89. TPI showed that those alternatives do not comport with this existing law. In a very detailed fashion, TPI described the specific alternatives proposed by CSXT, and exactly how each alternative failed to meet the existing legal standards. This is permissible rebuttal. See, e.g., PEPCO, slip op. at 3; AEP Texas North Company v. BNSF Railway Company, STB Docket No. 41191 (Sub-No. 1), slip op. at 31 and 37 (served Sept. 10, 2007) ("AEP Texas"); WFA, slip op. at 5-6; South Orient Railroad Company, Ltd. – Abandonment and Discontinuance of Trackage Rights – Between San Angelo and Presidio, TX, STB Docket No. AB-545, slip op. at 2 (served Mar. 26, 1999).

Whether or not TPI could or should have anticipated that CSXT would propose transportation alternatives in violation of controlling law is not the relevant question. TPI was not required to anticipate all possible transportation alternatives that CSXT might include in its Reply. PEPCO, slip op. at 3 (complainant is not required "to anticipate in its opening evidence

² Minnesota Power, Inc. v. Duluth, Missabe & Iron Range Railway Company, 4 STB 288 (1999).

³ Central Power & Light Company, et al. v. Southern Pacific Transportation Company, et al., 1 STB 1059 (1996) ("Bottleneck I"); pet. for clarification, 2 STB 235 (1997) ("Bottleneck II"); aff'd, MidAmerican Energy Company et al. v. Surface Transportation Board, 169 F.3d 1099 (8th Cir. 1999). The Bottleneck Decisions rely heavily on 49 USC § 10709.

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every possible defense or criticism of the SAC model”). The proper question is whether TPI’s Rebuttal Evidence was new evidence in support of its case-in-chief or a response to issues raised by CSXT’s Reply Evidence. *Id.* (“The Rules of Practice limit ‘[r]ebuttal statements...to issues raised in the reply statements to which they are directed.’ 49 CFR 1112.6. This standard has been broadly interpreted and does not bar the introduction in rebuttal of new, but responsive, evidence and argument.”). Indeed, CSXT itself has previously “conceded” that rebuttal is proper where it merely addresses the reply evidence, as opposed to bolstering the opening evidence. CSX Corporation and CSX Transportation, Inc. Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operating Leases/Agreements – Conrail, Inc. and Consolidated Rail Corporation, 3 STB 955, 958 (n. 8) (1998).

This is not a situation where TPI seeks to “significantly revise its case-in-chief.” Duke Energy Corporation v. CSX Transportation, Inc., STB Docket No. 42070, slip op. at 4 (served Mar. 25, 2003). TPI has not altered the facts or argument in its Opening Evidence. Here, TPI’s market dominance arguments do not rise or fall based upon the proper application of DMIR and the Bottleneck Decisions. TPI’s core evidence and argument has focused upon multiple other factors, including contractual requirements, { [REDACTED] }⁴ customer needs, the use of rail cars for storage, high volumes, additional personnel costs, and product quality and integrity among others. Rather, it is CSXT’s proposed alternatives purportedly showing comparable rates to rail transportation that are so impacted, and it is that reply evidence to which TPI properly has directed the contested rebuttal evidence.

The assertion that TPI’s Rebuttal Evidence included “new” argument also is undermined by the fact that CSXT’s Reply Evidence reveals that CSXT itself knew, or at least suspected, that

⁴ Text in single brackets {...} is designated “CONFIDENTIAL” and text in double brackets {...} is designated “HIGHLY CONFIDENTIAL” pursuant to the Protective Order entered by the Board in this proceeding.

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many of the transportation alternatives it proposed were improper. At footnote 81, on page II-68 of its Reply, CSXT unequivocally recognized the danger of geographic competition by using an origin-destination pair different than that covered by the challenged tariff. CSXT claimed that its “gateway shift does not constitute geographic competition” because the “true origin” remained the same. CSXT Reply at II-68 (n. 81). See also CSXT Reply at II-58. This was the exact same argument rejected by the Board in DMIR:

[T]he fact that the coal MPI receives at Laskin comes from the Montana and Wyoming mines served by BNSF is irrelevant. Because the transportation to which the rate at issue applies is limited to the movement between Keenan and Laskin, transportation alternatives involving service to or from other points would constitute geographic competition.

4 STB at 292 (citations omitted). Given CSXT’s acknowledgement of the issue on Reply, the argument made by TPI (and challenged by CSXT in its Motion) cannot be considered “new.”⁵ Thus, TPI’s discussion of DMIR was a perfectly proper response on rebuttal.

CSXT’s failure to identify alternatives that comport with controlling law for some of the issue movements is indicative of the fact that CSXT could not find effective alternatives and decided to look beyond the bounds of controlling precedent in the hope that TPI would not notice. Now that TPI has noticed, CSXT feigns outrage and surprise.

B. TPI’s Position Has Been Consistent Throughout this Proceeding.

CSXT expresses great consternation that, in the Opening Evidence, TPI evaluated the cost and competitiveness of certain transportation alternatives that, like many alternatives proposed by CSXT, are not true alternatives under DMIR, the Bottleneck Decisions, and 49 USC §§ 10707 and 10709. See, e.g., CSXT Motion at 5-10. CSXT misses the point. TPI’s consistent argument throughout this entire proceeding has been that CSXT possesses market dominance

⁵ Furthermore, CSXT witness Benton Fisher participated in the DMIR case and submitted testimony as an expert witness. See CSXT Reply at IV-5.

