

ENTERED
Office of Proceedings
July 14, 2016
Part of
Public Record

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

COMPLAINANT’S REPLY TO MOTION TO STRIKE

Catherine M. Reynolds
Senior Vice President and General Counsel
Eric V. Luoma
Assistant General Counsel
Consumers Energy Company
One Energy Plaza
Jackson, Michigan 49201

Kelvin J. Dowd
Robert D. Rosenberg
Andrew B. Kolesar III
Daniel M. Jaffe
Katherine F. Waring
SLOVER & LOFTUS LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

Of Counsel:

SLOVER & LOFTUS LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036

Dated: July 14, 2016

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

COMPLAINANT’S REPLY TO MOTION TO STRIKE

Complainant, Consumers Energy Company (“Consumers”), pursuant to 49 C.F.R. § 1104.13, hereby replies in opposition to the Motion to Strike (“Motion”) filed on June 24, 2016 by Defendant, CSX Transportation, Inc. (“CSXT”). For the reasons set forth herein, CSXT’s Motion is completely lacking in merit, and should be denied.¹

¹ As Consumers advised the Board by letter on June 27, 2016, CSXT’s Motion was filed out of time and in violation of 49 C.F.R. § 1104.13, as CSXT did not seek leave to present its Motion outside the 20-day period prescribed in the Rule. Consumers’ letter requested confirmation that the Board would reject the Motion summarily, on that basis. As the Board has not yet responded to that request, Consumers is submitting this Reply in order to protect its rights. However, Consumers’ reaffirms its position that CSXT’s unexcused failure to comply with the governing Rules of Practice should be grounds for rejection of its Motion without further consideration.

INTRODUCTION

The Board's standards for evaluating the scope of permissible rebuttal evidence in proceedings under the *Coal Rate Guidelines*' SAC Constraint² were set down in *Duke/NS*,³ and have been interpreted and applied in numerous subsequent decisions, up to and including the 2014 ruling in *Sunbelt*. In no small measure, the plethora of rulings on post-evidentiary motions to strike correlates with the now-common practice of railroad defendants using such motions as vehicles for surrebuttal, in response to what is supposed to be the closing evidentiary submission by the complainant, and/or as supplements to their final briefs, which typically are subject to page limitations. CSXT's Motion is the latest example of this tactic.

As articulated on numerous occasions by the Board, the standards for proper rebuttal in cases under the *Guidelines* can be summarized as follows:

1. A complainant cannot change or contradict evidence that it presented in its opening narrative and exhibits if the defendant accepts or does not challenge such evidence.⁵
2. A complainant cannot redesign its hypothetical SARR or change the core components of its opening case-in-chief.⁶

² In the interests of brevity in this Reply, Consumers adopts and uses the same Acronyms and short-form Case Glossary citations that are listed at pages iii-v of its June 24, 2016 Brief.

³ 7 S.T.B. at 100-101.

⁵ See *Sunbelt* at 11; *Otter Tail* at 4.

⁶ *Duke/NS*, 7 S.T.B. at 100; *FMC*, 4 S.T.B. at 790.

3. If the defendant’s reply presentation challenges elements of the complainant’s opening evidence, on rebuttal the complainant can:
 - a. accept the defendant’s reply evidence;
 - b. defend its opening evidence; and/or
 - c. acknowledge the defendant’s critique, but show that all or part of the defendant’s substitute evidence is “unsupported, infeasible or unrealistic,” and may present evidence to correct the flaws.⁷

Consumers’ Rebuttal Evidence in this proceeding scrupulously adhered to the foregoing rules. As shown in this Reply, CSXT’s claims to the contrary in its Motion advance an improperly restrictive reading of the standards and guiding precedents, and a conflation of “evidence” – which is the actual subject of the Board’s rules – with “argument,”⁸ where parties to litigation have always had considerable liberty at any stage of proceedings.⁹

CSXT’s Motion to Strike should be denied.

ARGUMENT

In the balance of this Reply, Consumers addresses each of the issue areas that are the subjects of CSXT’s Motion, in the order that CSXT raised them. As shown, when properly evaluated against the governing legal standards for motions to strike, none of CSXT’s preemptive challenges to Consumers’ Rebuttal Evidence are meritorious.

⁷ *Sunbelt* at 7-8; *Duke/NS*, 7 S.T.B. at 101.

⁸ *See, e.g.*, Motion at 1-4, 6, and *compare* Motion at 2 n.2.

⁹ *See e.g., Yale-New Haven Hosp., Inc. v. Thompson*, 198 F. Supp. 2d. 183, 186 (D. Conn. 2002); *Burlington N. Inc. & Burlington N. R.R. – Control & Merger – Santa Fe Pac. Corp. & the Atchison, Topeka, & Santa Fe Ry. Co.*, 10 I.C.C. 2d 661, 731 (1995).

