



SIDLEY AUSTIN LLP
 1501 K STREET, N.W.
 WASHINGTON, D.C. 20005
 (202) 736 8000
 (202) 736 8711 FAX

mjwarren@sidley.com
 (202) 736 8996

BEIJING
 BRUSSELS
 CHICAGO
 DALLAS
 FRANKFURT
 GENEVA
 HONG KONG
 HOUSTON
 LONDON

LOS ANGELES
 NEW YORK
 PALO ALTO
 SAN FRANCISCO
 SHANGHAI
 SINGAPORE
 SYDNEY
 TOKYO
 WASHINGTON, D.C.

FOUNDED 1866

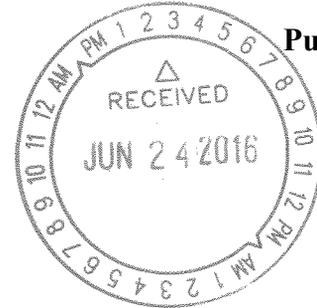
240969

ENTERED
Office of Proceedings
June 24, 2016
Part of
Public Record

June 24, 2016

By Hand-Delivery

Cynthia T. Brown
 Chief, Section of Administration
 Office of Proceedings
 Surface Transportation Board
 395 E Street, S.W.
 Washington, D.C. 20423



Re: Consumers Energy Company v. CSX Transportation, Inc.
STB Docket No. NOR 42142

Dear Ms. Brown:

Enclosed for filing in the above-referenced matter is Defendant CSX Transportation, Inc.'s ("CSXT's") Final Brief and a Motion to Strike. The filing includes:

- 1) An original and ten copies of the Highly Confidential version of CSXT's Final Brief. Double braces (e.g., "{{ }}") signify material designated Highly Confidential pursuant to the Board's March 17, 2015 Protective Order ("Protective Order"), and single braces (e.g., "{ }") designate Confidential material. These materials should not be placed in the Board's public docket or on its website.
- 2) An original and ten copies of the Public version of CSXT's Final Brief. Material that is designated Highly Confidential or Confidential pursuant to the Board's Protective Order is redacted from the Public version. These materials may be placed in the Board's public docket and posted on its website.
- 3) Three sets of disks containing the highly confidential and public version of the Brief in searchable pdf format.

Cynthia T. Brown

June 24, 2016

Page 2

- 4) An original and ten copies of the Highly Confidential version of CSXT's Motion to Strike and an original and ten copies of the Public Version; and three sets of disks containing both versions in searchable pdf format.

Please date-stamp the extra copies and return them to our messenger. Thank you for your assistance in this matter. If you have any questions, please contact the undersigned.

Sincerely,



Matthew J. Warren

MJW:aat
Enclosures
cc: Kelvin J. Dowd

BEFORE THE
SURFACE TRANSPORTATION BOARD

<hr/>)	
CONSUMERS ENERGY COMPANY)	
)	
	Complainant,)	
)	
v.)	Docket No. NOR 42142
)	
CSX TRANSPORTATION, INC.)	
)	
	Defendant.)	
<hr/>)	

MOTION TO STRIKE

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

Raymond A. Atkins
G. Paul Moates
Matthew J. Warren
Terence M. Hynes
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: June 24, 2016

TABLE OF CONTENTS

	<u>Page</u>
I. PRECLUDING IMPROPER REBUTTAL IS ESSENTIAL TO FAIR ADJUDICATIONS.....	4
II. CONSUMERS’ IMPROPER REBUTTAL EVIDENCE SHOULD BE STRICKEN.	7
A. Consumers’ Modification of Positions It Took On Opening and CSXT Accepted Is Improper Rebuttal.	7
1. Improper Modification of Opening Operating Costs of Transportation Alternatives.....	7
2. Improper Rebuttal Evidence Challenging KCBX Capacity.	9
B. Consumers’ Attempt On Rebuttal To Justify A Departure From Agency Precedent Is Untimely And Improper.....	11
1. Consumers’ Late Challenge to the Precedent that a Competitive Alternative Need Not Handle 100% of the Issue Movement Should Be Stricken.....	12
2. Consumers’ Legal Challenge to <i>SunBelt’s</i> Holding On Equity Flotation Costs Is Improper Rebuttal.	13
C. Consumers Has Submitted Improper Rebuttal By Attempting To Introduce Evidence That Could Have Been Presented On Opening....	14
1. New Experts Attempting to Explain the WorleyParsons Report.	14
2. New Evidence on Alleged New Capital Costs Of Cobb-Rail Option.	16
3. New Claim That One Crew Could Operate Up to Four Trains Per Day.	16
4. New Arguments on Excess Run-Through Locomotives.....	17
5. New Arguments For Fringe Benefit Ratio.	18
6. New Rationale for Information Technology Staffing.....	18
7. New Rationales for Attrition Rate.....	19
8. Newly Revealed Rationale For Maintenance-of-Way Equipment Asset Life.....	20

9. New Arguments About Real Estate Acquisition Costs.....20

10. New Explanation for Rail Train Costs.....21

11. New Justifications for Diamond Crossings.....22

12. “New Research” on Calumet Sag and Chicago Sanitary Channel
Bridges.....22

13. New Bridge Designs To Explain Away Opening Evidence Design
Omissions.23

14. New Evidence on Equity Flotation Costs.....24

CONCLUSION.....27

alternative or supplemental arguments on rebuttal.² By preventing complainants from changing evidence that defendants accepted on reply, from unveiling new legal or factual arguments on rebuttal, and from presenting new methodologies for the first time on rebuttal, the rules against improper rebuttal ensure that the Board's proceedings will comport with the minimum constitutional standard of ensuring that each party has a full and fair opportunity to respond to the other's best evidence.

Preventing improper rebuttal has a second important purpose of streamlining the processing of cases. One of the virtues of an adversarial process is that the Board can rely on each party to alert the Board to issues with the other party's evidence and arguments. When a complainant unveils evidence for the first time on rebuttal, however, the Board has a more burdensome task of having to weigh this new evidence without adversarial testing. Moreover, if the Board is to comply with the timelines of the STB Reauthorization Act, it has to ensure that opening evidence contains the complainant's complete evidence and arguments—just as a defendant's reply must contain its complete evidence and arguments. If the Board has to wait until rebuttal to receive the complainant's best evidence, complying with the Reauthorization Act may be an impossible challenge.