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over the issue movements, and that no effective competitive alternatives exist, regardless of whether the Board evaluates just the CSXT segment or the entire movement.⁶ No new market dominance evidence was provided on rebuttal to support TPI's market dominance claims. Rather, TPI cited to legal standards showing why CSXT's Reply Evidence fails to defeat market dominance. TPI Reb. Ev. at II-B-78-89.

The fact that some transportation alternatives considered, and rejected, by TPI in its Opening Evidence also did not comport with the same law that TPI cited in Rebuttal does not make TPI's Rebuttal improper or inconsistent. TPI *agrees* with CSXT's assertion that alternative transportation solely for CSXT's segment of a joint line movement often is less efficient than alternatives for either the entire movement or intermodal alternatives using different interchange points from the issue movement. CSXT Motion at 12. But that is the law under DMIR and the Bottleneck Decisions. Nevertheless, when making direct rate comparisons between CSXT's rail transportation and alternative transportation options, TPI compared the most efficient, and thus lowest cost, alternatives regardless if they conformed to DMIR and the Bottleneck Decisions out of an abundance of caution. By evaluating the cost of the most efficient transportation alternatives in its Opening Evidence, TPI took a very conservative approach in the presentation of its market dominance evidence because, if the more efficient alternative does not provide effective competition, neither can a less efficient alternative that does comport with the DMIR and Bottleneck precedents.

By being conservative, TPI ensured that its Opening Evidence would be relevant regardless whether the Board follows DMIR and the Bottleneck Decisions. In contrast, CSXT's

⁶ TPI presented opening evidence on a wide variety of factors besides transportation costs, including: contractual requirements, {██████████} customer needs, use of rail cars for storage, high-volume lanes, personnel costs, and product quality and integrity.

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failure to evaluate alternative transportation options that conform to those decisions has exposed it to the consequences of that precedent.

C. CSXT Fails to Differentiate its Reply Evidence from the Inappropriate Alternatives in DMIR.

In a further attempt to salvage its market dominance evidence, CSXT also argues the merits of DMIR, which of course destroys the claim (Motion at 9-10) that it has been denied the opportunity to respond to TPI's allegedly improper Rebuttal Evidence. CSXT claims that the prohibited transportation alternatives in DMIR are different from the transportation cited by CSXT in its Reply Evidence. As part of this futile effort, CSXT asserts that (1) the alternative considered in DMIR was "hypothetical", "customized", and "exceptional", while the alternatives proposed by CSXT are "similar" to actual transportation used by TPI; (2) the transportation considered in DMIR was improper geographic competition, but the alternatives proposed by CSXT are similar or identical to transportation used by TPI, and represent "one continuous movement"; and (3) applying the legal standard would foreclose CSXT's ability to propose the most efficient alternative transportation. CSXT Motion at 10-12. None of these reasons warrants ignoring the governing legal standard for market dominance.

First, it is irrelevant that CSXT may have proposed transportation alternatives similar to real-world transportation used by TPI. The key point under the statute, as even CSXT appears to recognize, is whether there is "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." 49 USC § 10707(a); CSXT Motion at 13 (n. 10). Whether or not TPI has used a particular transportation method cannot demonstrate effective competition if, as is true with many of the alternatives posed by CSXT in this case, the method concerns an origin-destination pair different from "the transportation to which [the challenged CSXT rate] applies." DMIR, 4 STB at 292; Market

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Dominance Determinations – Product and Geographic Competition, 3 STB 937, 946 and 949 (1998).

Second, CSXT is flatly wrong in its suggestion that the alternative conceived in DMIR was not “one continuous movement.” In DMIR, the Board plainly stated that the proposed alternative involved the utility “ship[ping] its Laskin-bound coal to Boswell via BNSF and transload[ing] the coal there for subsequent truck transport from Boswell to Laskin.” 4 STB at 291. The coal still originated in the Powder River Basin, with a simple transload occurring at Boswell.⁷ The alternative proposed by DMIR is no different from many of the alternatives proposed by CSXT. In DMIR, the defendant railroad handled only one part of a joint-line rail movement that also involved BNSF under contract. Similarly, all of the Exhibit B lanes in the TPI Complaint are also joint-line movements, with the non-CSXT portion under contract. Just like DMIR proposed intermodal transportation (with transloading at a location different than the rail interchange) to replace both railroads in a joint-line movement, so too has CSXT proposed similar transportation to replace a joint-line movement. Thus, the alternative transportation considered in DMIR is squarely on all fours with CSXT’s proposed alternatives for TPI’s issue movements.

Third, CSXT complains that application of governing law, as explained in DMIR and elsewhere, forecloses the most competitive and most efficient transportation alternatives. CSXT Motion at 11-12. On this point, TPI agrees. But, as explained in DMIR, the Bottleneck Decisions, and 49 USC §§ 10707 and 10709, this result is required by the governing law. Consequently, there may not be any efficient or feasible alternatives for the issue movements to which the challenged tariff rates apply.

⁷ In the alternative proposed by the defendant railroad in DMIR, the coal did not originate at Boswell; indeed, it could not originate there because Boswell was a power plant, not a coal mine.

