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December 7, 2015
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**TOTAL PETROCHEMICALS & REFINING
USA, INC.**

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

Docket No. NOR 42121

**CSX TRANSPORTATION, INC.'S REPLY TO COMPLAINANT'S
MOTION TO STRIKE**

Total Petrochemicals & Refining USA, Inc.'s ("TPI's") Motion to Strike is meritless and should be denied.¹ Having devoted much of its Supplemental Opening Evidence to an attempt to bolster its Rebuttal evidence on yard staffing, and having taken the position that its Supplemental "Scenario #1" adequately accounted for the industrial yard trains needed to serve the TPIRR traffic group, TPI now seeks to strike 13 pages of CSX Transportation, Inc.'s ("CSXT's") Supplemental Reply evidence that responded to that evidence. TPI's Motion boils down to a claim that TPI was allowed to use Supplemental Evidence to argue that "TPI's Rebuttal 'Y' Trains Evidence Is Superior and More Accurate"² than CSXT's evidence, but that CSXT was not

¹ According to the Board's rules, CSXT has until December 15, 2015 to respond to TPI's Motion to Strike. 49 C.F.R. 1104.13. In the interests of fairness and expediency, CSXT is filing this response well in advance of that deadline, and in time for the Board to rule upon the motion prior to the filing of final briefs if it so chooses.

² Compliance Evidence and Supplemental Opening Evidence of Total Petrochemicals & Refining USA, Inc., *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121, at III-C-8 (filed Oct. 7, 2015) ("TPI Supp. Op."). The quoted language is the

allowed to refute that claim in its Supplemental Evidence. TPI has no legitimate basis to object to Supplemental Reply Evidence that is directed at arguments made in its own Supplemental Evidence, and it has provided no persuasive explanation why it needs another evidentiary filing in addition to the sixty-page brief that it is entitled to file on December 14, 2015. TPI's attempt to throw yet another wrench into the procedural schedule of this case should be denied.

The sections of CSXT's Supplemental Reply that TPI seeks to strike were plainly directed at arguments that TPI made in its Supplemental Opening Evidence. Specifically, TPI's Supplemental Opening Evidence presented three "scenarios" for the Board's consideration. The first of these, "Scenario #1," argued that TPI's Rebuttal Evidence contained all the yard trains necessary to serve TPI's selected traffic group, adopted the same train list as TPI had submitted on Rebuttal, and even suggested that the supplemental evidence ordered by the Board was unnecessary.³ But TPI's Scenario #1 arguments did not simply state that the Board should rely on its Rebuttal evidence. Rather, TPI argued that the Board's expressed concerns in the Supplemental Evidence Order⁴ about TPI's failure to account for industrial yard jobs were misguided, and that its yards analysis actually contained sufficient yard jobs so as to make its supplemental evidence credible.⁵ TPI also included specific new arguments based on the

title of the five-page section of TPI's evidence to which TPI claims CSXT was not allowed to respond.

³ *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121, at 5 (served Sept. 4, 2015).

⁴ *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121 (served July 24, 2015) ("*Supplemental Evidence Order*").

⁵ *See, e.g.*, TPI Supp. Op. at I-9 to I-12, III-C-4 to III-C-10, III-C-15 to III-C-19.

briefing of its Petition for Reconsideration⁶ and new claimed examples of how certain industrial yard trains were allegedly unnecessary.⁷

TPI admits that the Supplemental Reply Evidence it seeks to strike was directed at these “Scenario #1” arguments, but claims that CSXT should not be allowed to respond to those arguments because Scenario #1 “was based upon TPI’s Rebuttal Evidence.” Motion to Strike, or in the Alternative, for Leave to Reply, *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121, at 3 (filed Nov. 25, 2015) (“Mot. to Strike”). This is wrong for two reasons. First, even if TPI had done nothing in its Supplemental Evidence except state that it believed that its Rebuttal Evidence contained all yard trains necessary to serve the issue traffic, CSXT clearly had a right in its Supplemental Reply Evidence to respond by showing that TPI’s Rebuttal Evidence in fact did not include all necessary yard trains. Second, TPI’s suggestion that its Supplemental Evidence did nothing other than restate its Rebuttal as to yard expenses is not accurate. On the contrary, TPI’s Supplemental Evidence included specific new arguments to support the supposed superiority of its Rebuttal Evidence, and it cited new alleged support from post-Rebuttal filings and from new cherry-picked examples of allegedly unnecessary yard trains. Having used its Supplemental Opening to attempt to bolster its Rebuttal yard train evidence, TPI should not be heard to complain that CSXT is not entitled to respond to that effort.

