

SERVICE DATE – JUNE 17, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42142

CONSUMERS ENERGY COMPANY

v.

CSX TRANSPORTATION, INC.

Digest:¹ This decision rejects CSX Transportation, Inc.’s May 26, 2016 errata filing to its reply evidence.

Decided: June 16, 2016

On January 13, 2015, Consumers Energy Company (Consumers) filed a complaint challenging the reasonableness of rates established by CSX Transportation, Inc. (CSXT) for unit train coal transportation service in shipper-supplied rail cars to Consumers’ generating station near West Olive, Mich., from CSXT’s established railroad interchange with BNSF Railway Company in the vicinity of Chicago, Ill. Consumers alleges that CSXT possesses market dominance over the traffic and that CSXT’s rates are unreasonable under both the stand-alone cost constraint and the revenue adequacy constraint.

CSXT filed its reply evidence on March 7, 2016. On May 26, 2016, six days after Consumers filed its rebuttal evidence, CSXT filed errata to its reply evidence, consisting of a new reference on page III-D-155 to a new workpaper—CSXT Reply WP “June 1974 Trackage Rights.pdf”—and the workpaper itself, the trackage rights agreement at issue.

On May 27, 2016, Consumers filed a letter arguing that the Board should reject CSXT’s errata filing as untimely and improper. Consumers argues that CSXT’s filing of the errata after rebuttal forecloses any opportunity for Consumers to respond to the new workpaper. Furthermore, Consumers argues that CSXT failed to produce this document in discovery, despite Consumers’ request for such documents.

On June 1, 2016, CSXT filed a response to Consumers’ letter, alleging that CSXT was unaware of the missing workpaper until Consumers noted the omission in its rebuttal evidence. CSXT states that, had Consumers notified CSXT of the omission, as is “ordinary practice in

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

SAC cases,” CSXT would have provided the workpaper earlier. CSXT also alleges that the workpaper at issue was not responsive to any discovery request, and thus CSXT should not be penalized for not producing a document that Consumers did not request.

Given the size and complexity of SAC cases, the Board has recognized that it is both appropriate and necessary to allow parties to correct minor technical errors. E.I. DuPont de Nemours & Co. v. Norfolk S. Ry., NOR 42125, slip op. at 33 (STB served Mar. 24, 2014), recon. denied (STB served Dec. 23, 2015). Errata filings are routinely used to correct, for example, typographical errors and minor discrepancies. However, the Board also “look[s] with disfavor upon the filing of errata that curtail the ability of parties to respond fully and adequately to the record within the time frames [the Board has] established.” Potomac Elec. Power Co. v. CSX Transp., Inc., NOR 41989, slip op. at 7 (STB served Nov. 24, 1997) (internal quotation omitted).

We find CSXT’s post-rebuttal attempt to support its reply argument to be improper errata. It is not apparent from the face of CSXT’s reply evidence that it intended to attach the workpaper. An attempt now to support its arguments regarding the 1974 trackage rights agreement goes beyond the correction of a minor technical error, particularly where Consumers has argued in rebuttal that those very arguments are unsupported. CSXT’s attempt to support its argument only after Consumers filed its rebuttal curtailed Consumers’ ability to respond fully and adequately. Therefore we will reject CSXT’s May 26, 2016 errata filing. Because we find this filing to be improper errata, we need not further address the question of whether the document at issue should have been produced in discovery.

It is ordered:

1. CSXT’s May 26, 2016 errata filing is rejected.
2. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.
Commissioner Begeman dissented with a separate expression.

Commissioner Begeman, dissenting:

In reviewing the record, it seems clear to me that CSX Transportation, Inc. (CSXT) inadvertently omitted the 1974 trackage rights agreement at issue when it filed its March 8, 2016 reply. After all, CSXT specifically recommended the agreement in its reply, offering it up as an alternative to its preferred method for determining trackage rights compensation. See CSXT Reply, III-D-155 – 154. It is unfortunate that Consumers Energy Company (Consumers) (or the Board, for that matter) didn’t bring the omission to CSXT’s attention before submitting its rebuttal, but acceptance of the evidence into the record at this point need not delay this case. If Consumers wishes to comment further (Consumers displayed a firm grasp of the agreement’s implications, refuting CSXT’s claims of the agreement’s applicability over several pages of its May 20 rebuttal), Consumers could still do so in its final brief.

We should be able to move the case along while still being reasonable. Numerous corrections have also been submitted by Consumers that presumably will be accepted without dispute. We should do the same here. I dissent.