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Of particular note in this final point, CSXT recognizes that many of its proposed alternatives, such as double-transloads, are “less efficient and less competitive with all-rail service than a one-transload option.” CSXT Motion at 12. With its Motion, therefore, CSXT has apparently abandoned its prior assertion that double and triple-transloads are competitive with transportation under the challenged tariff. See, e.g., CSXT Reply at II-51 and 57-58. See also description of CSXT-proposed alternatives in TPI Rebuttal Evidence at II-B-84-89. Taken to its inevitable conclusion, then, CSXT’s Motion represents CSXT’s view that the double and triple-transload alternatives previously proposed by CSXT (and described in the TPI Rebuttal Evidence at II-B-84-89) are less efficient than, and cannot be competitive with, transportation provided using the CSXT tariff. See TPI Reb. Ev. at II-B-108-111.

Although TPI agrees with CSXT that it is often less efficient to try to devise alternative transportation for joint-line movements with a transload at the interchange between CSXT tariff service and another railroad’s contract service (rather than a transload at a more convenient location), this is the law.⁸ The Board’s interpretation of 49 USC §§ 10707 and 10709 in the Bottleneck Decisions and DMIR requires that alternative transportation for such a joint-line movement include a transload at the interchange location. Accepting CSXT’s view of the permissible alternatives requires overturning not just DMIR but also the Bottleneck Decisions. Given that the Bottleneck Decisions were judicially affirmed⁹ and rely directly upon the Board’s interpretation of 49 USC § 10707, the Board would have to provide a “reasoned analysis” to completely revamp its implementation now. Rust v. Sullivan, 500 U.S. 173, 186-187 (1991); Borough of Columbia v. Surface Transportation Board, 342 F.3d 222, 229 (3rd Cir. 2003) (“If an

⁸ As expressed in the Motion, CSXT disagrees with this governing law, but such a viewpoint goes to the weight of the precedent, not its admissibility. Hi Tech Trans, LLC – Petition for Declaratory Order – Hudson County, NJ, STB Docket No. 34192, slip op. at 2 (served Nov. 20, 2002).

⁹ See MidAmerican Energy Company et al. v. Surface Transportation Board, 169 F.3d 1099 (8th Cir. 1999).

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agency departs from its own precedent without a reasoned explanation, the agency may be said to have acted arbitrarily and capriciously.”); Cross-Sound Ferry Services, Inc. v. Interstate Commerce Commission, 873 F.2d 395, 399-401 (D.C. Cir. 1989). Where agency action results in a policy change, the agency must “display awareness that it *is* changing its position. An agency may not...depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.” Federal Communications Commission v. Fox Television Stations, Inc., 556 U.S. ___, 129 S. Ct. 1800, 1811 (2009) (italics in original). “[G]ood reasons” must be shown for the new policy, and an even “more detailed justification” may be required when the “prior policy has engendered serious reliance interests.” Id.

D. Governing Law Applies Regardless Whether It Has Been Cited by the Parties.

Whether or not TPI cited to DMIR in its Opening Evidence, the Board still must consider the argument and the cited authorities because they concern Board jurisdiction. Under 49 USC § 10709, the Board does not have jurisdiction over rail transportation pursuant to a contract. Rail Transportation Contracts Under 49 U.S.C. 10709, Ex Parte 676, slip op. at 2 (served Jan. 22, 2010) (“Congress expressly removed all matters and disputes arising from rail transportation contracts from the Board’s jurisdiction in section 10709(c)”). The jurisdictional bar applies not just to the rate reasonableness phase of a rate case, but for all “rate complaint purposes.” DMIR, 4 STB at 293 (“we will not consider the movement prior to the interchange point for rate complaint purposes because that movement is governed by a rail transportation contract and is thus beyond our regulatory purview under 49 U.S.C. 10709(c)”). This sentiment was also noted in Bottleneck I, 1 STB at 1074:

Plainly we are without rate reasonableness jurisdiction over the rates of any rail transportation provided by contract. Regulation of the entire through route – even if the contract rate were simply treated as a given that cannot be changed – would indirectly result

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in review of the contract rate, and Congress has declared the rates for that portion of the through-route service to be beyond our reasonableness jurisdiction.

Therefore, the Board can only evaluate market dominance within the scope of its statutory jurisdiction, which does not include portions of a through movement that are under contract.

Because the Board's jurisdiction is at issue, it may not disregard the argument.

“[J]urisdiction cannot arise from the absence of objection.” Columbia Gas Transmission Corporation v. FERC, 404 F.3d 459, 463 (D.C. Cir. 2005). See also United States v. Cotton, 535 U.S. 625, 630 (2002) (“subject-matter jurisdiction, because it involves a court’s power to hear a case, can never be forfeited or waived”); Kansas City Power & Light Company v. Union Pacific Railroad Company, STB Docket No. 42095, slip op. at 3 (served July 27, 2006); U.S. v. Cotton, 535 U.S. at 630 (“[D]effects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court.”). Cf. 16AA Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3974.1 (4th ed. 2008) (on appeal, “a court must determine whether it has subject-matter jurisdiction, even if none of the parties raises the issue in any brief”).

