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BEFORE THE
SURFACE TRANSPORTATION BOARD

M&G POLYMERS USA, LLC

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

Docket No. NOR 42123

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MOTION TO STRIKE

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

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

Counsel to CSX Transportation, Inc

Dated: September 30, 2011

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

<p>M&G POLYMERS USA, LLC</p> <p style="text-align: center;">Complainant.</p> <p style="text-align: center;">v.</p> <p>CSX TRANSPORTATION, INC.</p> <p style="text-align: center;">Defendant.</p>	<p>Docket No. NOR 42123</p>
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MOTION TO STRIKE

It has become all too common in rate reasonableness cases for complainants to file rebuttal evidence that is significantly more extensive than their opening evidence. A recent complainant devoted just three-and-a-half pages of its opening argument to the alleged ineffectiveness of barge competition and then submitted well over a hundred pages of rebuttal evidence on that subject.¹ And as detailed in CSXT's pending Motion to Strike in *Total Petrochemicals USA, Inc. v. CSX Transportation, Inc.*, Docket No. NOR 42121, another rate complainant recently submitted rebuttal qualitative market dominance evidence that was three times as long as its opening evidence and that raised new evidence and arguments in multiple areas. See Motion to Strike, *Total Petrochemicals USA, Inc. v. CSX Transportation, Inc.*, Docket No. NOR 42121 (filed Sept. 29, 2011). The Board rightly has been "troubled" by this practice,² and it has repeatedly instructed complainants to submit their entire case-in-chief on

¹ Compare Opening Evidence of Seminole Elec. Cooperative, Inc. at II-10 through II-14, *Seminole Electric Cooperative, Inc. v. CSX Transp., Inc.*, Docket No. NOR 42110 (filed Aug. 31, 2009) with Rebuttal Evidence of Seminole Elec. Cooperative, Inc. at II-18 through II-76 & Exs. II-B-1 & II-B-2, *Seminole Electric Cooperative, Inc. v. CSX Transp., Inc.*, Docket No. NOR 42110 (filed Apr. 15, 2010).

² *Public Service Co. of Colo. d/b/a Xcel Energy v. BNSF Ry. Co.*, STB Docket No. NOR 42057, slip op. at 2 (served Apr. 4, 2003) ("*Xcel v. BNSF*") (served Apr. 4, 2003) ("We are increasingly

opening and not to treat rebuttal as “an opportunity to introduce new evidence that could and should have been submitted on opening to support the opening submissions.” *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, 5 S.T.B. 441, 446 (2001) (“*SAC Procedures*”).

While M&G Polymers USA, LLC (“M&G”) may not have violated the Board’s rules defining the scope of appropriate rebuttal evidence as flagrantly as complainants in other recent cases have, it chose to submit Rebuttal Evidence twice as long and much more detailed than its Opening Evidence. *Compare* M&G Opening Narrative Section II-B (57 pages without lane descriptions and 129 pages including lane descriptions) *with* M&G Rebuttal Narrative Section II-B (133 pages without lane descriptions and 276 pages including lane descriptions). M&G also used its Rebuttal to introduce the testimony of a new outside expert witness, Robert Granatelli. While M&G claims that Mr. Granatelli is testifying to rebut CSXT’s evidence, most of his testimony reiterates and expands upon claims M&G’s in-house witnesses made in Opening Evidence, and it is difficult to see why this testimony could not have been presented on Opening. These facts are troubling in light of the Board’s repeated admonitions that litigants must present their entire case-in-chief in opening evidence.³

Even more troubling than the new evidence that M&G appears to have saved for Rebuttal is the fact that M&G uses Rebuttal to directly contradict positions it took on Opening. Specifically, M&G claims for the first time on Rebuttal that the Board cannot consider any

troubled by the submission of incomplete or erroneous evidence on opening in a SAC case and a complainant’s reliance upon an opportunity to address deficiencies through later evidentiary submissions, to which the defendant has no opportunity to respond.”).

³ See, e.g., *SAC Procedures*, 5 S.T.B. at 446; *Duke Energy Corp. v Norfolk Southern Railway Co.*, 7 S.T.B. 89, 101 (2003) (“*Duke v. NS*”); *Public Service Co. of Colo. d.b.a Xcel Energy v BNSF Ry Co.*, STB Docket No. NOR 42057, slip op. at 2 (served Apr. 4, 2003) (“*Xcel v BNSF*”).

intermodal alternative to CSXT's rail service on a joint line movement unless the alternative would replace only CSXT's rail service on that joint movement (and not any part of other rail carriers' service). So for a number of joint-line movements where CSXT's Reply Evidence demonstrated that direct truck transportation could be an effective alternative for the entire movement, M&G claims that the Board may only consider truck transportation that would cover the CSXT leg of the movement and would allow rail transportation for the remainder of the movement.

