

**PUBLIC VERSION**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD 233308**

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<b>M&amp;G POLYMERS USA, LLC</b>	)	<b>ENTERED</b>
	)	<b>Office of Proceedings</b>
	)	<b>November 6, 2012</b>
<b>Complainant,</b>	)	<b>Part of</b>
	)	<b>Public Record</b>
<b>v.</b>	)	<b>Docket No. NOR 42123</b>
	)	
<b>CSX TRANSPORTATION, INC.</b>	)	
	)	
<b>Defendant.</b>	)	
<hr/>		

**CSX TRANSPORTATION, INC.'S  
REPLY TO M&G POLYMERS USA, LLC'S  
PETITION FOR RECONSIDERATION**

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**Dated: November 6, 2012**

## PUBLIC VERSION

Defendant CSX Transportation, Inc. (“CSXT”) respectfully submits its Reply to Complainant M&G Polymers USA, LLC’s (“M&G’s”) Petition for Reconsideration (“Petition”) of the Board’s September 27, 2012 Decision in this proceeding (“Decision”). M&G’s Petition identifies neither changed circumstances nor material errors that would justify reconsideration, and it should be denied.

The Decision both (1) resolved multiple issues related to the feasibility of truck and truck/transload competitive options for the issue movements – ultimately concluding that “feasible truck or truck/rail alternatives to CSXT’s service exist for most of the challenged movements,” Decision at 13; and (2) announced a new proposed “limit price” formula for determining whether such competition was effective. The Board has requested comments on the proposed limit price rule, and CSXT will submit comments that detail the reasons that the limit price approach is unlawful, unwise, and unnecessary in accordance with the Board’s October 25, 2012 Decision establishing a procedural schedule for such comments.

M&G’s Petition exclusively concerns specific aspects of the Board’s feasibility analysis. Displeased with the fact that on many issues the Board accepted CSXT’s well-supported evidence rather than M&G’s assertions – and perhaps concerned about the legal viability of the “limit price” approach adopted in the Decision – M&G seeks to reargue multiple issues that it lost. But 49 C.F.R. § 1115.3 is not an invitation for do-overs by disappointed litigants. Rather, petitions for reconsideration require a showing of “new evidence,” “changed circumstances,” or “material error.” 49 C.F.R. § 1115.3(b). Here, M&G presents no new evidence, points to no legitimate changed circumstance, and identifies no material error. Instead, its arguments boil down to complaints that in some instances the Board accepted CSXT’s evidence and arguments

## PUBLIC VERSION

over those proffered by M&G. M&G's Petition falls far short of the standards set forth in § 1115.3 for reconsideration, and it should be denied.

### I. M&G FAILS TO MEET THE STANDARDS FOR RECONSIDERATION

Petitions for reconsideration are “discretionary appeal[s],” and the Board has adopted strict standards for its consideration of such appeals. 49 C.F.R. § 1115.3. A petition for reconsideration may be granted “only upon a showing of one or more of the following points: (1) the prior action will be affected materially because of new evidence or changed circumstances; [or] (2) the prior action involves material error.” § 1115.3(b). The Board consistently rejects petitions for reconsideration that fail to establish material changed circumstances or material errors, and it looks with particular disfavor on petitions that simply restate arguments previously considered and decided by the Board.<sup>1</sup> M&G's Petition is such a pleading.

M&G first asserts that its Petition is justified by “changed circumstances,” claiming that the Decision's adoption of a limit price methodology constitutes a changed circumstance. Petition at 1-2. But the Board has made clear that a party cannot bootstrap a “changed circumstance” out of a holding in the Board decision at issue. On the contrary, a changed circumstance is by definition a change in one of the extrinsic factual or legal predicates relied upon in the decision – not the decision itself. As the Board has explained, “a changed circumstance justifying reconsideration necessarily concerns something extrinsic to, and usually occurring after, a Board decision.” *Union Pac. Corp. et al. – Control & Merger – So. Pac. Rail Corp. et al.*, Decision No. 104, Finance Docket No. 32760, at 5 (Jan. 22, 2009). This is so even

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<sup>1</sup> See, e.g., *Xcel Energy v. Burlington N. & S.F. Ry. Co.*, STB Docket No. 42057 (served Jan. 19, 2005) at 11 (rejecting arguments where party “repeats the same arguments that it raised earlier” and noting that “[t]hese arguments were fully addressed in [a prior decision]”).

## PUBLIC VERSION

if the Board decision in question takes an approach not anticipated by the parties. *See id.* (rejecting argument that decision “constitute[d] a materially changed circumstance because the Board’s legal analysis differs from the legal arguments [in the party’s submissions]”). And even if the limit price methodology were a “changed circumstance,” M&G does not begin to explain why such a changed circumstance would be material to the complaints raised in its Petition. Because the Petition exclusively addresses the Board’s resolution of issues other than the limit price methodology, the Board’s decision to adopt the limit price methodology could not possibly have a material impact on those issues.<sup>2</sup>