E. TPI’s Rebuttal Evidence Does Not Prejudice CSXT.

1. TPI did not “induce” CSXT.

CSXT claims that TPI “induce[d]” CSXT to propose transportation alternatives that violated governing law. CSXT Motion at 9. This is incorrect. TPI does not establish CSXT’s litigation strategy. Indeed, in the adversarial system of litigation, each party is responsible for its own strategic decisions and conducting its own legal research. Moreover, no inducement was possible because, in its Opening Evidence, TPI clearly stated that none of the transportation alternatives evaluated by TPI provided effective competition for the issue lanes. The fact that

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CSXT may have mimicked some of the alternatives considered by TPI cannot be inducement because TPI clearly argued that those alternatives were not effective competition. If anything, CSXT should have been dissuaded from proposing those alternatives because TPI had already evaluated them.

Because proceedings before the Board are adversarial in nature, Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42071, slip op. at 2 (served Dec. 13, 2004), each party is responsible for preparing its case, conducting legal research, and developing its legal theories. United States v. Rivas-Macias, 537 F.3d 1271, 1281 (10th Cir. 2008) (“Absent extraordinary circumstances, our adversarial system of justice imposes an abiding duty on each party to take the legal steps necessary to protect his or her own defenses”), citing Cotto v. United States, 993 F.2d 274, 278 (1st Cir. 1993); United States v. Mitchell, 518 F.3d 740, 749 (10th Cir. 2008) (“Ours is an adversarial system of justice. The presumption, therefore, is to hold the parties responsible for raising their own defenses.”). Cf. Ackermann v. United States, 340 U.S. 193, 197 (1950) (noting that defendant has a “duty to take legal steps to protect his interest in litigation in which the United States was a party adverse to him”). With its Motion, CSXT erroneously places responsibility for its litigation strategy at the feet of TPI. The Board should reject CSXT’s attempt to disclaim its duty to protect its own interests and raise its own defenses.

2. CSXT was not prejudiced by the length of TPI’s Rebuttal.

CSXT makes a feeble attempt to contend that TPI’s Rebuttal Evidence was improper on the basis of the number of pages included. CSXT Motion at 2. CSXT notes that the qualitative market dominance section of TPI’s Opening was 41 pages (147 pages with the lane summaries), but that the Rebuttal was 117 pages (374 pages with lane summaries). CSXT has provided no

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authority for its claimed page-count standard for permissible rebuttal. Moreover, any relevant comparison would not be between TPI's Opening and Rebuttal, but between CSXT's Reply and TPI's Rebuttal, because the CSXT Reply is the document to which TPI responded in its Rebuttal. CSXT's Reply section on qualitative market dominance was 79 pages (189 pages with lane summaries, or 278 pages with charts and maps). Moreover, rebuttal evidence is often longer because it necessarily includes a summary of what was previously said on both opening and reply.¹⁰ The key point is not the number of pages, but whether the Rebuttal was responsive to issues raised in the Reply. PEPCO, slip op. at 3; WFA, slip op. at 5-6. On this point, TPI's Rebuttal was entirely proper.

F. The Board Should Reject the Alternate Request of CSXT for Another Round of Evidentiary Filings.

CSXT has asked the Board for an opportunity to respond to TPI's Rebuttal Evidence if it denies the Motion. CSXT Motion at 3. But, CSXT has already argued the legal merits of the contested argument. See CSXT Motion at 10-13. Moreover, another round of evidentiary filings would be futile. It would serve no purpose to permit CSXT to submit evidence of transportation alternatives that it has admitted are less efficient than the ones already proven to be ineffective competitive constraints. See CSXT Motion at 11-12. Establishing yet another round of evidentiary filings would further extend an already lengthy proceeding, not to mention waste the Board's resources. Congress has directed the Board "to provide for the expeditious handling and resolution of all proceedings." 49 USC § 10101(15). Ordering a round of futile evidentiary filings would be contrary to that clear Congressional mandate.

¹⁰ For example, the Lane Summaries that TPI prepared in Part II-B-3 of its Rebuttal Evidence repeated both TPI's Opening and Rebuttal evidence alongside CSXT's Reply Evidence. Consequently, all of the lane summaries that were a single page in TPI's Opening Evidence expanded to 3-4 pages in its Rebuttal Evidence.

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III. The Motion Should be Denied As To The Other Issues Raised By CSXT.

CSXT also objects to TPI's Rebuttal Evidence in three additional areas. As shown below, CSXT's objections are meritless because TPI's Rebuttal Evidence responded to issues and arguments in CSXT's Reply Evidence.

A. Product Integrity.

CSXT's contention that TPI has submitted improper rebuttal evidence on product integrity concerns associated with transloading is predicated upon a fundamental mischaracterization of TPI's evidence. Contrary to CSXT's assertion, TPI did not announce "a new and radically broader theory of product contamination" that would preclude all transloading for all customers. CSXT Motion at 14. Rather, TPI responded directly to a subset of specific transportation alternatives suggested by CSXT that are contrary to accepted industry practice. If this is improper rebuttal, it is difficult to conceive what would be proper.