Consumers' Rebuttal violates these rules in multiple respects and seriously prejudices CSXT. While much of Consumers' Rebuttal is a permissible (if

² See *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, 5 S.T.B. 441, 446 (2001) (“*SAC Procedures*”) (“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.”).

unpersuasive) response to issues CSXT raised on Reply, its Rebuttal also contains multiple instances of impermissible alterations of its Opening presentation.

First, it attempts to alter opening evidence that CSXT accepted on Reply. After CSXT accepted many of Consumers' market dominance expert's assumptions in an effort to narrow the number of disputes before the Board, Consumers' expert turned around on Rebuttal and disavowed those same assumptions. Such an about-face is not permissible.

Second, Consumers chose to wait until its Rebuttal to unveil challenges to multiple STB precedents. For example, Consumers' Rebuttal challenges for the first time the agency's longstanding holding that a transportation alternative need not be capable of handling 100% of the volume of an issue movement to provide effective competition. Consumers also waited until Rebuttal to challenge the reasoning of recent Board decisions recognizing that a SARR would have to account for equity flotation costs. The Board has made clear that such challenges to agency precedent must be made on opening.

Third, on multiple occasions Consumers submitted evidence and arguments on Rebuttal "that could and should have been submitted on opening to support the opening submissions."³ When a complainant waits until Rebuttal to offer new evidence or justifications for its opening positions, it deprives the defendant of any meaningful opportunity to respond to that evidence. Consumers does exactly that when it attempts to support its Opening operating plan with new theories, "new research," and even brand new witnesses. Countenancing such tactics would

³ See *id.*

deprive CSXT of due process and deprive the Board of a full record in which each party had an opportunity to respond to the other's best evidence.

Each of these instances of impermissible rebuttal is explained in more detail below, and Appendix 1 organizes all improper Rebuttal which is subject to this Motion by section and page number.

Apart from the impact of the issues addressed herein on the outcome of this proceeding, this motion is extremely important for the Board's ability to manage its docket efficiently and in a way that comports with due process. The Board has signaled in recent cases that it has a growing concern with impermissible rebuttal, a concern that should only be heightened by Consumers' Rebuttal filing. The best way to prevent these problems is to strike evidence that crosses the line and demonstrate that impermissible rebuttal will not be tolerated.

I. PRECLUDING IMPROPER REBUTTAL IS ESSENTIAL TO FAIR ADJUDICATIONS.

The fairness of the Board's proceedings rests in part on the fundamental due process principle that a party should be afforded an opportunity to respond to the other party's evidence and arguments. In a rate reasonableness case, that means each side's evidence should be subjected to full adversarial testing—the complainant's opening evidence through the defendant's reply, and the defendant's reply evidence through the complainant's rebuttal. The introduction of new arguments on rebuttal violates not only Board rules and procedures, but also fundamental due process rights. The D.C. Circuit has recognized that "the opportunity to meet and rebut evidence utilized by an administrative agency has long been regarded as a primary requisite of due process," and defendants are

deprived of that right when complainants wait until rebuttal to present evidence that could and should have been presented on opening.⁴

The Board's rules reflect these due process principles. Rebuttal is not to be used "as an opportunity to introduce new evidence that could and should have been submitted in the party's case-in-chief."⁵ A complainant shipper rather "must plan to submit its best, least-cost, fully supported case on opening" and may not hold back to see the railroad's reply evidence before finalizing or supporting its own case."⁶ In *Duke/NS* the Board explained that a complainant on rebuttal has three options when responding to a railroad's challenge on reply: (1) "demonstrate that its opening evidence was feasible and supported"; (2) "adopt the railroad's evidence"; or (3) "in certain circumstances . . . offer to refine its evidence to address issues raised by the railroad regarding its opening evidence."⁷ That third circumstance is the only situation in which a complainant may offer something new on rebuttal, and it may only do so where "the railroad has identified flaws in the shipper's evidence but has not provided evidence that can be used in the Board's SAC analysis, or where the shipper shows that the railroad's reply evidence is itself unsupported, infeasible

⁴ *Jolly v. Listerman*, 672 F.2d at 941, n.17; see also *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d at 63 ("the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation"); *Coughlan v. Director, Office of Workers' Compensation Programs*, 757 F.2d at 969 ("Fundamental concepts of fairness require that litigants be given equal opportunities to present their respective positions.").

⁵ *Duke Energy Corp. v. CSX Transp., Inc.*, STB Docket No. 42070, at 4 (S.T.B. served March 25, 2003).

⁶ *Duke Energy Corp. v. Norfolk Southern Ry. Co.*, 7 S.T.B. 89, 101 (2003) ("*Duke/NS*").

⁷ *Id.*

or unrealistic.”⁸ In other words, to present new evidence on rebuttal a shipper must show either that the defendant railroad failed entirely to present evidence to correct the flaws it identified or that the defendant’s own solution to those flaws was unsupported, infeasible, or unrealistic. There is no allowance for a shipper to bolster its opening positions with supplemental arguments or evidence.

The Board has explained that it is “increasingly troubled by the submission” of improper rebuttal evidence, which includes the filing of “incomplete or erroneous evidence on opening” and then addressing those deficiencies in rebuttal, “to which the defendant has no opportunity to respond.”⁹ The interests of fairness and orderly handling of cases require “that parties submit their best evidence on opening” which gives the opposing party “a fair opportunity to reply.”¹⁰ Late changes to a case-in-chief also complicate the Board’s review and impede its “efforts to handle these cases in an orderly and timely matter.”¹¹

For these reasons, the Board has encouraged defendants to use motions to strike to challenge improper rebuttal evidence.¹² That is what CSXT is doing here.

⁸ *Id.*

⁹ *Xcel Energy v. BNSF Ry. Co.*, STB Docket No. 42057, at 2 (S.T.B. served April 4, 2003).