1. Operating Costs for Direct Water “Option”

In a rather transparent example of surrebuttal under the guise of a motion to strike, CSXT argues that Consumers’ Rebuttal improperly “revised” certain evidence concerning costs associated with a hypothetical vessel transportation “option” after CSXT had accepted it.¹⁰ Even the most casual review of the record, however, shows this claim to be groundless. Specifically:

- On Opening, Consumers’ expert Dr. Barbaro used a { } per ton vessel transportation rate included in the 2014 WorleyParsons report (for Class II vessels from KCBX to Cobb) to assemble an estimated cost for a fully-loaded, Class III vessel moving coal from the MERC dock at Superior, WI to Pigeon Lake.¹¹ CSXT’s Motion claims that because its consultants “adopted” the rate in their alternative analysis,¹² Consumers was precluded from challenging CSXT’s use of the rate on Rebuttal. As Dr. Barbaro showed, however, CSXT’s consultants did not adopt Consumers’ Opening Evidence. They cherry-picked one component, and then applied it to a different and incompatible scenario. Significant, key distinctions between the scheme described by CSXT’s consultants and the scenario discussed by Consumers on Opening made the { } rate invalid in the context of CSXT’s plan. These included CSXT’s use of smaller vessels, which would not be loaded to their full capacity; the need for extended seasonal operations under the CSXT plan; and vessel loading delays occasioned by

¹⁰ Motion at 7-9.

¹¹ See Consumers Opening, Exhibit II.B-1 at 47. The total calculated cost for Class III vessel transportation was { } per ton.

¹² Motion at 7.

CSXT's assumption that each vessel would carry only a single trainload of coal.¹³ Each of these differences carried an increase in costs,¹⁴ which Consumers was entitled to demonstrate on Rebuttal.¹⁵

- CSXT argues that Consumers was precluded from criticizing CSXT's use of { } per ton as the operating cost for a Pigeon Lake unloading facility, because Dr. Barbaro incorporated that same number in his Opening Report without adjusting it for volume differences or dredging, the two (2) bases for his critique of CSXT's consultants' costs on Rebuttal.¹⁶ Again, however, CSXT distorts the record. As Dr. Barbaro explained, a volume-based adjustment was necessary for the CSXT plan because that plan would allow for the delivery of only { } million tons of coal per year, rather than the { } million tons that WorleyParsons' { } estimate was based on.¹⁷ Since 75% of the costs of unloading were fixed, the substantially fewer tons translate into a higher per ton cost.¹⁸ The additive for maintenance dredging was to account for a cost that CSXT's *own consultants* said would be incurred, but had not

¹³ See Consumers Rebuttal, Exhibit II-1 at 65-68.

¹⁴ The individual cost components were detailed in Figure 2-23 of Dr. Barbaro's Rebuttal Report.

¹⁵ *Duke/NS*, 7 S.T.B. at 101 ("where the shipper shows that the railroad's reply evidence is itself unsupported, infeasible or unrealistic, the shipper may supply corrective evidence").

¹⁶ Motion at 8-9.

¹⁷ There was no need for an adjustment to account for the difference between WorleyParsons' { } annual tons assumed by Dr. Barbaro, as the difference was modest and it was reasonable to assume that the { } figure would have been valid as applied to a higher annual volume. Compare Motion at 9 n.20.

¹⁸ Consumers Rebuttal, Exhibit II-1 at 68.

included in their calculations.¹⁹ Correcting CSXT's own error cannot be considered improper rebuttal.²⁰

- CSXT objects to Dr. Barbaro's quantification of rail demurrage costs at the KCBX Terminal on Rebuttal, because his Opening Report, which identified those costs, did not calculate them.²¹ Again, a look at the record shows that CSXT's claim is meritless. On Opening, Dr. Barbaro took and defended the position maintained by Consumers throughout this case, that vessel shipments through KCBX were *operationally infeasible* as a substitute for CSXT rail service. Even so, Dr. Barbaro identified rail demurrage costs as an expense that would have to be accounted for *if* one considered KCBX as an option.²² Without an actual operating plan for movements from KCBX, it was not possible to compute the actual demurrage cost, but Consumers' Opening Evidence clearly put CSXT on notice that such a cost would have to be included in any KCBX scenario. On Reply, CSXT argued that shipments through KCBX Terminal were feasible, but failed to include an estimated cost for the railroad demurrage that Consumers identified as an expense component on Opening (among other cost components). Consumers' correction of this error was well within the proper scope of Rebuttal.²³

¹⁹ *Id.*

²⁰ *See WFA I* at 8.

²¹ Motion at 9.

²² Consumers Opening, Exhibit II.B-1 at 25.

²³ *See Sunbelt* at 9.

2. KCBX Capacity

Prior cases confirm that if *Consumers* had taken a position on the transloading capacity limit at the KCBX South Terminal on Opening, and CSXT relied on that position, then *Consumers* would not be permitted to change its position on Rebuttal.²⁴ As a review of the relevant portion of Dr. Barbaro's Opening Report shows, however, *Consumers* never proposed a maximum throughput capacity at KCBX,²⁵ arguing instead that regulatory restrictions, seasonal operating limitations and other factors (including cost) made KCBX an infeasible "option" for competitive coal deliveries to Campbell.²⁶ In its Motion, CSXT claims that a statement made by a *KCBX representative* and recorded by Dr. Barbaro in a workpaper, but never relied upon by *Consumers*, is nevertheless binding on *Consumers*, and precluded *Consumers* on Rebuttal from challenging CSXT's claims regarding KCBX capacity.²⁷ There is no precedential support for such a position.²⁸

To be sure, CSXT was within its rights to try and rely on the KCBX salesman's statement,²⁹ or any other source whose credibility it thought it could defend,

²⁴ See *M&G* at 9; *FMC*, 4 S.T.B. at 790.