As CSXT concedes at page 14 of its Motion, TPI's Opening Evidence did raise product integrity concerns associated with *any* transloading for customers that use TPI polymers in medical applications. See, e.g., TPI Opening at I-8, I-10, and II-B-24. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } For non-medical shipments, TPI

consistently has acknowledged that transloading polymers from rail cars into trucks does occur, albeit only as a very small proportion of total volume and only in limited circumstances. See TPI Op. Ev. at II-B-6-8, 31 (n. 23). Nowhere in its Rebuttal Evidence did TPI alter, or deviate from, that argument. See TPI Reb. Ev. at II-B-22 ("the industry makes every possible effort to limit

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transloading to just once per shipment”; “when transloading of polymers does occur, it almost always is from rail to truck”).

After mentioning product integrity and contamination in opening, TPI’s Rebuttal Evidence on this issue was in direct response to CSXT’s Reply. At page II-56 of its Reply, CSXT plainly stated that “the transloading process for plastic polymers poses extremely low risk of contamination.” The CSXT Reply then proposed many transportation alternatives which involved double and triple transloads. For example, CSXT proposed that any customer who uses TPI’s rail cars for storage (which is every customer) could transload truck deliveries into a pre-positioned empty rail car at the customer’s facility (CSXT Reply at II-51). CSXT also proposed that truck shipments to lease tracks could be transloaded from trucks to rail cars at the lease track. CSXT Reply at II-57-58. Because all truck shipments begin in rail cars (TPI Op. Ev. at II-B-4), CSXT’s proposals would necessitate a double-transload. A close evaluation of the alternative transportation proposed by CSXT for each individual lane at issue has revealed that many of CSXT’s alternatives require double or even triple transloads. See TPI Reb. Ev. at II-B-84-89 and 108-111.

In response to that CSXT Reply Evidence, TPI presented Rebuttal Evidence that neither double-transloading nor truck-to-rail transloading of polymers occurs except in rare circumstances when no other options are available. TPI’s product integrity Rebuttal Evidence, at pages II-B-21-25, explained why this is so. At no point did TPI present this evidence to contend that product integrity precludes single transloading of the issue polymers from rail cars into trucks (except for medical applications as described in TPI’s Opening Evidence). TPI’s Rebuttal Evidence responded directly to CSXT alternative transportation proposals to double transload the issue movements, including truck-to-rail transloading, and to rebut claims that customers could

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still use rail cars for storage by unloading truck shipments into empty rail cars at the customer destination.¹¹ This clearly is proper rebuttal evidence. WFA v. BNSF, slip op. at 5-6; AEP Texas v. BNSF, slip op. at 31 and 37; PEPCO v. CSXT, slip op. at 3; Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company – Control – Chicago and North Western Transportation Company and Chicago and North Western Railroad Company, ICC Docket No. 32133, Decision No. 20, slip op. at 18 (served Sept. 12, 1994) (“UP-Control-CNW”) (new studies offered on rebuttal are not stricken where they respond to an argument raised by opponents in reply).

B. Inventory Carrying Costs.

CSXT’s request to strike TPI’s Rebuttal Evidence on inventory carrying costs is replete with “strawman” arguments designed to mislead the Board. Throughout the period for submitting market dominance evidence, CSXT has continued to misrepresent TPI’s evidence of inventory carrying costs as an accounting argument, despite TPI’s unequivocal statements that invoice timing (*e.g.* when the customer takes title to the product¹²), not accounting, is the reason TPI incurs higher inventory costs for truck shipments. CSXT’s motion to strike is a transparent attempt to preclude TPI from correcting CSXT’s enduring misrepresentation of this evidence.

The concept of inventory carrying costs is basic to any business. The cost of holding inventory is the value of the product multiplied by the time value of money. The longer a product sits in the seller’s inventory, the longer that capital is tied up and unavailable for other purposes, and thus the higher the inventory carrying cost. Despite this well-established and

¹¹ CSXT’s suggestion that TPI could and should have anticipated in its Opening Evidence that CSXT would propose double transloading simply is not credible. Because double transloading, including transloading from trucks into rail cars, simply is not done in the polymer industry, it was inconceivable to TPI that any potential CSXT witness with any experience in the industry would suggest such a far-fetched option as an alternative for routine rail shipments. See PEPCO v. CSXT, slip op. at 3 (complainant is not required “to anticipate in its opening evidence every possible defense or criticism of the SAC model”).

¹² See TPI Op. Ev. at II-B-32 (“When TPI ships a rail car directly to a customer, it is able to invoice the customer immediately and the customer takes title to the product.”).

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commonly applied business concept, CSXT's Reply described inventory carrying costs as an "accounting gimmick" and a "made-for-litigation cost." CSXT Reply at II-77. TPI's Rebuttal Evidence is a perfectly acceptable and appropriate response.

In its Opening Evidence, at pages II-B-32-33, TPI explained that truck shipments impose higher inventory carrying costs because of the delay associated with the sales transaction (*e.g.* transfer of title), and thus the receipt of payment, when trucking through bulk terminals. TPI can only invoice a rail customer upon the purchase of each rail car, and a truck customer upon the purchase of each truck. Although rail and truck customers both rely upon rail cars for storage, unlike with rail customers, the expense falls upon TPI when selling to truck customers because title to the product has not yet transferred. With rail customers, the polymer sits in the customer's inventory at a customer facility until consumed because the customer has already taken title to, and paid TPI for, the rail shipment. With truck customers, the polymer sits in TPI's inventory at a bulk terminal leased by TPI until the customer is ready to consume, because the customer has not yet purchased, and thus has not taken title to, the truck shipment. The logical upshot of these facts is that, for truck customers, TPI ends up carrying the cost of the customer's inventory. In other words, polymer shipments to truck customers remain in TPI's inventory longer than shipments to rail customers. Hence, if TPI were to convert any rail customer to trucks, its inventory costs would increase.