¹⁰ *Id.*

¹¹ *Id.*

¹² See *SunBelt Chlor Alkali P’ship v. Norfolk Southern Ry. Co.*, STB Docket No. 42130, at 2 (S.T.B. served July 15, 2013); *Total Petrochemicals & Ref. USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121, at 9 (S.T.B. served May 31, 2013) (“*TPP*”).

II. CONSUMERS' IMPROPER REBUTTAL EVIDENCE SHOULD BE STRICKEN.

A. Consumers' Modification of Positions It Took On Opening and CSXT Accepted Is Improper Rebuttal.

Perhaps the most fundamental restriction on rebuttal evidence is that a complainant may not change opening assumptions that a defendant accepted on reply.¹³ If a defendant accepts a methodology or cost assumption that the complainant made on opening, that issue is resolved. A complainant is not allowed to then decide that it wants to stake out a more aggressive position on rebuttal. But here, Consumers tries to do just that in its market dominance evidence.

1. Improper Modification of Opening Operating Costs of Transportation Alternatives.

In its Reply Market Dominance Evidence, CSXT disagreed with Consumers' overall estimate of the costs for alternative transportation of coal to the Campbell plant, largely because CSXT and Consumers disagreed on the need to account for certain alleged costs such as storage fees, stockpile fees, and inventory carrying costs. But where CSXT and Consumers agreed on the need for a cost, CSXT generally accepted Consumers' estimate on opening. For example, CSXT used the same Chicago-to-Campbell vessel transportation rate in its evidence that Consumers used in its opening analysis.¹⁴ CSXT similarly adopted Consumers'

¹³ See, e.g., *FMC Wyoming Corp. and FMC Corp. v. Union Pacific R.R. Co.*, 4 S.T.B. 699, 790 (2000) ("*FMC*") (complainant's proposal of triple track segment on Opening that was accepted by defendant in Reply could not be modified on Rebuttal); *Duke/NS*, 7 S.T.B. at 101, n.18; *Xcel Energy v. BNSF Ry. Co.*, 7 S.T.B. 589, 683-684 (2004).

¹⁴ See CSXT Reply at II-B-44 (noting that "CSXT accepts" {{ }} rate for transportation to Campbell "used by Mr. Barbaro in his analysis"); Consumers Opening Ex. II-1 at 47 (using {{ }} per ton rate for KCBX to Cobb as basis for

estimated operating costs for unloading operations (which Consumers in turn took directly from the WorleyParsons report).¹⁵ And CSXT took great pains to specifically identify which costs it accepted and which it contested.¹⁶

On Rebuttal, Consumers certainly was entitled to respond to CSXT's evidence as to each contested cost and to explain why Consumers thought its opening position was the better evidence. Consumers was not entitled to revise its evidence on costs that CSXT accepted or to posit new cost categories that it failed to include on opening. But that is exactly what it did:

- On Rebuttal, Mr. Barbaro now says that the {{ }} per ton rate that CSXT adopted for use in its evidence is too low and alleges that the number must be adjusted to account for certain differences between contemplated contract operations and the proposed alternative (such as an allegedly longer loading and unloading process).¹⁷ But Mr. Barbaro made no such adjustments to his opening use of the same contract rate, even though he proposed a conveyor with an even slower throughput than the Transystems' conveyor that Mr. Barbaro claims would require an adjustment.¹⁸
- Mr. Barbaro also now says that the {{ }} per ton estimate of Campbell operating costs is too low, even though that was the exact

estimating rate from MERC to Campbell). The only difference between the vessel transportation rate used by CSXT and the rate used by Mr. Barbaro is that Mr. Barbaro adjusted the rate for the longer cycle times from MERC.

¹⁵ See CSXT Reply at II-B-45 (“Consumers estimated [dock operating costs] to be {{ }} per ton, and CSXT accepts this estimate.”); Consumers Opening Ex. II.B-1 at 87 (“The operating cost of the unloading dock is { } based on WorleyParsons’ estimate.”).

¹⁶ See CSXT Reply at II-B-42 to 51.

¹⁷ See Consumers Rebuttal Ex. II-1 at 65-68.

¹⁸ Compare Consumers Rebuttal Ex. II-1 at 67 (claiming that proposed Transystems conveyor with throughput of 2,500 tons per hour would require contract adjustment) *with* WorleyParsons Report at 34 (proposing conveyor with throughputs of as low as 2,000 tons per hour) *and* Consumers Opening Ex. II-1 at 86 (using WorleyParsons estimates as starting point for estimating capital costs).

number he and WorleyParsons used in their analysis.¹⁹ Mr. Barbaro’s claim that an adjustment for differing volumes is necessary ignores the fact that he made no such adjustment when he used the cost on Opening.²⁰

- For the first time on Rebuttal, Mr. Barbaro claims that dredging costs are a separate cost category not encompassed in WorleyParsons’ operating cost estimate.²¹ Having failed to include dredging costs as a separate cost on Opening, he cannot add them on Rebuttal.
- Also for the first time on Rebuttal, Mr. Barbaro argues that the costs of alternative transportation must include “rail demurrage costs” of millions of dollars per year because of supposed complications at KCBX.²² But on Opening, Consumers only generally referenced the potential of demurrage and offered no calculations of such costs for operating at KCBX.²³

2. Improper Rebuttal Evidence Challenging KCBX Capacity.

Similarly, CSXT relied in its Reply on a Consumers Opening workpaper stating that KCBX would have a capacity of {{ }}.

{{

¹⁹ See Consumers Rebuttal Ex. II-1 at 68.

²⁰ See *id.* (arguing that WorleyParsons’ number must be adjusted because it contemplated shipments of 5.0 million tons per year); Consumers Opening Ex. II-1 at 87 (using unadjusted WorleyParsons { } cost estimate despite contemplating shipments of 6.0 million tons per year).

²¹ See Consumers Rebuttal Ex. II-1 at 68

²² See Consumers Rebuttal Ex. II-1 at 70-71.

²³ See Consumers Opening Ex. II-1 at 25.