²⁵ See *Consumers* Opening, Exhibit II.B-1 at 20-25.

²⁶ *Id.* at 24-25.

²⁷ Motion at 9-10.

²⁸ To the contrary, the Board has affirmed in various contexts that a party's position is defined by its evidentiary narrative, not by what might be reflected in a workpaper. See *Sunbelt*, STB Decision on Reconsideration served June 30, 2016 at 18, citing *AEPCO 2011* at 74.

²⁹ It is instructive to note that had Dr. Barbaro only made a record of the information that he was interested in and used, and CSXT later contacted the KCBX

in making its claims on Reply on the issue of KCBX capacity. However, the information relied on by CSXT came from a third party; it was not generated by Consumers or its expert, nor was it endorsed by either one in any fashion. Because Consumers never relied on the salesman's statement regarding capacity, it was well within its own rights under *Duke/NS* and following cases to show that CSXT's evidence was "unsupported, infeasible or unrealistic...."³⁰ This clearly is not a case wherein Consumers presented specific evidence on Opening and then "urge[d] the Board in its Rebuttal Evidence to preclude consideration" of that same evidence.³¹ CSXT's request to strike Consumers' Rebuttal Evidence on KCBX capacity should be rejected.

3. Full Replacement of CSXT Service

In its Opening Evidence establishing the absence of effective transportation competition for CSXT service to Campbell,³² Consumers reviewed previous analyses of hypothetical alternatives, and a more recent and complete evaluation performed by its expert witness Dr. Barbaro, which demonstrated that no operationally and economically effective substitute for CSXT existed. CSXT clearly understood Consumers' position to be that full replacement was necessary, for on Reply it took issue with that position and argued that effective competition could be created through the diversion of only 75% of

salesman for his views on capacity, it is beyond dispute that Consumers would have been entitled to challenge CSXT's Reply Evidence.

³⁰ *Duke/NS*, 7 S.T.B. at 101. *See also*, *WFA I* at 8.

³¹ *M&G* at 9.

³² *See* Consumers Opening at II-11-52 and Exhibit II-1.

Campbell's annual coal requirements to another transportation mode.³³ On Rebuttal, consistent with *Duke/NS* and following cases, Consumers defended its Opening position, and then demonstrated that CSXT's alternative "75% solution" scenario was operationally and economically infeasible and unsupported by relevant evidence.³⁴ The first point was advanced through argument based on the existing evidentiary record and reliance on the Board's *TMPA* decision.³⁵ No new evidence was introduced.

CSXT's Motion does not challenge Consumers' right on Rebuttal to critique the Defendant's "75% solution." However, it objects to Consumers' defense of its Opening position, claiming that Consumers' arguments "deprived CSXT of a chance to respond...."³⁶ The objection is wholly unfounded. CSXT in fact had a full opportunity in its Brief to respond to *every* point made by Consumers on Rebuttal in support of its position that under the specific circumstances of this case, full replacement of CSXT service should be deemed necessary in order to assure effective competition for coal deliveries to Campbell. CSXT took advantage of that opportunity.³⁷ As Consumers submitted no new *evidence* on Rebuttal, and CSXT had the chance to respond to all of Consumers' arguments, its request to strike that portion of Consumers' Rebuttal must be overruled.

³³ See CSXT Reply at II-B-14.

³⁴ See Consumers Rebuttal at II-22-61.

³⁵ *Id.* at II-22-27.

³⁶ Motion at 13.

³⁷ See CSXT Final Brief at 5.

4. Equity Flotation Costs

Consumers' Opening position on the question whether the CERR should be forced to incur equity flotation costs was fully consistent with the string of Board precedents culminating in *Sunbelt*, almost all of which excluded flotation costs from the SARR cost of capital calculation.³⁸ Consumers acknowledged the Board's ruling in *Sunbelt* that such costs *might* be included *if* evidence was presented of equity flotation fees for stock issuances by firms "of a similar size ... [and] with a similar profile" to the CERR.³⁹ However, the burden of presenting such evidence, if it existed – and justifying an exception to precedent – rested on CSXT, not Consumers.⁴⁰ As Consumers noted on Opening, no reasonable surrogates for the CERR could be identified from public information.⁴¹ In its Rebuttal, Consumers observed that the *Sunbelt* exception appeared to be an unexplained departure from previous decisions' categorical preclusion of equity flotation costs,⁴² but Consumers then went on to apply the conditions for the exception, and showed that CSXT's made-for-litigation "study" of selected and incomparable initial public offerings did not pass the test.⁴³ CSXT's claim that Consumers somehow should

³⁸ See *Sunbelt* at 183-185; *AEPCO 2011* at 135-138. The one exception was a case in which both the complainant and the defendant agreed that an equity flotation cost should be included. See *AEP Tex. N. Co. v. BNSF Ry. Co.*, NOR 41191 (Sub-No. 1) (STB served May 15, 2009) at 23.