While the legal grounding of M&G's new position is questionable, the bigger problem is that almost every one of the options that M&G's Rebuttal claims are improper was proposed by M&G itself in Opening Evidence. Out of the fifteen lanes where M&G now claims that one or more of CSXT's intermodal alternatives is improper, M&G's Opening proposed an identical alternative on fourteen of them. CSXT submits that the Board should not permit this blatant gamesmanship. Rebuttal evidence is not an opportunity for complainants to spring new legal arguments and play "gotcha" with defendants who reasonably accepted positions that the complainant itself took on opening. The Board should strike this improper evidence.

Because the Board is considering market dominance on an expedited basis, in order to avoid undue delay CSXT believes that the Board should strike the improper rebuttal evidence and proceed to consider the case on the current record (or after oral argument, should the Board choose to schedule one). If the Board chooses not to strike the improper rebuttal discussed in this motion, however, CSXT respectfully requests an opportunity to respond to the improper evidence and to amend its Reply Evidence as necessary to respond to arguments and evidence that M&G should have included in its Opening Evidence.

I. REBUTTAL IS NOT AN OPPORTUNITY FOR A PARTY TO RAISE NEW ARGUMENTS OR PRESENT NEW EVIDENCE THAT COULD AND SHOULD HAVE BEEN INCLUDED IN OPENING EVIDENCE.

Because of the unfortunate trend of complainants saving evidence for rebuttal that should have been presented in their case-in-chief, CSXI began Section II of its Reply Evidence with a reminder of the Board's admonitions to complainants to include their entire case-in-chief on opening and not to use rebuttal to present evidence that could and should have been presented on opening:

[T]he party with the burden of proof on a particular issue must present its entire case-in-chief in its opening evidence. Rebuttal presentations are limited to responding to the reply presentation of the opposing party. Rebuttal may not be used as an opportunity to introduce new evidence that could and should have been submitted on opening to support the opening submissions. New evidence improperly presented on rebuttal will not be considered.

SAC Procedures, 5 S.T.B. at 445-46 (emphasis added) (cited at CSXI Reply Evidence II-1).

The Board has devoted a significant amount of attention to the proper scope of rebuttal evidence. In *Duke v. NS* it held that "the shipper must plan to submit its best, least-cost, fully supported case on opening. It may not hold back to see the railroad's reply evidence before finalizing or supporting its own case." 7 S.T.B. at 101. In *Xcel v. BNSF* the Board grounded this rule in the need to give the other party "a fair opportunity to reply" to evidence. *Xcel v. BNSF*, STB Docket No. NOR 42057, slip op. at 2 (served Apr. 4, 2003) ("The interests of fairness and orderly handling of a case dictate that parties submit their best evidence on opening, so that each party has a fair opportunity to reply to the other's evidence."). To be sure, a complainant properly may use rebuttal evidence to respond to criticisms of its opening evidence or to demonstrate that "the railroad's reply evidence is itself unsupported, infeasible or unrealistic." *Duke v. NS*, 7 S.T.B. at 101. But a complainant may not "alter the core assumptions upon which its case-in-chief is based" on rebuttal. *Id.* And under no

circumstances may it present evidence or arguments that could have been presented on opening, under the guise of “responding” to the defendant’s reply evidence. *See SAC Procedures*, 5 S.L.B. at 445-46. The Board understandably has been “troubled” by incidents where complainants have used rebuttal as a mechanism to submit evidence that should have been submitted on opening,⁴ and it has not hesitated to strike improper rebuttal evidence that does not comply with the strictures of *SAC Procedures*.⁵

II. M&G’S ASSERTION OF A NEW LEGAL THEORY THAT DIRECTLY CONTRADICTS POSITIONS IT TOOK ON OPENING IS IMPROPER REBUTTAL.

M&G opens its Rebuttal discussion of intermodal competition by revealing a new argument that the Board cannot consider the competitiveness of any intermodal alternative to a joint rail movement that does not originate at the precise CSXT “origin” named in the Complaint and terminate at the precise CSXT “destination” named in the Complaint (even if that origin and destination do not represent the initial origin and final terminus of the movement). According to M&G, “the Board may only consider market dominance for the movement between the points covered by the challenged CSXT rate.” M&G Rebuttal at II-B-3. For example, Lane B-15 of the Complaint is a challenge to CSXT’s tariff rates for its portion of a joint movement between M&G’s plant at Apple Grove, WV and an M&G customer in Fremont, OH: CSXT provides transportation between Apple Grove and Columbus, Ohio, where

⁴ *Xcel v. BNSF*, STB Docket No. NOR 42057, slip op. at 2 (served Apr. 4, 2003).