²⁴ See Consumers Opening WP “2015_08_20 KCBX phonecall notes.pdf.”

}}²⁵ Based on this Opening

evidence about KCBX's capacity and current practices, CSXT designed a plan for direct loading coal vessels in a way that was consistent with that evidence.²⁶

On Rebuttal, however, Mr. Barbaro submits a brand new analysis purporting to show that KCBX lacks the capacity to handle more than 2.5 million tons per year.²⁷ He admits that on Opening he included KCBX's own statement that "it had the capacity to ship five to six million tons annually," but claims that his new Rebuttal analysis shows that KCBX's self-assessment is unrealistic.²⁸

This is textbook impermissible rebuttal: Consumers included assertions in its Opening Evidence that CSXT accepted and used to develop its Reply Evidence, and now on Rebuttal Consumers attempts to impeach its Opening Evidence. And Mr. Barbaro's allegation that his changed position is due to changing operations at KCBX is nonsense. {{

}}²⁹ Nothing has

occurred between Consumers' submission of Opening Evidence and its submission of Rebuttal evidence to justify its changed positions on this critical point.

²⁵ See Consumers Opening Ex. II-1 at 23 n.21.

²⁶ See CSXT Reply at II-B-34 (noting that CSXT's plan was consistent with the KCBX information included in Consumers' evidence).

²⁷ See Consumers Rebuttal Ex. II-1 at 29-37.

²⁸ See *id.* at 27.

²⁹ See Consumers Opening WP "2015_08_20 KCBX phonecall notes.pdf."

Contradicting a Complainant's own evidence introduced on Opening and accepted on Reply is plainly improper and prohibited by Board precedent.³⁰ This improper Rebuttal Evidence should be stricken from the record.

B. Consumers' Attempt On Rebuttal To Justify A Departure From Agency Precedent Is Untimely And Improper.

The Board has also made clear that challenges to agency precedent must be made on opening, not on rebuttal.³¹ Parties have a heavy burden to justify departures from agency precedent, and such departures must be justified in the opening submission. And it of course is reasonable for a defendant to rely on existing agency precedent in its reply, and defendants cannot be expected to anticipate a complainant's potential rebuttal challenges to that precedent. But in this case, Consumers waited until Rebuttal to challenge the rationale of several agency decisions. This improper Rebuttal should not be allowed.

³⁰ See *FMC*, 4 S.T.B. at 790 (complainant proposal of triple track segment on Opening, accepted by defendant in Reply, could not be modified on Rebuttal). See also *M&G Poymyers USA, LLC v. CSX Transp., Inc.*, STB Docket No. 42123, at 9 (S.T.B. served Sept. 27, 2012) ("Board rules clearly direct complainants to put forth their best and most complete case on opening. . . . This principle of fairness would be subverted were the Board to allow M&G to present specific potential transportation alternatives in its Opening Evidence and then urge the Board in its Rebuttal Evidence to preclude consideration of those same alternatives, particularly where (as here) CSXT relied on M&G's initial discussion of those potential alternatives when preparing its Reply Evidence.").

³¹ See, e.g., *Western Fuels Ass'n & Basin Electric Power Corp. v. BNSF Ry.*, STB Docket No. 42088, at 136 (S.T.B. served Sept. 10, 2007) ("*WFA*") ("BNSF has properly objected to the unexplained departure from agency precedent. Because *WFA* failed to justify a departure from agency precedent in its opening submission, we use the established approach here.").

1. Consumers' Late Challenge to the Precedent that a Competitive Alternative Need Not Handle 100% of the Issue Movement Should Be Stricken.

The Board has long held that for “an alternative mode to provide effective competition, it need not necessarily be ‘capable of handling substantially all or even a majority of the subject traffic.’”³² This principle was applied in the *DuPont (Chlorine) Three Benchmark* case, where the Board held that the fact that barge competition would sometimes be unavailable and could not handle 100% of the issue movement did not mean that it did not constitute effective competition. But in its Opening Evidence, Consumers ignored that precedent and assumed that a competitive alternative to CSXT must transport 100% of the issue traffic.³³ This assumption allowed it to posit massive “storage fees” and complications for the winter months when water deliveries would be impossible. On Reply, CSXT directly refuted Consumers’ assumption, both by citing precedent holding that competitive alternatives need not be shown capable of handling 100% of issue traffic in order to constitute “effective competition,”³⁴ and by the economic testimony of Professor Kevin Murphy. On Rebuttal, Consumers for the first time argues that Board precedent that alternatives need not be capable of handling substantially all or even a majority of the subject traffic should not apply to this case and that “the market dominance assessment in this case should assume the need for complete

³² See CSXT Reply at II-B-29 to II-B-32; *E.I. DuPont de Nemours & Company v. CSXT*, STB Docket No. 42100, at 4 (S.T.B. served June 27, 2008) (citing *Amstar Corp. v. Great Alabama S. R.R.*, I.C.C. Docket No. 382392 (served Nov. 10, 1987)).

³³ See, e.g., Consumer Op. Ex. II-1 at 18.

³⁴ See CSXT Reply at II-B-29 to II-B-32.

avoidance of CSXT.”³⁵ Consumers’ decision to wait until Rebuttal to argue that the Board should distinguish or otherwise not apply precedent to the contrary deprived CSXT of a chance to respond to that argument, and the improper Rebuttal should be stricken.

2. Consumers’ Legal Challenge to *SunBelt’s* Holding On Equity Flotation Costs Is Improper Rebuttal.

The Board’s recent decisions in *SunBelt* and *DuPont* recognized that a SARR would incur equity flotation costs (although the Board found that the specific costs proposed in those cases were insufficiently supported). On Opening, Consumers acknowledged these holdings, but still failed to include any costs on the ground that no “reasonable surrogates” were available.³⁶ CSXT’s Reply included detailed expert evidence supporting equity flotation costs of 6.0%.³⁷ In response, Consumers’ Rebuttal includes both a new legal challenge to *SunBelt* and a new factual explanation that a “private placement” might allow lower flotation costs. The legal challenge—that *SunBelt* failed to justify the agency’s change in position and failed to recognize that how equity flotation costs factor into the cost of capital—is plainly a challenge to Board precedent that could and should have been addressed on Opening. The new factual theory is similar to the evidence that could and should have been presented on Opening, and it is addressed below at pages 24—26.