³⁹ *Sunbelt* at 185.

⁴⁰ See *Otter Tail* at C-18; *Pub. Serv. Co. of Colo. d/b/a Xcel Energy v. BNSF Ry. Co.*, NOR 42057 (STB served Jan. 19, 2005) at 76. See also, *AEPCO 2011* at 33.

⁴¹ Consumers Opening at III-G-5.

⁴² Consumers Rebuttal at III-G-2.

⁴³ *Id.* at III-G-3-5.

be precluded from exposing the flaws in the carrier's Reply Evidence on the issue⁴⁴ is unfounded.

Equally unfounded is the argument that Consumers improperly submitted "new evidence" concerning equity flotation costs on Rebuttal.⁴⁵ Consumers' entire Rebuttal section on the subject of flotation costs was a point-by-point response to evidence offered by CSXT on Reply in an effort to meet the *Sunbelt* test. Consumers explained how CSXT's IPO "study" failed to include analyses of any companies "of a similar size ... [and] with a similar profile" to the CERR,⁴⁶ but did not introduce any new evidence that could have been submitted on Opening. Similarly, Consumers' argument regarding private equity placements as lower cost alternatives to IPOs was directly responsive to CSXT's assumption⁴⁷ that an IPO should have been considered the exclusive vehicle for the CERR to raise its necessary equity. Again, however, consistent with then-prevailing precedent that assumed no equity flotation component, no new evidence was offered. The authorities and sources cited by Consumers all were public texts, articles and reports readily available through common electronic research,⁴⁸ and CSXT took full advantage of its opportunity to reply to Consumers' arguments in its

⁴⁴ Motion at 13.

⁴⁵ *Id.* at 24-26.

⁴⁶ Consumers Rebuttal at III-G-4-5.

⁴⁷ *See* CSXT Reply at III-G-2.

⁴⁸ *See* Consumers Rebuttal at III-G-6-13. Those sources indicated that a reasonable estimate of private placement costs for an enterprise such as the CERR ranged between 0.4% and 1.402%. *Id.* at III-G-10.

brief.⁴⁹ The *Duke/NS* standard for improper rebuttal does not preclude a complainant from offering additional argument regarding the accuracy of contested information (such as CSXT’s IPO “study”) where, as CSXT admits is the case here, the defendant can fully respond.⁵⁰

In its June 30, 2016 decision on reconsideration in *Sunbelt*, which obviously post-dated the submission of Consumers’ Rebuttal Evidence, the Board abruptly reversed its original ruling on equity flotation and decided that evidence which it had twice rejected as insufficient to pass the *Sunbelt* test⁵¹ – data related to the Facebook IPO – was acceptable to establish a fee of 2.1%. This was higher than the private placement cost range shown in note 48, above, but only a *third* of the unsupported and inapplicable 6% fee advanced by CSXT in this case. *See Sunbelt*, STB Decision on Reconsideration served June 30, 2016, at 29-30. Because the Board’s change of position on the evidentiary value of large IPO’s occurred too late for Consumers to present evidence in response to it on Rebuttal, contemporaneous with this Reply Consumers is submitting a petition for leave to offer limited, supplemental evidence related to a proper determination of equity flotation costs for the CERR.

⁴⁹ *See* CSXT Final Brief at 53-54.

⁵⁰ *See* Motion at 24; *Pub. Serv. Co. of Colo. d/b/a Xcel Energy v. BNSF Ry. Co.*, NOR 42057 (STB served June 8, 2004) at 4. *See also Sunbelt* at 9-10.

⁵¹ *See Sunbelt* at 184; *DuPont* at 274.

5. The Petro/Bovitz Statement

It is well-established that in assembling its opening evidence, a complainant need not attempt to anticipate every argument that the defendant railroad might make on reply, and it is not impermissible for the complainant to meet claims that it did not have reason to expect with conflicting rebuttal evidence.⁵² The same holds true for rebuttal evidence that is directed at factual misrepresentations contained in the defendant's reply.⁵³

In this case, Consumers' Opening Evidence included a discussion of the 2014 report prepared by WorleyParsons, examining certain aspects of hypothetical coal transportation delivery alternatives for the Campbell Station.⁵⁴ A copy of the report had been produced to CSXT during discovery. CSXT's Reply presentation on the issue of qualitative market dominance, however, included two (2) elements that Consumers had no reason to anticipate: (1) repeated mischaracterizations and misrepresentations of the conclusions reached – and not reached – by the WorleyParsons authors; and (2) a claim that from the standpoint of commercial vessel transportation, the 225-acre, shallow and recreational Pigeon Lake is virtually identical to the 6.48 square mile wide, 75-foot deep Muskegon Lake.⁵⁵ On Rebuttal, therefore, Consumers presented a Verified Statement by

⁵² See, e.g., *TPI* (STB served May 31, 2013) at 13-14; *Potomac Elec. Power Co. v. CSX Transp., Inc.*, NOR 41989 (STB served Nov. 24, 1997) at 3.