⁵ *See, e.g., Otter Tail Power Co. v BNSF Ry. Co.*, STB Docket No. NOR 42071 (served Jan. 27, 2006) (striking rebuttal evidence seeking to modify complainant’s original cost-of-capital calculations, which defendant had relied upon in its reply evidence and to which defendant had no opportunity to respond); *Duke Energy Corp v. CSX Transp., Inc.*, STB Docket No. NOR 42070, slip op. at 4 (served Mar. 25, 2003) (striking rebuttal evidence where complainant’s change to yard configuration had “gone beyond simply seeking to support what it presented in its opening evidence or adopting evidence submitted by CSX”); *Texas Mun. Power Agency v. BNSF Ry. Co.*, STB Docket No. NOR 42056 (served Mar. 24, 2003) (refusing to rely on new maintenance-of-way evidence first presented on rebuttal).

the traffic is interchanged with Norfolk Southern Railway Co. ("NS") for rail transportation to Fremont. M&G's Opening Evidence admitted that {}

{}, and CSXT's Reply Evidence demonstrated that direct truck transportation was an effective competitive alternative to all-rail service. See CSXT Reply Ex. II-B-2 at 28. But M&G now claims that Apple-Grove-to-Fremont truck transportation cannot be considered by the Board because it would replicate the entire CSXT-NS rail movement, and not the CSXT portion alone. See M&G Rebuttal at II-B-5.

M&G bases this new theory on its interpretation of *Minnesota Power, Inc v Duluth, Missabe and Iron Range Railway Co.*, 4 S.T.B. 288 (1999) ("*DHIR*"), a case it did not cite in its Opening Evidence. But the problem here is not only that M&G failed to assert this theory on Opening, but also that M&G's Rebuttal theory is a complete reversal from its treatment of this issue in Opening Evidence. For Lane B-15 discussed above, M&G's own Opening Exhibit II-B-20 analyzed a direct truck alternative identical to that proposed in CSXT's evidence: *i.e.*, a direct truck alternative from actual origin at Apple Grove to actual customer destination at Fremont. Indeed, almost two-thirds of the alternative transportation options that M&G itself analyzed in its Opening Evidence flunk the "*DHIR* test" it first asserted on Rebuttal. Forty-four direct truck options and several rail-truck options set forth in M&G's Opening Evidence were not between the CSXT origin and the CSXT destination named in the Complaint; instead, M&G postulated direct truck options that would replace the entire rail movement (including non-CSXT carriers' portion of the movement) and rail-truck options that contemplated that movements originating on western railroads could be interchanged with NS at a different Mississippi River gateway than that used for the challenged CSXT rate.

M&G Opening Exhibit II-B-20 “compares its rates for trucking directly from each origin to each destination in every case lane, except those that originate in Altamira, Mexico and Parkersburg, WV, with its rail rates for the same service.” M&G Opening at II-B-51. Forty-four of the lanes analyzed in M&G Opening Exhibit II-B-20 are lanes where M&G is challenging CSXT’s tariff rate for its portion of a joint movement. For each of those lanes, M&G calculated costs for a direct truck alternative to the entire joint movement, *i.e.*, costs to truck from the actual origin to the actual destination. M&G then compared those trucking costs to the entire through rail rate – the CSXT tariff plus the contract rates with other carriers. So while M&G’s Rebuttal dismisses any direct truck alternative that replicates more than the CSXT portion of a joint movement as not being a “true alternative” to CSXT rail service, M&G did the exact same thing in Opening Evidence. *See, e.g.*, M&G Rebuttal at II-B-199 (claiming that direct truck transportation from Apple Grove to Fremont was not a “true alternative” to CSXT rail service on Lane B-15 – even though CSXT’s alternative was identical to alternative analyzed in M&G Opening Ex. II-B-20). Indeed, almost every single one of the allegedly improper direct truck alternatives that M&G lists at pages II-B-4 and II-B-5 of its Rebuttal is identical to a direct truck option analyzed in M&G Opening Exhibit II-B-20!⁶