³⁵ See, e.g., Consumers Rebuttal at II-26.

³⁶ See Consumers Opening at III-G-5.

³⁷ See CSXT Reply at III-G-1 to III-G-5.

C. Consumers Has Submitted Improper Rebuttal By Attempting To Introduce Evidence That Could Have Been Presented On Opening.

The final major category of improper rebuttal is new evidence that could and should have been introduced on opening. The Board has previously admonished that “the 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.”³⁸ For these reasons, a complainant may not present new evidence on opening³⁹ and it may not alter or abandon a methodology used on opening.⁴⁰ Consumers has ignored this fundamental rule in several areas of its evidence, which are detailed below in the order they appear in the Rebuttal.

1. New Experts Attempting to Explain the WorleyParsons Report Consumers Submitted on Opening.

The significance of Consumers’ own internal studies of its transportation alternatives have been a major focus of the market dominance portion of this case from the outset. Substantial discovery was directed at the studies, and Consumers’ Opening Evidence discussed its studies extensively. In particular, Consumers’

³⁸ *SAC Procedures*, 5 S.T.B. at 445-446.

³⁹ *SunBelt Chlor Alkali P’ship v. Norfolk Southern Ry. Co.*, STB Docket No. 42130, at 8-9 (served June 20, 2014) (“*SunBelt*”) (complainant did not address crew deadheading on Opening but did so in Rebuttal); *E.I. DuPont de Nemours & Co. v. Norfolk Southern Ry. Co.*, STB Docket No. 42125, at 35 (served Mar. 24, 2014) (“*DuPont*”) (complainant failed to present a car classification or blocking plan for general freight traffic on Opening but did so in Rebuttal).

⁴⁰ *See, e.g., SunBelt*, STB Docket No. 42130, at 11 (improper rebuttal for complainant to change its methodology for calculating fringe benefits from an average of all Class I railroads in a single year on opening to a three year average of two carriers on rebuttal); *Id.* at 11-12 (complainant proposed annual yard cleaning on Opening but sought to change the frequency of cleaning on Rebuttal).

Opening discussed a 2014 study of transportation alternatives performed by WorleyParsons in some detail, and this study was the predicate for several of Mr. Barbaro's opening cost estimates.⁴¹ On Reply, CSXT pointed out several areas in which WorleyParsons' assumptions were in tension with those of Mr. Barbaro.

On Rebuttal, Consumers submits a 45-page verified statement from new witnesses Petro and Bovitz, who testify that they worked on the WorleyParsons report and make new arguments that the report was limited in scope and purpose and not inconsistent with Consumers' current arguments. This is a classic example of evidence that could and should have been presented on opening. Consumers made the WorleyParsons report a major subject of its Opening presentation, and indeed many of its market dominance calculations derive directly from WorleyParsons' calculations. Consumers' decision to wait until Rebuttal to present evidence from the WorleyParsons authors offering self-serving characterizations of the scope of their work is the sort of unfair surprise that the rebuttal rules are designed to prevent.

In *TPI*, the Board faced a similar issue when the Complainant waited until the Rebuttal stage to introduce the testimony of a new expert witness regarding an issue the Complainant was aware on Opening would be in dispute.⁴² Here, Consumers was plainly aware of the significance of the WorleyParsons report, which was a major subject of its opening evidence. To wait until Rebuttal to

⁴¹ See, e.g., Consumers Opening at II-21 to II-32.

⁴² See *TPI*, STB Docket No. 42121, at 12-13 (striking the testimony of a Rebuttal expert because Complainant was "aware" of the "issues on opening.>").

introduce extensive testimony directly related to a study Consumers knew would be at issue is improper Rebuttal and should be stricken.

2. New Evidence on Alleged New Capital Costs Of Cobb-Rail Option.

On Opening, Consumers used the WorleyParsons study to estimate the capital costs of infrastructure that could connect the Cobb plant to the Michigan Shore Railroad.⁴³ But in Rebuttal, Consumers proposed several new costs to the rail build-out that WorleyParsons allegedly did not account for, including rail yard upgrades, mobile equipment, additional permitting costs, and a mobilization additive.⁴⁴ The appropriate place for Consumers to have identified these alleged costs was in its Opening Evidence, where it instead decided to use the figures from the WorleyParsons report. Rebuttal is too late for Consumers to generate new costs to add to its analysis.

3. New Claim That One Crew Could Operate Up to Four Trains Per Day.

On Opening Consumers argued that the CERR would use turn crews “where possible.”⁴⁵ CSXT accepted on Reply the assumption that many CERR crews could handle more than one train movement in one shift, but pointed out that under Consumers’ staffing assumptions, *every* crew member would need to complete two train assignments per shift, *every day*, without *once* exceeding their hours of

⁴³ See Consumers Op. Ex. II-1 at 113 (“The capital cost for each option was based on the WorleyParsons estimates in the 2014 study...”).

⁴⁴ See Consumers Rebuttal Ex. II-I at 87-92.

⁴⁵ See Consumers Opening at III-C-80.

service.⁴⁶ That is not realistic, and thus CSXT provided some additional re crews and personnel. According to Consumers' Rebuttal, CSXT was mistaken because some CERR crews "could handle up to four trips a day"—a number which is unheard of in real-world railroading—and because CERR should receive some kind of "crewing credits" for such occasions.⁴⁷ Consumers did not argue on Opening that its crews could handle such a superhuman workload and offered no evidence to support such a fiction, but only proposed it on Rebuttal when CSXT would not have an opportunity to respond.