⁵³ *TPI* at 14-15.

⁵⁴ See Consumers Opening at I-19-21, II-21-32.

⁵⁵ See Consumers Rebuttal at II-12, II-15.

the WorleyParsons authors, for the specific purpose of correcting the record on both points.⁵⁶

Consumers did not “wait” until Rebuttal to present the Petro/Bovitz Statement,⁵⁷ because until CSXT’s Reply was filed Consumers had no reason to expect that CSXT would make the claims to which the Statement responded. Unlike the evidence that was rejected in *TPI*,⁵⁸ the Petro/Bovitz Statement did not reflect a new Consumers position on the relevance of the WorleyParsons report, or an initial evidentiary submission on an issue that Consumers ignored on Opening. The Statement was presented solely and specifically in response to extreme and unfounded claims made by CSXT on Reply, which Consumers could not have been charged with anticipating. Additionally, CSXT had and took the opportunity to respond to the Statement in its Brief.⁵⁹ CSXT cannot claim “unfair surprise”⁶⁰ under these circumstances.

6. Cobb-Rail Capital Costs

CSXT’s Motion argues that Consumers’ Rebuttal restatement of the capital costs for what CSXT on Reply presented as its “Cobb-Rail Option” improperly included costs for rail yard upgrades and equipment, in addition to permitting and mobilization, because these cost items supposedly were not identified in Consumers’ Opening

⁵⁶ *Id.* at II-15 n.26.

⁵⁷ Motion at 15.

⁵⁸ *TPI* at 7-9.

⁵⁹ CSXT Final Brief at 6.

⁶⁰ Motion at 15.

description of the hypothetical water-rail route examined by WorleyParsons in 2014.⁶¹ However, a comparison of Dr. Barbaro's Opening Report Figures 6-22 through 6-25⁶² and CSXT's consultants' Reply Appendices 8, 10 and 12⁶³ shows that CSXT's claim is meritless. The plan proposed by CSXT included the use of the existing MSRR yard that was not contemplated by WorleyParsons, which justified the addition of yard rail trackage under *Duke/NS*.⁶⁴ Additionally, Dr. Barbaro's Opening Figures *included* costs for permitting, environmental mitigation, engineering, procurement (*i.e.*, mobilization) and land, none of which were accounted for by CSXT's consultants. It was entirely appropriate for Consumers to correct these errors and omissions on Rebuttal.⁶⁵

7. Turn Crew Assignment Assumptions

Consumers' operating witnesses assumed that crews operating in turn service would handle two movements per day on average. This assumption, as shown by Consumers' RTC results, was reasonable and well supported because the average transit times for movements handled by turn crews operating in the Chicago-area was generally less than four hours, and in many cases just over two hours. Thus, Consumers assumed that no recrewing would be necessary, and that each crew would make no more than two moves in a shift for purposes of calculating crew requirements.

⁶¹ Motion at 16.

⁶² *See* Consumers Opening, Exhibit II.B-1 at 116-119.

⁶³ *See* CSXT Reply, Exhibit II-B-1 at 85, 89 and 96.

⁶⁴ *See* 7 S.T.B. at 101.

⁶⁵ *See* Consumers Rebuttal, Exhibit II-1 at 85-87; *Sunbelt* at 9-10.

On Reply, CSXT argued that Consumers' average of two moves per shift assumption was not realistic – even though CSXT's own RTC Modeling plainly demonstrated that it was. Thus, CSXT concocted an unnecessary recrew additive for these moves.

On Rebuttal, Consumers did not alter the calculation procedures it used on Opening. Instead, Consumers responded directly to CSXT's Reply by pointing out that Consumers' Opening position was well supported and conservative, because it would be possible for some crews to operate as many as four turns per day, especially on shorter moves between, for example, Curtis and Barr Yard. Thus, adding more train and engine employees, as CSXT posited, was not necessary. Despite the plain possibility of some crews working more than two turns per day, Consumers did not alter its Opening calculation procedures on Rebuttal nor did it assign any crews to perform more than two turns. Consumers introduced no new evidence on Rebuttal, and its responsive arguments relied exclusively on evidence that already was on the record. This plainly meets the standard of proper rebuttal.⁶⁶

8. Compensation for Run-Through Locomotives

Consumers followed standard practice for handling run-through power in proceedings under the SAC Constraint by selecting a standard locomotive consist for trains handled by the CERR. Any additional locomotives that operated on the trains in the real world are simply idled and deadheaded on to the receiving carrier.