The inconsistencies do not stop there. M&G’s Opening Evidence also analyzed rail-truck transload options for seven issue lanes. *See* M&G Opening Exhibit II-B-21. Just like in Opening Exhibit II-B-20, M&G’s analysis considered alternatives that did not precisely replicate the CSXT portion of joint movements. For two movements M&G proposed an rail-truck transloading alternative that NS could receive at a different Mississippi River gateway

⁶ The thirteen lanes where M&G objected to direct truck options on Rebuttal that were identical to direct truck options analyzed in M&G Opening Exhibit II-B-20 are Lanes B-8, B-10, B-11, B-14, B-15, B-18, B-19, B-20, B-32, B-34, B-35, B-39, and B-41.

than that used by CSX1. For Lane B-47 (Spring, TX – Apple Grove, WV), for which the CSX1 interchange specified in the Complaint was East St. Louis, M&G proposed an option where traffic instead could be interchanged with NS at Chicago for transportation to the Columbus Thoroughbred Bulk Terminal for transloading into trucks for delivery to Apple Grove. *See* M&G Opening Exhibit II-B-21. M&G proposed a similar “gateway shift” for Lane B-50, where it proposed that NS could receive the traffic at Chicago in lieu of CSX1 receiving it at New Orleans. *See id*. And just as it did for so many direct truck options, M&G outlined a rail-truck option for Lane B-3 (Altamira, MX – Cambridge OH) that contemplated truck delivery to the final customer at Cambridge and not to CSXT’s Columbus interchange with the Columbus and Ohio River Railroad (“CUOH”). M&G then reversed itself on Rebuttal and claimed that “CSX1 has not proposed a true ‘alternative’” for Lane B-3 because CSXT likewise proposed a rail-truck option that would replace both CSXT and the CUOH and deliver product directly to M&G’s customer. M&G Rebuttal at II-B-4.

It is impossible to reconcile M&G’s Opening approach of evaluating competitive options from the actual shipment origins to actual customer destinations with its Rebuttal claims that evaluating such options is impermissible. And it is impossible to interpret its decision to use Rebuttal Evidence to attack CSXT for proposing alternatives identical to those proposed in its own Opening Evidence as anything but the sort of “gotcha” tactic that the Board’s rules are intended to prevent. Complainants cannot be allowed to withhold legal arguments for rebuttal that could and should have been asserted on opening. Nor should they be permitted to bait defendants into accepting and addressing the complainant’s positions on opening only to attack those same positions on rebuttal. The integrity and fairness of the Board’s proceedings requires that this improper new argument be stricken.

There is little question that M&G's new *DARR* argument "could and should have been submitted on opening to support the opening submissions." *SAC Procedures*, 5 S.T.B. at 446. CSXI's Motion for Expedited Determination of Jurisdiction over Challenged Rates proposed many of the same intermodal alternatives set forth in CSXI's Reply Evidence, including direct truck options for joint movements from the actual origin to the actual destination. *See* Motion for Expedited Determination of Jurisdiction Over Challenged Rates Ex. 2 at 9-14 (filed Jan. 27, 2011) (maps of direct truck alternatives to joint movements). Despite being on clear notice of CSXI's position that an intermodal alternative that substitutes for all segments of a joint movement is not geographic competition, M&G failed to raise any legal objection to these intermodal alternatives in its Reply to that Motion or in its Opening Evidence. If M&G believed that the only intermodal competition that can be considered by the Board is transportation that substitutes for the CSXT portion of a joint movement (and only the CSXT portion), then it was incumbent on M&G to advance that theory on Opening and give CSXI a fair opportunity to rebut it or potentially reformulate its Reply Evidence to account for M&G's position. *See SAC Procedures*, 5 S.T.B. at 446; *Union Pac. Corp. et al. - Control - Chicago & N.W. Transp. Co.*, Finance Docket No. 32133 (Decision No. 20) (ICC served Sept. 16, 1994) ("*UP - Control - CN&W*"), available at 1994 WL 498541, at *4 (granting motion to strike rebuttal evidence that introduced "a theory not previously advocated").