4. New Arguments on Excess Run-Through Locomotives.

Several of the run-through trains that Consumers proposes the CERR would handle have three or four locomotives; nevertheless, Consumers only accounts for the costs of two locomotives. On Reply, CSXT accepted that the CERR could idle these locomotives (and thus save on fuel costs), but pointed out that the CERR would still have to pay other carriers for locomotives while they were on the CERR system—idled or not.⁴⁸ On Rebuttal, Consumers for the first time offers theories that the CERR's "interchange partners have no expectation of compensation" for locomotives on run-through trains.⁴⁹ While Consumers offers no support for this novel theory, in the first instance it should be stricken as improper rebuttal.

⁴⁶ See CSXT Reply at III-C-70.

⁴⁷ Consumers Rebuttal at III-D-20.

⁴⁸ See CSXT Reply at III-C-103.

⁴⁹ See Consumers Rebuttal at III-C-104.

5. New Arguments For Fringe Benefit Ratio.

On Opening, Consumers proposed a fringe benefit ratio of 37.6% that was calculated from the 2014 average of all Class I railroads. Consumers' entire explanation on Opening for this position was that "each class I carrier has a presence in the vicinity of the CERR."⁵⁰ In Reply, CSXT followed Board precedent that fringe benefit ratios should be geography-specific and offered a revised fringe benefit ratio that limited the average to the Class I railroads actually operating in Chicago, an approach that was consistent with Consumers' logic on Opening.⁵¹ On Rebuttal, however, Consumers rejects its own "vicinity of the CERR" argument as a basis for its fringe benefit ratio and asserts that inclusion of all Class I railroads is appropriate because the "vast majority of fringe benefits for Class I carriers are for employees that work nowhere near Chicago" (and, therefore, nowhere near the CERR).⁵² Consumers also submits a brand new argument that using a single year of data was superior to an average because of supposed increasing efficiency.⁵³ Saving this new logic and arguments for Rebuttal is in direct violation of the Board's rule against new rebuttal evidence.

6. New Rationale for Information Technology Staffing.

On Opening, Consumers proposed an Information Technology ("IT") Function with no real evidentiary support or benchmarking.⁵⁴ CSXT replied with a slightly

⁵⁰ Consumers Opening at III-D-31.

⁵¹ See CSXT Reply at III-D-46 to III-D-48.

⁵² Consumers Rebuttal at III-D-43.

⁵³ See *id.* at III-D-42-43.

⁵⁴ See Consumers Opening at III-D-67 to III-D-70.

modified organization.⁵⁵ For the first time on Rebuttal, Consumers' expert sought to justify his opening numbers by comparing them to alleged KCS staffing levels.⁵⁶ This new rationale for Consumers' original approach is improper new Rebuttal evidence.

7. New Rationales for Attrition Rate.

Consumers presented an attrition rate in its Opening Evidence that it inaccurately claimed was based on CSXT's real-world 2012-2014 attrition rate.⁵⁷ On Reply, CSXT explained that the attrition rate Consumers alleged was a real-world figure that actually excluded multiple categories of employees who depart CSXT employment, such as those who are deceased, furloughed, or retired.⁵⁸ On Rebuttal, Consumers attempts to explain for the first time why it excluded retired and deceased employees from its evidence.⁵⁹ While Consumers' assertion that it can achieve a better attrition rate than CSXT because it will only hire young and healthy employees who will not retire or die at the rate of CSXT employees is ludicrous on the merits, it is also plainly improper rebuttal that the Board should strike and need not address on the merits.

⁵⁵ See CSXT Reply at III-D-96 to III-D-98.

⁵⁶ See Consumers Rebuttal at III-D-100 ("This staffing level is comparable to what Mr. Kruzich had when Vice President Computer Operations at KCS in the late 1990's"); *id.* at III-D-101 ("These additions are unnecessary because the CERR is a very small railroad compared to the KCS where Mr. Kruzich used one Help Desk position...").

⁵⁷ See Consumers Opening at III-D-89.

⁵⁸ See CSXT Reply at III-D-106.

⁵⁹ See Consumers Rebuttal at III-D-112 to III-D-113.

8. Newly Revealed Rationale For Maintenance-of-Way Equipment Asset Life.

Without explanation, Consumers tucked into an Opening workpaper a claim that Maintenance-of-Way equipment would have a 20 year asset life.⁶⁰ In Reply, CSXT generally accepted Consumers' methodology for calculating equipment costs but disagreed with the unexplained assumption that the useful life of the equipment would be 20 years.⁶¹ Instead, CSXT put forth evidence that the appropriate asset life would be ten years, which was supported by figures from the Bureau of Economic Research. For the first time on Rebuttal, Consumers sought to support its 20 year figure with new evidence.⁶² Consumers' decision to wait until Rebuttal to attempt to justify the incorrect figure it used on Opening is untimely new evidence.

9. New Arguments About Real Estate Acquisition Costs.

On Opening, Consumers included no costs for real estate acquisition, a category of costs the Board has recognized in prior SAC cases.⁶³ In Reply, CSXT estimated what the CERR would have to pay on a per parcel basis and included the appropriate costs.⁶⁴ On Rebuttal, Consumers argues against including *any* cost for acquisition. But instead of remaining silent on the issue as it had in Opening—or offering its own calculation or correction to CSXT's calculation—Consumers claimed

⁶⁰ See Consumers Op. WP "CERR Opening MOW Costs.xlsx," Cell Y44.

⁶¹ See CSXT Reply at III-D-133 to III-D-134.

⁶² See Consumers Rebuttal at III-D-138 to III-D-139.

⁶³ See *DuPont*, STB Docket No. 42125, at 141; *SunBelt*, STB Docket No. 42130, at 104.

⁶⁴ See CSXT Reply at III-F-18 to III-F-21.

for the first time that no such costs should be included because of supposed discovery problems.⁶⁵ It is perfectly appropriate for Consumers to question CSXT's calculation and to offer its own estimate of acquisition costs. Consumers cannot, however, remain silent on the issue on Opening and then assert discovery issues as a justification for including zero cost in a category of evidence the Board has said should be included in SAC evidence. That is particularly true when Consumers' late claims of discovery problems precluded CSXT from rebutting those claims on the merits.