Compensation via inclusion of locomotives in the run-through power pool was based on

⁶⁶ See *Sunbelt* at 9; *Duke/NS*, 7 S.T.B. at 100-101.

the horsepower hours actually used, which is typical for such arrangements.⁶⁷ On Reply, CSXT accepted this approach, but then complained that the CERR had to compensate the interchange partners for locomotives that the CERR does not need, but which were left in place by the interchange partners (*i.e.*, no horsepower hours were consumed).⁶⁸ On Rebuttal, Consumers rejected CSXT's proposed compensation scheme noting specifically that on Opening, Consumers had used the standard approach for run-through power compensation. Consumers then cited multiple reasons why the CERR would not pay the interchange partners for locomotives that it does not use or need.⁶⁹

Despite the record evidence to the contrary, CSXT argues in its Motion that Consumers' presented a "novel," unsupported theory for the first time on Rebuttal. CSXT's argument is without merit. Consumers simply provided further details that explain the standard approach it used on Opening and to rebut CSXT's cost additive, which is plainly permissible under the governing standards.⁷⁰

9. Fringe Benefit Ratio Support

CSXT argues in its Motion that Consumers' Rebuttal Evidence on fringe benefit ratios is impermissible because Consumers supposedly rejected its own Opening rationale and presented a brand new argument to support its use of the 2014 fringe benefit

⁶⁷ Consumers Opening at III-C-31-32.

⁶⁸ CSXT Reply at III-C-51-52.

⁶⁹ Consumers Rebuttal at III-C-102-104.

⁷⁰ *See Sunbelt* at 7-8.

ratios reported by Class I carriers. CSXT mischaracterizes Consumers' evidence, and ignores the fact that Consumers did not change its position on Rebuttal.

Consumers' Opening Evidence was very straightforward. Consumers used an average fringe benefit ratio for all Class I railroad employees in the United States, based on the 2014 R-1 data submitted by the railroads.⁷¹ Consumers chose to use an average ratio because all of the Class I railroads have some presence in Chicago. CSXT disagreed that KCS should be included given its modest presence in Chicago,⁷² and Consumers properly and permissibly responded to CSXT's argument by pointing out that most of the employees of the other Class I railroads do not work in Chicago either.⁷³ Thus, there was no reason to exclude the KCS from the analysis – except of course that CSXT liked the results more than if KCS stayed in the average. Likewise, CSXT argued that a three-year average of fringe benefits was more appropriate than a one-year snapshot,⁷⁴ and Consumers again responded directly to CSXT's Reply evidence by noting that the 2014 figure is more representative of fringe benefit ratios going forward because the 2014 ratio had declined significantly as compared to 2012 and 2013⁷⁵ – a point that CSXT's own Reply chart makes in part.⁷⁶ Consumers was within the bounds of

⁷¹ Consumers Opening at III-D-31.

⁷² CSXT Reply at III-D-46.

⁷³ Consumers Rebuttal at III-D-43.

⁷⁴ CSXT Reply at III-D-46.

⁷⁵ Consumers Rebuttal at III-D-42-43.

⁷⁶ CSXT Reply at III-D-48, Figure III-D-9.

permissible rebuttal to further imply and explain why CSXT's approach would not produce the most accurate results going forward.

10. IT Staffing

CSXT did not accept Consumers' IT staffing, which was based on Consumers' IT expert's (Mr. Kruzich) many years of experience with the KCS Railway – a point well known to CSXT as Mr. Kruzich has appeared in other cases involving CSXT, including *TPI*. CSXT, with no evidentiary support and without even an expert witness in information technology to sponsor its evidence, modified Mr. Kruzich's staffing by adding several positions.⁷⁷ On Rebuttal, Consumers directly responded to CSXT's unnecessary additions by noting that in some cases Consumers' Opening staffing levels were consistent with KCS's staffing levels – a natural comparison given that Consumers made it clear on Opening that the CERR staffing levels were developed by the former CIO of KCS.⁷⁸ Moreover, Consumers did not alter its IT staffing on Rebuttal, and the staffing responsibilities were fully detailed on Opening.⁷⁹ Thus, Consumers' Rebuttal arguments were plainly permissible rebuttal.⁸⁰

11. Attrition Rate

CSXT again attempts to introduce surrebuttal evidence by arguing that Consumers' Rebuttal presentation with respect to attrition rates is “ludicrous on the

⁷⁷ CSXT Reply at III-D-96-98.

⁷⁸ Consumers Opening at III-D-67 and V-28-30.

⁷⁹ Consumers Opening at III-D-69-70; Consumers Rebuttal at III-D-99-101.

⁸⁰ *Sunbelt* at 9-10 (denying motion to strike G&A evidence related to marketing and claims staff).

merits.”⁸¹ CSXT also claims that Consumers’ adherence to its Opening position, which excluded deceased, retired and furloughed employees in its attrition rate, was improper because it was the first time Consumers provided a detailed rationale for its methodology. This is not correct. Consumers’ Opening approach was self-evident from the submitted workpaper – the CERR is a new railroad where the proportion of deceased, retired or furloughed employees is irrelevant. On Reply, CSXT did not agree with Consumers’ approach, which it plainly understood, and Consumers directly responded to an unexpected criticism that CSXT leveled. Its Rebuttal was permissible and proper.⁸²

12. MOW Equipment Asset Life

On Opening, Consumers assumed that certain heavy MOW equipment would have a useful asset life of 20 years, a figure that other complainants have used in similar cases. CSXT cited a public document that it believed supported a 10-year asset life.⁸³ On Rebuttal, Consumers directly rebutted CSXT’s asset life argument using the same public document that CSXT relied on in Reply. Public documents are not new evidence.⁸⁴ Likewise, Consumers pointed out that CSXT’s own documents, provided in discovery, support the use of a 20-year asset life.⁸⁵ Thus, Consumers did not alter its

⁸¹ Motion at 19.