This is not a complicated concept to grasp; rather, it is a matter of logic and basic math. It does not require pages of evidence to explain. Moreover, inventory carrying costs are a well-understood concept in the business world. Any doubt about this fact can be resolved easily just by typing "inventory carrying cost" into Google. While there may be different ways to calculate inventory carrying costs, the concept itself is well-defined and accepted in business circles.

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Because CSXT's Reply Evidence misrepresented TPI's inventory carrying cost argument, TPI sought to correct this distortion on rebuttal.

CSXT's request to strike TPI's Rebuttal Evidence on inventory carrying costs is especially disingenuous in light of a very explicit exchange of correspondence with CSXT's counsel shortly after the filing of TPI's Opening Evidence. TPI has attached that complete correspondence as Exhibit 1 to this Reply to CSXT's Motion to Strike.

- On May 13, 2011, CSXT asked TPI to produce "any workpapers supporting its underlying allegation that TPI is entitled to claim these additional [inventory carrying] costs in the first place."
- In a response that same day, TPI expressed confusion as to what type of workpaper CSXT expected TPI to possess that would show "entitlement" to claim inventory costs. From TPI's perspective, this was not an entitlement issue, but a matter of basic business logic.
- CSXT replied by asking "for any support TPI claims it has for its factual assertions on page II-B-32 that it *accounts* for inventory shipped to customers via truck differently than inventory shipped via rail and that this allegedly different *accounting* treatment causes TPI to incur additional inventory costs for truck shipments." (emphasis added)
- On May 17, 2011, TPI pointed out to CSXT that "[i]t is not the 'accounting treatment' that TPI has stated is different on page II-B-32, as your e-mail incorrectly suggests, but the timing of invoices that is different." TPI then explained again that rail shipments are invoiced when the rail car leaves a SIT yard, but that trucks are not invoiced until they leave the bulk terminal. TPI further explained that "the additional days that TPI's product remains in inventory when shipping by truck as opposed to rail are the rail transit days from the SIT yard to the bulk terminal (note 28) and the days the loaded rail car sits at the bulk terminal prior to loading onto a truck (note 27)."

There was no further correspondence from CSXT on this subject. As far as TPI was concerned, this e-mail exchange removed any possible doubt that CSXT could have as to TPI's inventory carrying cost argument.

Much to TPI's surprise, CSXT's Reply Evidence repeated the incorrect theme that inventory carrying costs are an accounting concept. CSXT referred to TPI's argument as an

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“accounting gimmick” (Reply at II-77); “a quirk of TPI’s accounting practices” (id.); and “not a cost that would be recognized in GAAP accounting” (id. at II-79). Having created this “strawman,” which TPI had explicitly disavowed, CSXT proceeded to systematically tear it down. Id. at II-79-80.

On rebuttal, TPI sought to explain once again what it already had explained to CSXT in both its Opening Evidence and the Exhibit 1 correspondence, namely, that the difference in inventory carrying costs between rail and truck shipments is not in the accounting, but in the timing of the sale and thus the receipt of payment. TPI Reb. Ev. at II-B-96-101. TPI also responded to CSXT’s claim that inventory carrying costs are a “made-for-litigation cost” by showing that businesses of all sorts routinely evaluate this cost in the ordinary course of business. TPI did so by performing its own Google search of the term “inventory carrying costs” and presenting as evidence the most apt examples from the public record. Those examples, in Rebuttal Exhibits II-B-20 and 21, illustrated the connection between transportation mode and inventory costs.

CSXT continues to perpetuate its “strawman” arguments in its Motion to Strike. CSXT criticizes TPI for not including any “workpapers or exhibits to support its *asserted invoicing practices* and the claimed effect that these practices would have on inventory costs; indeed it did not even bother to procure testimony from any TPI employee with responsibility for *inventory accounting*.”¹³ CSXT Motion at 16 (emphasis added). First, inventory carrying costs are not the

¹³ CSXT posits another “strawman” in its claim that “[t]his new evidence not only was not produced on Opening; none of it was produced in discovery.” CSXT Motion at 17. But, CSXT’s Motion refers to just three documents in TPI’s Rebuttal Evidence. Exhibits II-B-20 and 21 are public documents that TPI acquired in a Google search conducted in response to CSXT’s Reply Evidence, and thus could not have been produced in discovery, and otherwise were just as easily available to CSXT in the public domain as they were to TPI. TPI Rebuttal Workpaper “ASR Analysis” was not responsive to any CSXT discovery request (except for a very general request for all documents that support TPI’s claim of market dominance, to which TPI objected as overbroad and a premature attempt to require TPI to submit its Opening Evidence prior to the due date), and was submitted solely to rebut CSXT’s assertion that TPI does not include inventory costs in any of its internal transportation analyses.