10. New Explanation for Rail Train Costs.

Consumers proposed to rent one rail train for four days for construction of the CERR's main line on Opening but provided no explanation as to how it would be able to construct rail lines with that minimal level of support. *See* Consumers Opening at III-F-57. In Reply, CSXT developed the actual amount of time a rail train would be needed and corrected the proposed costs on the basis of these calculations. *See* CSXT Reply at III-F-80-82. For the first time on Rebuttal, Consumers proposed a novel approach in which rail trains would be unloaded by having contractors drag rail for miles at top speed down the unfinished roadbed. *See* Consumers Reb. at III-F-88-89. By waiting until Rebuttal to explain how it planned to achieve its optimistic rail train costs, Consumers deprived CSXT and its engineers of the opportunity to explain why this plan simply would not work.

⁶⁵ *See* Consumers Rebuttal at III-F-20.

11. New Justifications for Diamond Crossings.

On Opening, Consumers included the cost for one diamond crossing, which it said was the only one it identified for which CSXT or its predecessors would have been the junior railroad.⁶⁶ Consumers did not provide its methodology or any other explanation for only identifying a single diamond crossing. On Reply, CSXT's Engineering Experts reviewed ICC Engineering Reports for the CERR route and identified 21 total crossing diamonds along the CERR route for which the CERR would be wholly or partially responsible for costs.⁶⁷ On Rebuttal, Consumers acknowledges the CERR's responsibility for some of the diamond crossings it excluded on Opening, but provides brand new justifications for its decision to continue to not include costs for other ones.⁶⁸ These new justifications include assertions about the particular histories of each disputed crossing and the alignment of the crossings at issue.⁶⁹ None of those arguments were presented on Opening, and Consumers' decision to save its explanations for Rebuttal is improper.

12. "New Research" on Calumet Sag and Chicago Sanitary Channel Bridges.

Costs for the Calumet Sag Channel Bridge and Chicago Sanitary Channel Bridge were not included by Consumers on Opening because it asserted that "the City of Chicago constructed both of these bridges."⁷⁰ Consumers cited a single 106 year old article as support for its argument, an article which does not even mention

⁶⁶ See Consumers Opening at III-F-59.

⁶⁷ See CSXT Reply at III-F-85 to III-F-87.

⁶⁸ See Consumers Rebuttal at III-F-96 to III-F-97.

⁶⁹ See Consumers Rebuttal Table III-F-11.

⁷⁰ Consumers Opening at III-F-63.

one of the bridges at issue and which indicates that the other publicly funded movable bridge replaced a prior nonmovable bridge.⁷¹ CSXT pointed out these deficiencies on Reply.⁷² Then for its Rebuttal, Consumers states that it “performed additional research” to uncover another century-plus old document that it alleged demonstrated that the CERR would not need to pay for the bridges.⁷³ But rebuttal is not the time to provide “additional research” to which a defendant cannot respond. Complainants may not use rebuttal to provide further evidentiary support for their opening positions that could and should have been introduced as evidence then. Such tactics deprive CSXT of the opportunity to respond on the merits to Consumers’ full evidence and arguments.

13. New Bridge Designs To Explain Away Opening Evidence Design Omissions.

On Opening, Consumers proposed three standard bridge types. *See* Consumers Opening at III-F-64-66. Consumers’ costs for these bridge types included the costs for precast abutment caps and rip rap. Precast abutment caps—consistent with the design elements and associated costs of the CSXT bridge projects relied on by Consumers (Consumers Opening at III-F-67)—require a spill slope for support, and the only purpose of rip rap for bridges is for such spill slopes,⁷⁴ which is confirmed by CSXT’s standard bridge designs produced in discovery. Because

⁷¹ *Id.*

⁷² *See* CSXT Reply at III-F-88 to III-F-91. To the extent there was public participation in the construction of the current bridges, those bridges were replacing preexisting railroad-constructed structures.

⁷³ *See* Consumers Rebuttal at III-F-100.

⁷⁴ *See* CSXT Reply at III-F-95, n.223; CSXT Reply WP “RSTD3517.dgn.”

Consumers' opening bridge costs thus contemplated spill slopes, CSXT noted on Reply places where these design elements would obstruct space under the bridges, and CSXT developed alternative costs for wall abutments where a spill slope would interfere with pedestrian traffic, vehicle traffic, or water flow. *See* CSXT Reply at III-F-92-98.

Consumers now claims on Rebuttal that its Opening bridge design costs were just "average costs" and that for any bridge where a spill slope would be problematic, CERR could use dollars that had been allocated for rip rap to instead fund a wall abutment. *See* Consumers Rebuttal at III-F-101-104. Nothing on Opening suggested that Consumers' bridge costs were just "averages." Nor did anything on Opening suggest that the costs of some elements (like rip rap) could somehow be reallocated to pay for other components whose costs were underestimated. While Consumer's evidence should be rejected on the merits (for the reasons addressed in CSXT's Brief), the Board should not allow such thoroughgoing alterations of its Opening position.

14. New Evidence on Equity Flotation Costs.

CSXT will explain on Brief why Consumers' rejection of any equity flotation costs associated with raising the approximately one-half billion dollars of capital needed to fund the design, construction, and operation of the CERR ignores CSXT's well-supported evidence demonstrating that the average underwriting spread for 535 Initial Public Offerings ("IPOs") of various sizes and in a variety of industries over the past decade have averaged 6.3% of the amount raised.⁷⁵ However,

⁷⁵ *See* CSXT Reply at III-G-1 to III-G-5; CSXT Reply Ex. III-G-1.

Consumers flouts the Board's well-established rules on the scope of proper rebuttal evidence by including, for the first time in its Rebuttal, an extensive argument that the CERR could raise the needed capital through an allegedly lower cost Private Placement rather than a public IPO.⁷⁶ That argument could and should have been included in Consumers' Opening Evidence, but by saving it for Rebuttal Consumers has denied CSXT the opportunity to respond to it.