The utter meritlessness of TPI’s claim that CSXT’s Supplemental Reply was “not [used] to respond to TPI’s Supplemental Opening”⁸ is demonstrated by reviewing the 13-page section that TPI seeks to have stricken from the record—all of which plainly consisted of responses to

⁶ See, e.g., *id.* at III-C-10.

⁷ See, e.g., *id.* at III-C-11 to III-C-12.

⁸ Mot. to Strike at 3.

claims TPI made in that Opening Supplemental Evidence. At pages 5-9 of CSXT's Supplemental Reply⁹, CSXT responded to TPI's Supplemental Evidence assumption that the number of locomotives required to perform yard switching is directly proportional to the average number of cars per day that move through a yard and thus that the TPIRR could reduce yard jobs "to reflect the TPIRR's smaller traffic group."¹⁰ CSXT showed that this assumption was unreasonable, for three reasons: (1) the work performed in a yard is primarily driven by the number of switching movements, not the number of cars in each block that is switched¹¹; (2) 95% of the carload traffic that TPI excluded from its traffic group was not switched at a hump yard, and therefore TPI's non-selection of that traffic could not reduce required work at hump yards¹²; and (3) TPI did, in fact, select virtually all traffic moving to and from TPI-served facilities, and thus would need to operate the same industrial yard trains as CSXT did in its real-world operations.¹³ This direct response to TPI's Supplemental Evidence arguments was plainly proper.¹⁴

⁹ CSX Transp., Inc.'s Reply to Total Petrochemical & Refining USA, Inc.'s Compliance Evidence and Supplemental Opening Evidence, *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121, (filed Nov. 20, 2015) ("CSXT Supp. Reply").

¹⁰ TPI Supp. Op. at I-11; *see also id.* at III-C-9.

¹¹ CSXT Supp. Reply at 5-6.

¹² *See id.* at 7-8.

¹³ *See id.* at 8-9.

¹⁴ CSXT's Supplemental Evidence provided the first (and only) opportunity for CSXT to address TPI's mathematical approach to determining the number of yard assignments (including industrial yard trains) required to serve TPIRR's selected traffic. The yard assignments posited by TPI on Opening were based solely on the (unsupported) opinion of TPI's operating witness, Mr. McDonald. *See* TPI Opening WP "TPIRR Yard Operations.xlsx," footnote 10 ("TPI Daily Yard Jobs based on expert witness Dick McDonald.") On Reply, CSXT posited that TPIRR would need the same yard assignments as CSXT deploys in its real-world operations in order to replicate CSXT's real-world train service and car blocking plans. *See* CSXT Reply at III-C-128 to III-C-133. On Rebuttal, TPI presented – for the first time – a new methodology for determining TPIRR's yard staffing requirements based upon the supposed difference between

Next, at pages 9 to 12 of its Supplemental Reply, CSXT responded to the yard staffing productivity assumptions in TPI Supplemental Workpaper “Yard & Support Job Comparison_Supplemental.xlsx.” CSXT showed that TPI’s reliance on 2013 CSXT yard productivity was unwarranted,¹⁵ because CSXT achieved those productivity improvements by making a substantial investment in remote control technology that TPI failed to make for the TPIRR. Again, this was a permissible response to an Opening Supplemental Evidence claim.

At pages 12 to 13 of its Supplemental Reply, CSXT showed that TPI’s Opening Supplemental Evidence claim that “the TPIRR classifies 15 [percent] fewer cars at hump yards in 2010 than the real-world CSXT”¹⁶ was inconsistent with its assertion that the TPIRR would mimic historical CSXT operations and irreconcilable with the figures in TPI’s own Supplemental Workpaper. Once again, this was a direct response to assertions made by TPI in its Opening Supplemental Evidence.