⁸² See *TPI* at 13-14.

⁸³ CSXT Reply at III-D-134.

⁸⁴ See *N. Am. Freight Car Ass’n v. Union Pac. R.R.*, NOR 42119 (STB served Mar. 12, 2015) at 4-5 (publicly available document UP included in Brief found to not constitute “new evidence.”); *Xcel*, 7 S.T.B. at 637; *Duke/NS*, 7 S.T.B. at 101, 141, 175; *WFA I* at 48, 71.

⁸⁵ Consumers Rebuttal at III-D-139.

Opening position and it replied to a spurious revision by CSXT with public documents and documents in CSXT's possession. Consumers' Rebuttal was permissible and proper.

13. Real Estate Acquisition Costs

CSXT claims that Consumers failed to include expenses associated with real estate acquisition in its Opening CERR costs, then raised problems with CSXT's discovery production for the first time on Rebuttal,⁸⁶ in support of its Opening position. In fact, however, acquisition expenses *were* included in Consumers' Opening real estate acquisition costs,⁸⁷ and Consumers defended its Opening position on Rebuttal – as was its right under *Duke/NS*⁸⁸ – on several grounds beyond problems with CSXT's discovery production.⁸⁹ Moreover, the discovery deficiencies that Consumers cited on Rebuttal were specifically brought up by Consumers on Opening, and were not refuted by CSXT on Reply.⁹⁰ CSXT's Motion with respect to this issue is without basis.⁹¹

⁸⁶ Motion at 20-21.

⁸⁷ *See generally* Smith Opening Report at 3-5 (market value includes passage of title from buyer to seller).

⁸⁸ *Duke/NS*, 7 S.T.B. at 100-101.

⁸⁹ Consumers Rebuttal at III-F-19-24.

⁹⁰ Consumers Opening at III-F-9.

⁹¹ SAC procedures require parties to submit functional spreadsheets. *See Texas Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, NOR 42056 (STB served Feb. 6, 2002) at 2.

14. Rail Train Costs

CSXT's Motion argues that a plan for off-loading rail trains was not part of Consumers' Opening Evidence,⁹² but as shown therein, there was no reason for Consumers to include such a plan because the rail "will be unloaded and distributed by the rail installation contractor, which costs are covered in Consumers' track construction labor costs."⁹³ Consumers' construction labor costs were for the most part accepted by CSXT on Reply.⁹⁴ However, CSXT nevertheless took issue with the off-loading time accounted for by Consumers, arguing that it would take upwards of 17 days to off-load the rail train.⁹⁵ In its Rebuttal, Consumers' experts refuted this unsupported assumption, and showed that the standard equipment for rail construction incorporated in Consumers' Opening Evidence was physically capable of off-loading the rail trains within approximately 1.5 days, using the contract labor that the CERR would employ.⁹⁶ Given that Consumers did not deviate from its Opening position, and was entitled to respond to the new argument raised by CSXT,⁹⁷ there is no legitimate basis to strike Consumers' explanation of the off-loading process for the rail train.⁹⁸

⁹² Motion at 21.

⁹³ Consumers Opening at III-F-57.

⁹⁴ *Id.* at III-F-57, III-F-62; CSXT Reply at III-F-87.

⁹⁵ CSXT Reply at III-F-81-82.

⁹⁶ Consumers Rebuttal at III-F-89.

⁹⁷ *See Sunbelt* at 7-8, 10.

⁹⁸ *See, e.g., TPI* at 13-14.

15. Diamond Crossings

Consumers included a single diamond crossing for the CERR on Opening, based on the lines being replicated and a review of materials produced by CSXT in discovery.⁹⁹ In Reply, CSXT claimed that CERR should be responsible for 21 crossings, allegedly based on the ICC Engineering Reports.¹⁰⁰ Consistent with *Duke/NS*¹⁰¹ and following cases, Consumers reviewed CSXT's evidence and determined that some, but not all of the proposed additional crossings were appropriate. In each instance where Consumers rejected new diamond crossing costs to refute CSXT's proffers on Reply, however, Consumers relied on CSXT's own documents that were provided in discovery, track charts, or publicly available maps, all of which are accepted sources of corrective evidence on rebuttal.¹⁰² Consumers did not change the alignment of any diamond crossing, and the description provided is consistent with Consumers' Opening track diagrams (Opening Exhibit III-B-1). Consumers rejected crossings proposed by CSXT at the following locations:

- {

} A shipper is allowed to rely on data provided by the railroad during discovery.¹⁰⁴

⁹⁹ See Consumers Opening at III-F-59.

¹⁰⁰ Motion at 22.

¹⁰¹ *Duke/NS*, 7 S.T.B. at 101.

¹⁰² See *N. Am. Freight Car Ass'n* at 4-5; *Xcel*, 7 S.T.B. at 637; *Duke/NS*, 7 S.T.B. at 101, 141, 175; *WFA I* at 48, 71.