In its Opening Evidence, Consumers included a single paragraph summarily rejecting *any* amount of equity flotation costs.⁷⁷ It noted that "the size of the issuance" and "numerous other factors dictate the gross-spread incurred in an equity offering."⁷⁸ This is an implicit recognition that "gross spreads" of various magnitudes are in fact "incurred in an equity offering," despite Consumers' dogged adherence to the position that equity flotation costs for the CERR should be zero. Consumers also appended a one-sentence footnote to that paragraph as follows: "These other factors can include, but not be limited to, whether the stock issuance is an initial public offering ("IPO") or a seasoned offering, whether the issuance is a public offering *or private placement*, or whether the issuance is backed by a reputable investment banking firm or venture capitalist."⁷⁹ That was the only mention of private placements in Consumers' Opening. Accordingly, CSXT's Reply Evidence similarly included a single footnote that acknowledged Consumers' mention of private placements as a "factor" that could affect gross spreads, but

⁷⁶ See Consumers Rebuttal at III-G-6 to III-G-13.

⁷⁷ See Consumers Opening at III-G-5.

⁷⁸ *Id.*

⁷⁹ *Id.* at n.4 (emphasis added).

pointed out that the Complainant offered not a shred of evidence of what the level of equity flotation costs would be if the CERR relied upon a private placement.

Therefore, CSXT correctly observed that such omission constituted “a plain and simple failure of proof.”⁸⁰

Consumers then submitted for the first time in its Rebuttal extensive arguments to support the notion that the CERR could raise its needed capital through a private placement, citing a variety of sources for its claims dating from 1991 to 2015—*none* of which were published after Consumers filed its Opening Evidence and *all* of which could and should have been included in that Opening filing.⁸¹ This is precisely the sort of gamesmanship that the Board has indicated it will not tolerate. The entirety of Consumers’ Rebuttal Evidence dealing with private placements should be stricken from the record.

* * *

The Board has repeatedly admonished complainants to submit complete and supported evidence on opening and not to present new evidence on rebuttal. If the Board is serious about requiring complainants to follow the rules and affording defendants a fair and reasonable opportunity to reply to complainant’s evidence, then it must strike improper rebuttal evidence. Indeed, a failure to strike

⁸⁰ See CSXT Reply at III-G-4, n.6.

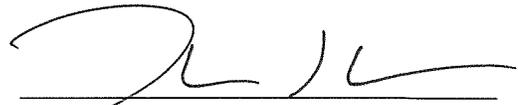
⁸¹ Moreover, not all of the “support” that Consumers offered for the first time for its arguments regarding private placements even constitutes “evidence” as opposed to clear unsupported speculation. For example, Consumers speculates that Berkshire Hathaway might be an investor in the CERR, or Canadian Pacific, or “other major transportation and infrastructure companies.” See Consumers Rebuttal at III-G-12. Such self-serving musings scarcely constitute probative evidence about the level of equity flotation costs that CERR would incur in financing itself.

Consumers' improper Rebuttal would encourage future gamesmanship, by suggesting that the Board will permit complainants to hold back before revealing their full cases-in-chief until after defendants have completed their evidentiary submissions and have no opportunity to respond. If the Board were to give consideration to any of Consumers' improper Rebuttal, it would undermine the fairness of these proceedings, deprive the Board of evidence vetted through the adversarial process, and violate CSXT's due process right to be permitted to respond to Consumers' full and complete case-in-chief.

CONCLUSION

For the foregoing reasons, the impermissible Rebuttal detailed in this Motion should be stricken from the record, and the Board should not rely on any such evidence in its resolution of this case.

Respectfully submitted,



Raymond A. Atkins
G. Paul Moates
Matthew J. Warren
Terence M. Hynes
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. Shudtz
Paul R. Hitchcock
John P. Patelli
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

Counsel to CSX Transportation, Inc.

Dated: June 24, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2016, I caused a copy of the foregoing Motion to Strike to be served by hand delivery or more expeditious means upon:

Kelvin J. Dowd
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036



Marc Korman

APPENDIX 1

—

Consumers v. CSXT
STB Docket No. 42142

**Appendix 1
Impermissible Rebuttal**

Section Number	Page Number	Topic
Consumers Rebuttal Ex. II-1	Consumers Rebuttal Ex. II-1 at 65	Altered Class III vessel transportation rate and operating cost
Consumers Rebuttal Ex. II-1.	Consumers Rebuttal Ex. II-1 at 68; <i>Id.</i> at 70-71.	New dredging and rail demurrage costs
Consumers Rebuttal Ex. II-1	Consumers Rebuttal Ex. II-1 at 68	Campbell operating cost
Consumers Rebuttal Ex. II-1	Consumers Rebuttal Ex. II-1 at 27	KCBX capacity change
II-B-4-b; Consumers Rebuttal Ex. II-2	II-59 through II-60; Consumers Rebuttal Ex. II-2 in its Entirety	New WorleyParsons statement
II-B-2-a	II-24 through II-27	Attack on Board precedent regarding what volume of shipments a competitive option must move
Consumers Rebuttal Ex. II-I.	Consumers Rebuttal Ex. II-I at 87-92.	Capital costs of rail build-out
III-C-1-c-ii-(b)	III-C-104	Excess run-through locomotives
III-D-3-a-ii	III-D-20 through III-D-21	New efficiency arguments regarding turn crews
III-D-3-a-iv-(a)	III-D-41 through III-D-44	New rationale for the fringe benefit ratio
III-D-3-b-ii-(d)-(vii)	III-D-99 through III-D-101	IT staffing references at KCS
III-D-3-b-v-(c)	III-D-112 through III-D-113	Removal of certain employees from the attrition rate
III-D-4-e-i	III-D-138 through III-D-139	MoW equipment asset life support

Section Number	Page Number	Topic
III-F-1-b-iv	III-F-19 through III-F-24	Real estate acquisition costs arguments
III-F-3-c-iii	III-F-88 through III-F-89	Rail train costs
III-F-3-e-iii	III-F-95 through III-F-97	Diamond crossings survey and arguments
III-F-5-a	III-F-100	Bridges additional evidence
III-F-5-b	III-F-101-104	New bridge design explanations
III-G-1-a-ii	III-G-6 through III-G-13	Equity flotation costs new arguments and attack on Board precedent