Finally, at pages 13 to 18 of its Supplemental Reply, CSXT showed that the estimate of car counts in TPI Supplemental Workpapers “TPIRR Yard Operations_Rebuttal_Supplemental.xlsx” and “Yard and Support Job Comparison_Supplemental.xlsx” failed to account for numerous car handlings that TPIRR would be required to perform to serve its selected traffic. Identifying flaws in calculations made in supplemental workpapers and showing that TPI was wrong to claim that its Scenario #1 accounted for all necessary yard trains is legitimate reply evidence.

the number of cars classified by CSXT and TPIRR, respectively. Based on that new (and flawed) analysis, TPI’s Rebuttal Evidence actually reduced the number of TPIRR yard assignments included in its Opening Evidence.

¹⁵ See, e.g., TPI Supp. Op. at I-11; I-12; III-C-9-10; III-C-12-13.

¹⁶ TPI Supp. Op. at I-11, III-C-9

In short, TPI cannot have it both ways. TPI cannot use Supplemental Evidence to prop up its flawed Rebuttal Evidence, arguing that it represents the “superior operating plan that includes all of the trains” and simultaneously preclude CSXT from explaining why that evidence does not in fact include all the necessary yard trains. CSXT’s Supplemental Reply Evidence illustrates why TPI’s “Scenario #1” fails to show that the SARR could adequately serve the traffic group. CSXT Supp. Reply at 4. Indeed, CSXT identified conceptual and mathematical flaws in TPI’s “Scenario #1” evidence that render that Scenario utterly incapable of providing complete train service to TPIRR’s selected traffic. *Id.* at 4-5. It was entirely appropriate for CSXT to show why TPI’s “Scenario #1”—the very “Scenario” that TPI urges the Board to adopt as the supposed ‘best’ evidence of record—is not feasible and must be rejected. *Id.* at 5.

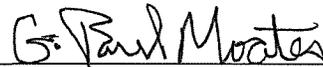
Furthermore, TPI’s Motion to Strike is unnecessary and if granted could create serious procedural complications. TPI will have ample opportunity to respond to CSXT’s Supplemental Evidence in the 60-page brief that it may file by December 14, 2015. TPI does not advance any compelling reason why it needs a supplemental evidentiary filing in addition to that brief. It says in a footnote that its response “requires the submission of additional evidence,” but does not say why that is the case.¹⁷ And its claim that it lacks sufficient space in its brief to address yard trains rings hollow. TPI has had the last word on every contested evidentiary issue in this case in a Rebuttal Evidence submission that is over twice as long as its Opening Evidence.¹⁸ If CSXT is only afforded a single 60-page brief to address the hundreds of pages of Rebuttal Evidence TPI has submitted on every contested issue in the case, then it is surely not unreasonable for TPI to address a 14-page section of CSXT’s Supplemental Reply Evidence in its final brief.

¹⁷ Mot. to Strike at 2 n.2.

¹⁸ TPI’s Opening Evidence contained 260 narrative pages; its Rebuttal was 606 narrative pages.

Granting TPI's request for yet another supplemental filing also would be procedurally unfair and would further delay resolution of this case. Indeed, TPI's Motion to Strike was filed just after the one-year anniversary of the last time that TPI disrupted the procedural schedule with a request to alter the evidence in the record—a request that delayed this case by many months.¹⁹ While TPI says that it does not want the Board to change the briefing schedule in response to its Motion, it asks in the alternative to be allowed to submit an additional round of evidence on yard expenses—evidence that would necessarily be due after final briefs. It would be patently unfair to allow TPI to submit post-briefing evidence on an important disputed issue. And the Board should not delay the schedule for final briefs any further. CSXT urges the Board to expeditiously deny the motion and to leave the schedule for final briefs unaltered.

Respectfully submitted,



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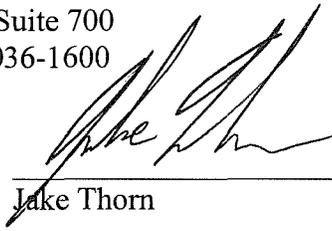
Dated: December 7, 2015

¹⁹ See Petition to Supplement the Record, *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121 (filed Nov. 5, 2014).

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2015, I served a copy of the foregoing upon counsel for Complainant TPI via electronic mail and U.S. first-class mail, postage prepaid, at the address below:

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