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result of TPI “invoicing practices,” which implies a choice; they are a result of the fact that there is no sale to invoice until there is a purchase, which necessarily occurs later for truck shipments than for rail shipments. No workpaper is required to understand that point; indeed, it is difficult to conceive of any workpaper that could be responsive to CSXT’s demand. Second, there was no need for TPI to submit Opening Evidence testimony from an accountant because the invoice timing difference is not caused by an inventory accounting practice, but by when title to the product transfers from TPI to its customer (*i.e.* when the actual sale occurs). TPI’s opening evidence testimony on inventory costs was sponsored by personnel who are familiar with the sales transaction for both rail and truck shipments and why the timing necessarily is different.

On rebuttal, TPI submitted the testimony of Jim Parks, a TPI Senior Manager—Financial Accounting, for the purpose of responding to CSXT’s accounting arguments. This is permissible rebuttal. Testimony from new witnesses on rebuttal is not stricken if “their statements appear to directly and specifically controvert statements made” in reply. UP-Control-CNW, slip op. at 25. See also 49 CFR § 1112.6. It is CSXT which made accounting an issue in its Reply Evidence, despite TPI’s unequivocal statements that its argument was not based upon different accounting practices for rail and truck shipments. CSXT cannot now claim that TPI’s Rebuttal Evidence, in response to a subject matter that CSXT raised on reply, is improper. TPI could not have anticipated that CSXT would deliberately misrepresent TPI’s evidence and ignore TPI’s express statements disavowing different accounting practices for rail and truck shipments. PEPCO, slip op. at 3.

Finally, CSXT also argued on Reply that TPI does not consider “inventory carrying costs” in its internal transportation analyses. CSXT Reply at II-78. On rebuttal, TPI demonstrated that CSXT had either misrepresented or misinterpreted two TPI documents to

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reach this conclusion. TPI also presented evidence that it has in fact considered inventory costs in transportation analyses. TPI Reb. Ev. at II-B-99. Once again, this was a perfectly acceptable response to a false accusation made by CSXT. WFA, slip op. at 5-6; AEP Texas, slip op. at 31 and 37; PEPCO, slip op. at 3; UP-Control-CNW, slip op. at 18. Under CSXT's concept of acceptable rebuttal evidence, TPI would need a crystal ball to predict CSXT's reply arguments so that TPI could anticipate each such argument in its Opening Evidence.

C. UP-SP Merger Testimony.

Curiously, CSXT seeks to strike TPI's rebuttal submission of testimony from the Society of the Plastics Industries ("SPI") in the UP-SP Merger proceeding¹⁴, while simultaneously arguing that the testimony has little relevance and is entitled to little weight. Motion at 17-18. One cannot help but ask why CSXT would expend the effort to request the Board to strike such allegedly insignificant evidence. Nevertheless, there is nothing inappropriate in TPI's submission of the SPI testimony on rebuttal.

The SPI testimony does not present a single new argument that TPI had not presented on opening. In its Opening Evidence, TPI stated that the polymer industry is organized around rail transportation. See, e.g., TPI Op. Ev. at I-8 ("TPI's customers need rail cars to store TPI's product until they are ready to use it in their manufacturing process. This is a prevalent practice in the polymer industry."); TPI Op. Ev. at II-B-3 ("These facts...illustrate the integral nature of rail transportation to the polymer industry's sales and distribution network"). See also TPI Op. Ev. at I-8-12 and II-B-15-27. On reply, CSXT disputed TPI's position. CSXT claimed that storage is a mere "alleged desire" of TPI's customers (Reply at II-50), that TPI "dreamed up" the

¹⁴ Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corporation, and The Denver and Rio Grande Western Railroad Company, 1 STB 233 (1996) ("UP-SP Merger").

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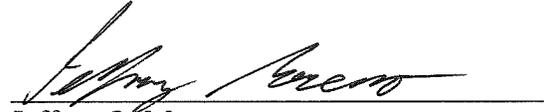
customer requirements for rail transportation (Reply at II-53), and that “the fact that TPI can think up reasons why its customers might want the storage flexibility of railcar deliveries” is not sufficient to show market dominance (Reply II-36). On a more general level, CSXT vehemently argued that truck transportation is competitive with rail transportation for polymers. CSXT Reply at II-26 (asserting existence of “robust and continuous competition among rail carriers and motor carriers”).

TPI responded directly to these assertions of CSXT with the rebuttal submission of the SPI testimony from the UP-SP Merger proceeding. The cited document responds directly to CSXT’s claim of “robust...competition” between rail and truck in the polymer industry. See Reb. Ex. II-B-31 at 13-14. The document also responds directly to CSXT’s claim that customer need for rail transportation was “dreamed up” by TPI. See TPI Reb. Ex. II-B-31 at 14-15. This is permissible rebuttal. The Rebuttal testimony of Robert Granatelli also responded to these same assertions of CSXT. Therefore the Granatelli testimony is permissible. UP-Control-CNW, slip op. at 25.

The SPI testimony merely repeated the facts presented by TPI company witnesses regarding the integral role of rail transportation in the polymer supply chain, the polymer industry’s almost complete dependence upon rail cars for storage, and the important but limited role of trucks. CSXT’s Reply Evidence attempted to portray the testimony of TPI company witnesses on these matters as self-serving and not credible. See, e.g., CSXT Reply at II-46. On rebuttal, TPI responded to CSXT’s assertions through the SPI testimony, which independently confirms that TPI did not “dream-up” the facts in its Opening Evidence.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jeffrey O. Moreno", is written over a horizontal line.