More importantly, having proposed on Opening that the Board consider intermodal alternatives to the Issue Movements that were not limited to alternatives between the CSXI complaint "origins" and "destinations," and having induced CSXI to respond with similar evidence of such alternatives, M&G has waived its ability to alter that position. A shipper may not "alter the core assumptions upon which its case-in-chief is based" on rebuttal. *See Duke v.*

NS. 7 S.L.B. at 101. Here, a core assumption of M&G's market dominance evidence was that intermodal alternatives were not logistically feasible or cost-competitive with CSXT's rail service, and in proposing those intermodal alternatives M&G did not limit them to transportation between the CSXT complaint origin and complaint destination. CSXT responded with evidence that M&G exaggerated the logistical impediments to those intermodal alternatives and in some cases miscalculated the costs of intermodal alternatives. CSXT proposed intermodal alternatives that, like those proposed by M&G, were designed to provide service between the actual origin and actual destination and not necessarily the CSXT interchange "origin" and "destination" named in the Complaint. M&G cannot predicate its Opening Evidence on the assumption that intermodal alternatives that would fail its "DMIR test" are relevant to the market dominance analysis and then cry foul on Rebuttal because CSXT made the exact same assumption on Reply.

Indeed, M&G's suggestion that the Board "should find that market dominance conclusively exists" on any lane where CSXT did not propose an alternative that would only replace CSXT's leg of a joint movement has matters exactly backwards. M&G Rebuttal at II-B-4. M&G had the burden of proving market dominance in its Opening Evidence, and if the Board agrees with M&G that alternative transportation that does not begin at the complaint "origin" and end at the complaint "destination" cannot be considered in the market dominance analysis, then it is M&G which has failed to disprove the existence of an effective intermodal alternative for every lane for which it posited an option that does not satisfy its new "DMIR test." Put differently, if M&G's argument is correct, then it has presented no cognizable evidence that direct truck transportation is not cost-competitive with CSXT service for any of the issue movements that are joint movements and no cognizable evidence that truck-rail

transloading is not cost-competitive for the three lanes on which M&G proposed options that did not precisely replicate the CSX I complaint “origin” and “destination”

M&G’s tactics have prejudiced CSX I. Had CSXT known that M&G would argue that the Board cannot consider intermodal competitive options to CSX I rail service that do not originate at the CSXT Complaint “origin” and terminate at the CSX I Complaint “destination,” CSX I could have included additional intermodal alternatives to address that argument. CSXT also would have had the opportunity to fully respond to the legal arguments M&G first raised on Rebuttal. Importantly, M&G does not argue that alternative transportation from the real-world origin to the real-world destination fails to reflect real-world competition – indeed, the Opening Evidence developed by its own in-house commercial and logistics personnel identified nearly fifty intermodal options that did not meet that criteria. Instead, for the first time on Rebuttal, M&G argues that *DMIR* has created a legal regime under which the Board should ignore evidence of real-world intermodal competition between the actual movement origin and the actual movement destination unless that intermodal option precisely substitutes for CSXT’s portion of a joint rail movement – and only CSXT’s portion of that movement. M&G fails to acknowledge several critical distinctions between *DMIR* and this case, however.

First, *DMIR* addressed a preliminary discovery dispute over a hypothetical option that would have postulated a customized, exceptional arrangement involving the trucking of coal from the stockpile at one of the utility’s other plants to substitute for rail delivery of high-volume unit trains. In contrast, what is at issue here is relatively low-volume carload traffic and direct truck options similar to those M&G has used to serve its customers. *See CSXT Reply Ex. II-B-1.*

Second, the hypothetical option in *DMIR* was an option reminiscent of the geographic competition that was forbidden in *Market Dominance Determinations – Product and Geographic Competition*, 3 S.I.B. 937 (1998).⁷ Here, on the other hand, M&G is asking the Board to reject supported evidence of real-world intermodal options similar or identical to those proposed in M&G’s own evidence and similar or identical to direct truck options M&G uses today. And here the intermodal options proposed by CSX I bear no resemblance to “geographic competition”: rather, they would take product in one continuous movement from the M&G plant or storage track origin to actual destination.

Third, *DMIR* rested upon the Board’s conclusion that restricting discovery into truck competition originating at the utility’s Boswell plant would not “foreclose the carrier’s opportunity to show lack of market dominance.” *DMIR*, 4 S.I.B. at 293. Specifically, the Board held that *DMIR* would have been free to postulate a rail-truck transloading option with the transloading occurring at the *DMIR* interchange at Keenan rather than at the utility’s Boswell plant. That Keenan option would have had the same number of loading events and the same logistical complexity as the Boswell option *DMIR* sought to demonstrate. That is not the case here, particularly for joint line movements where there is a competitive direct truck option to serve the customer from Apple Grove or Belpre. While it would be technically feasible to transload the issue commodities into trucks at origin and then to have those trucks transload product back into railcars at the interchange where CSXT’s rail service terminates, that double-