¹⁰³ See Consumers Rebuttal at III-F-96, Rebuttal Table III-F-11.

¹⁰⁴ See *Sunbelt* at 9.

- Barr/MP 10.80/NS (Dolton): Consumers explained how the CERR does not cross the NS at Dolton. As evidence, Consumers included a CSXT engineering diagram that illustrated the alignment, consistent with Consumers’ Opening stick diagrams.¹⁰⁵ It is also consistent with CSXT’s track charts for the Barr Subdivision. There was no reason for Consumers to have expected a need to defend this exclusion, given that it does not exist on the lines replicated by the CERR.¹⁰⁶
- Barr/MP 10.90/IHB (Dolton): Consumers referenced a public document with a map depicting seniority of railroads in Chicago. Publicly available information is not considered “new evidence.”¹⁰⁷
- {
 - } While the history of the crossing as described on Rebuttal was more detailed, it did not conflict with Consumers’ Opening position.¹⁰⁸
- IHB Dolton Interlocking: Consumers rejected this crossing because, as Consumers showed elsewhere in its Rebuttal Evidence, the CERR was not responsible for an ownership share of the IHB.¹⁰⁹

16. Calumet Sag and Chicago Sanitary Channel Bridges

CSXT argues in its Motion that Consumers’ Rebuttal introduced “new” evidence showing that the Calumet Sag and Chicago Sanitary Channel Bridges were publicly funded, noting that on Opening, “Consumers cited a single 106 year old article

¹⁰⁵ See Consumers Opening e-workpaper “CERR STICK DIAGRAMS.pdf;” Consumers Rebuttal e-workpaper “CERR STICK DIAGRAMS_REBUTTAL.pdf.”

¹⁰⁶ See, e.g., *TPI* at 13-14.

¹⁰⁷ *N. Am. Freight Car Ass’n* at 4-5.

¹⁰⁸ See *Sunbelt* at 9-10

¹⁰⁹ See, e.g., Consumers Rebuttal at III-B-19-28.

as support for its argument....”¹¹⁰ As explained by Consumers on Rebuttal, CSXT’s Reply did not introduce any conflicting evidence,¹¹¹ and the article cited on Opening showed that the channel spanned by the bridges was a public works project.¹¹² Consumers then presented additional, publicly available records and Google Earth images to illustrate the obvious point that the bridges were built as part of the same public works project.¹¹³ It is well-settled that such publicly-sourced information is not considered “new evidence.”¹¹⁴ CSXT’s argument for striking Consumers’ Rebuttal showing has no validity.

17. Bridge Designs

In another classic example of surrebuttal through a motion to strike, CSXT challenges Consumers’ Rebuttal argument that its Opening bridge design costs represented an “average cost,” such that some costs could be shifted or repurposed to cover differences in individual bridge features.¹¹⁵ Consistent with STB precedent,¹¹⁶ Consumers utilized standard bridge designs with standard components, which by definition equates to an “average” design and cost, and applied them at several locations. CSXT on Reply suggested that Consumers had omitted costs for certain bridge features at

¹¹⁰ Motion at 22.

¹¹¹ *See id.* at III-F-100.

¹¹² *See id.* at III-F-99-100.

¹¹³ *Id.*

¹¹⁴ *N. Am. Freight Car Ass’n* at 4-5.

¹¹⁵ *See* Consumers Rebuttal at III-F-99-100.

¹¹⁶ Developing representative bridge types is a standard approach in cases under the *Coal Rate Guidelines*. *See Sunbelt* at 140-143; *DuPont* at 214.

certain locations, so on Rebuttal Consumers explained – without introducing any new evidence – that its Opening “average cost” approach conservatively allocated monies for components that would not be required, thus leaving excess CERR funds to be dedicated elsewhere. In short, Consumers’ Rebuttal simply defended its Opening position based on evidence already on the record, which fits squarely within the scope of proper rebuttal.¹¹⁷

CONCLUSION

For the reasons set forth herein, CSXT’s June 24, 2016 Motion to Strike should be denied.

Respectfully submitted,

CONSUMERS ENERGY COMPANY

By: Catherine M. Reynolds
Senior Vice President and General
Counsel
Eric V. Luoma
Assistant General Counsel
Consumers Energy Company
One Energy Plaza
Jackson, Michigan 49201

/s/ Kelvin J. Dowd
Robert D. Rosenberg
Andrew B. Kolesar III
Daniel M. Jaffe
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

Of Counsel:

SLOVER & LOFTUS LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: July 14, 2016

Attorneys and Practitioners

¹¹⁷ *Duke/NS*, 7 S.T.B. at 100-101.

CERTIFICATE OF SERVICE

I hereby certify that this 14th day of July, 2016, I have caused copies of Complainant's Reply to Motion to Strike to be served by electronic mail upon counsel for Defendant CSX Transportation, Inc. as follows:

G. Paul Moates, Esq.
Raymond A. Atkins, Esq.
Matthew J. Warren, Esq.
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005



Katherine F. Waring