Jeffrey O. Moreno

David E. Benz

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(202) 331-8800

October 17, 2011

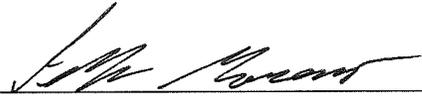
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CERTIFICATE OF SERVICE

I hereby certify that this 17th day of October 2011, I served a copy of the foregoing upon counsel for defendant CSXT via e-mail and first class mail at the address below:

G. Paul Moates
Paul Hemmersbaugh
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005
pmoates@sidley.com
pheimmersbaugh@sidley.com

Counsel for CSX Transportation, Inc.



Jeffrey O. Moreno

Exhibit 1

(Highly Confidential Attachments Redacted)

Moreno, Jeffrey

From: Moreno, Jeffrey
Sent: Tuesday, May 17, 2011 8:45 AM
To: 'Warren, Matthew J.'
Cc: Benz, David; Moates, G. Paul; Hemmersbaugh, Paul A.
Subject: RE: TPI v. CSXT
Attachments: Invoices.pdf

Matt,

In response to your work paper request below, I have attached a PDF file of two TPI invoices. One is an invoice for a typical delivery by rail, in this example from the Dayton SIT yard, and the other is an invoice for a typical delivery by truck from a bulk terminal, in this example from East Morris, IL. It is not the "accounting treatment" that TPI has stated is different on page II-B-32, as your e-mail incorrectly suggests, but the timing of invoices that is different.

For both truck and rail shipments, TPI's accounting moves the product from inventory to accounts receivable upon customer invoicing. But for rail shipments, the invoice is issued when the rail car leaves the Texas or Louisiana SIT yards, except as noted in note 26 on page II-B-32. For truck shipments, the invoice is issued when the truck leaves the bulk terminal. Thus, the additional days that TPI's product remains in inventory when shipping by truck as opposed to rail are the rail transit days from the SIT yard to the bulk terminal (note 28) and the days the loaded rail car sits at the bulk terminal prior to loading onto a truck (note 27).

Jeffrey O. Moreno | Partner | **Thompson Hine LLP**
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From: Warren, Matthew J. [mailto:mjwarren@sidley.com]
Sent: Friday, May 13, 2011 1:05 PM
To: Moreno, Jeffrey
Cc: Benz, David; Moates, G. Paul; Hemmersbaugh, Paul A.
Subject: RE: TPI v. CSXT

Jeff,

The request was for any support TPI claims it has for its factual assertions on page II-B-32 that it accounts for inventory shipped to customers via truck differently than inventory shipped via

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rail and that this allegedly different accounting treatment causes TPI to incur additional inventory costs for truck shipments. The request does not go to the legal appropriateness of these alleged costs – it goes to what foundation TPI has, if any, for its factual assertions that it accounts for truck and rail shipments in a way that creates additional inventory costs for truck shipments. If TPI has any factual support backing up these assertions, then it should have been included in TPI's Opening Evidence and TPI should produce it immediately. If TPI does not possess any such workpapers (or possesses but does not intend to produce them), please inform us as soon as possible.

Matt

From: Moreno, Jeffrey [mailto:Jeff.Moreno@thompsonhine.com]
Sent: Friday, May 13, 2011 12:05 PM
To: Warren, Matthew J.
Cc: Benz, David; Moates, G. Paul; Hemmersbaugh, Paul A.
Subject: RE: TPI v. CSXT

Matt,

I am confused by your request for workpapers supporting an assertion that TPI is entitled to claim inventory carrying costs. Your request seems to concern the legal foundation for recovering inventory carrying costs, but workpapers typically support the underlying facts and analyses. As your message acknowledges, TPI has provided the latter. Therefore, I am confused by the type of workpaper you are requesting and the contents that you would expect such a workpaper to have. If CSXT wants to argue that it is not proper to consider inventory carrying costs in TPI's transload costs, CSXT is free to take that position and the Board can decide which argument is more sound. If I have misunderstood the nature of your workpaper request, however, can you please clarify your request?

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From: Warren, Matthew J. [mailto:mjwarren@sidley.com]
Sent: Friday, May 13, 2011 9:08 AM
To: Moreno, Jeffrey
Cc: Benz, David; Moates, G. Paul; Hemmersbaugh, Paul A.

10/14/2011

Subject: TPI v. CSXT

Jeff,

TPI's Opening Market Dominance asserts that TPI incurs an "inventory carrying cost" for any shipments through a bulk terminal, and TPI uses this "inventory carrying cost" to inflate its estimates of rail-truck transload costs for most of the case lanes by {{thousands}} of dollars per lane. See TPI Opening Market Dominance Evidence at II-B-32-33. While TPI's workpapers include its calculations of these "inventory carrying costs," TPI has not produced any workpapers supporting its underlying allegation that TPI is entitled to claim these additional costs in the first place. Instead, TPI simply asserts that it "must" incur a higher inventory cost for a shipment to a transloading terminal. If any such workpapers exist, TPI should produce them immediately.

Matt

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