⁷ *Product and Geographic Competition* defined “geographic competition” as “whether the complaining shipper can avoid using the defendant railroad by obtaining the same product from a different source or by shipping the same product to a different destination.” *Product and Geographic Competition*, 3 S.T.B. at 937. The proposal in *DMIR* that the utility obtain coal by trucking it from its other plant is of a piece with “obtaining the same product from a different source.” In contrast, every alternative transportation option proposed in CSXT’s Reply Evidence would have the issue commodities originate at the same origin and be delivered to the same destination as they would using CSXT rail service.

transload option is less efficient and less competitive with all-rail service than a one-transload option in which trucks load at the origin and deliver product directly to the customer. Simply put, *DMIR* was premised on a factual scenario where there were no obvious differences between the potential competitiveness of truck transportation originating at the utility's other plant and truck transportation originating at the *DMIR* interchange. In this case, however, imposing M&G's newly-asserted *DMIR* theory would preclude evidence of the most efficient and effective real-world competition for many movements and only permit evidence of less-efficient options that would require multiple transloads.⁸

While M&G's failure to assert its *DMIR* theory on opening evidence has precluded CSXT from making the full response to that argument to which it is entitled, there are clear distinctions between the facts presented in *DMIR* and the facts in this case. And to the extent that dicta in *DMIR* suggests that in all cases the Board should ignore evidence of effective competitive options that does not precisely replicate the "origin" and "destination" of the defendant rail carrier's section of a joint movement, that dicta should be rejected as inconsistent with Congress's unmistakable intent that the Board not exercise its rate reasonableness jurisdiction over any movement subject to effective intermodal competition.⁹ Regardless, the

⁸ It should not be overlooked that M&G's new *DMIR* argument was made in conjunction with its insistence that product integrity concerns prevent the issue commodities from being transloaded more than once. M&G therefore claims on the one hand that real-world competition from direct trucks to serve customers on joint line lanes is impermissible because of its new legal theory, and on the other hand that intermodal competition that would satisfy its legal theory (by loading trucks once from railcars at Apple Grove or Belpre and then transloading PET back into railcars at the interchange) is impossible.

⁹ Dicta in the *DMIR* decision suggests that 49 U.S.C. § 10707(a) requires intermodal competition for a bottleneck segment to be limited to that segment. *See DMIR*, 4 S.T.B. at 292. This attempt to parse the statute is not convincing. The statute certainly requires that the intermodal transportation be competition for the "transportation to which [the rate at issue] applies," but nothing in the statute suggests that the intermodal option must substitute for that segment and only that segment. Intermodal competition for a CSXT segment of a joint

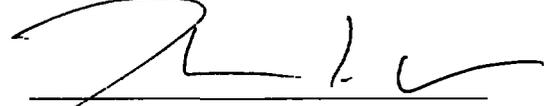
Board does not need to address these issues in this litigation, because M&G's unfair tactics of saving its *DMIR* argument until Rebuttal is ample reason to reject it. It is plainly improper for M&G to use Rebuttal Evidence to advance a new legal theory that directly contradicts positions it took on Opening Evidence, and this improper Rebuttal should be stricken.

III. CONCLUSION

For the reasons detailed above, the Board should strike the new evidence and arguments contained in M&G's August 4, 2011 Rebuttal Evidence claiming that the Board may not consider intermodal competitive options to CSX1 rail service that do not originate at the CSX1 Complaint origin and terminate at the CSX1 Complaint destination.

movement does not stop being effective because it would also replicate other carriers' portions of that joint movement. Consider a hypothetical two-carrier joint line movement between Origin A and Destination C that is subject to effective barge competition between Points A and C. If the shipper were to bring a rate complaint against both carriers, the Board could consider that barge competition. But what if the shipper were to enter a contract with one of the railroads from Point A to a landlocked Interchange B and then challenged the other railroad's rate from Interchange B to Destination C? Nothing has occurred to change the effectiveness of barge competition, and the fact that the barge competition would replace both carriers' portions of the joint movement certainly doesn't mean that it is not effective competition for the defendant carrier. But according to M&G's reading of *DMIR*, the Board would be precluded from considering the effective barge competition between Points A and C.

Respectfully submitted,



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

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

Counsel to CSX Transportation, Inc

Dated: September 30, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2011, I caused a copy of CSX Transportation, Inc.'s foregoing Motion to Strike to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery:

Jeffrey O. Moreno
David E. Benz
Thompson Hine LLP
1920 N Street, NW, Suite 800
Washington, DC 20036



Lva Mozena Brandon