Nor is there any merit to M&G’s claims of “material error,” which fail to demonstrate either materiality or errors. In the first place, few of the purported “errors” about which M&G complains are material to the outcome in this case. M&G’s arguments are plainly not “material” for any of the lanes for which the Board concluded that CSXT was market dominant.<sup>3</sup> And M&G makes little effort to connect its complaints to the specific lanes over which the Board concluded that CSXT lacked market dominance. For example, M&G claims that the Board should not have struck the testimony of its rebuttal witness Mr. Granatelli, but it does not identify any individual lane where Mr. Granatelli’s testimony would have affected the outcome. Other alleged errors have virtually no impact on the analysis. For example, the total effect of accepting M&G’s argument that the Board should have used M&G’s calculations of truck costs on Lanes J-5 and J-50, rather than those of CSXT, would be to increase the “limit price”

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<sup>2</sup> Nor does M&G’s Petition claim that the limit price methodology itself constitutes a material error. CSXT believes that the proposed limit price rule is unlawful and unwise, and it will demonstrate the legal and logical infirmity of the proposed limit price approach in its separate comments to be filed November 28, 2012.

<sup>3</sup> Indeed, some of M&G’s alleged “errors” only apply to lanes for which the Board found CSXT market dominant. For example, M&G complains about the Board’s resolution of the double-transload issue on ten case lanes, but not one of those lanes is one as to which the Decision found a lack of market dominance. *See* Petition at 18.

## PUBLIC VERSION

calculations on those lanes by just {{ }} per truck, far from sufficient to alter the conclusion of no market dominance.

More importantly, M&G's alleged "errors" in the Decision do not withstand scrutiny. As demonstrated below in Section II, the Board did not err in its resolution of any of the issues raised in the Petition. The Board's decisions were supported by ample and compelling evidence, and M&G's disappointment that the Board found CSXT's evidence to be more convincing than M&G's on these issues does not create an "error." Simply put, M&G's Petition "argues that the Board should have agreed with its arguments and given more weight to the evidence that it has already submitted."<sup>4</sup> That is not sufficient to warrant reconsideration.

### **II. NONE OF M&G'S GROUNDS FOR RECONSIDERATION HAS ANY MERIT.**

#### **A. The Board Did Not Materially Err by Being Unconvinced By M&G's Claims About the Significance of CSXT Rate Increases.**

M&G first accuses the Board of "erroneously ignoring" M&G's evidence of "rate history," *i.e.*, M&G's claims that the increase in CSXT's rates after the 2009 expiration of a long-term legacy contract demonstrated market dominance. Petition at 4. This accusation is unfounded and based upon an unreasonably narrow reading of the Board's decision. Indeed, it is M&G that ignores the substantial countervailing evidence presented by CSXT that thoroughly discredited M&G's "rate history" argument.

In the first place, the premise of M&G's argument is wrong, for the Decision shows that the Board did not ignore M&G's "rate history" evidence. M&G's evidence acknowledged that many of the challenged rail rates were comparable to rates for alternative truck or truck/transload transportation, but it argued that those comparable rates were not an effective constraint because

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<sup>4</sup> *Canadian Pac. Ry. Co., et al. – Control – Dakota, Minn. & E. R.R. Corp., et al.*, Decision No. 14, STB Fin. Docket No. 35081, at 4 (May 7, 2009) (denying petition for reconsideration).

## PUBLIC VERSION

trucking allegedly had greater internal costs than rail and because CSXT's rate increases somehow proved market dominance. *See* M&G Opening at II-B-51 through 55. M&G thus made its "rate history" argument as part and parcel of its general argument that comparable trucking prices could not demonstrate effective competition. *See id.* The Board directly addressed and rejected that argument, finding that "[w]e are not satisfied with the approach urged by either party to determine whether the proposed alternatives represent competition sufficient to restrain rates effectively." Decision at 13. The Decision's explicit rejection of M&G's approach thus belies M&G's claim that the Board "ignored" its evidence.

The fact that the Decision did not explicitly recite M&G's rate history argument is of no moment. Particularly in a complex, seventy-lane case like this one, the Board's Decision need not explicitly detail every single argument presented by the parties. *See Rail Transportation of Grain*, STB Ex Parte No. 665, at 3 (May 13, 2008) ("A regulatory agency is not required to catalogue and address every argument it receives and comment on them"). As the D.C. Circuit has explained, it is not appropriate to assume that "the failure to mention certain evidence means that it was not considered" or "that an explanation is incomplete unless it dutifully lists all the evidence that the Commission examined." *Lorion v. United States Nuclear Regulatory Comm'n*, 785 F.2d 1038, 1042 (D.C. Cir. 1986). The Board is well aware of what evidence it considered when making its decision, and CSXT is confident that it gave appropriate consideration to M&G's "rate history" claims.

Indeed, the Board had ample reason to ascribe no significance to M&G's "rate history" arguments. CSXT's Reply Evidence included substantial evidence that CSXT's rate increases since the expiration of a long-term legacy contract in 2009 were not evidence of market dominance. *See* CSXT Reply at II-77 through 78. CSXT explained that the bulk of the rate

## PUBLIC VERSION

increases about which M&G complained were agreed to by M&G in a contract and that the remaining increases were attributable to {  
}. *See id.* Perhaps most persuasively, CSXT presented evidence that {{

}} CSXT Reply Ex. II-B-9; *see* CSXT Reply at 77-78. In sum, CSXT presented considerable evidence that M&G's "rate history" evidence did not establish market dominance, and the Board did not commit clear error by accepting that evidence.

### **B. The Board had Grounds to Strike Mr. Granatelli's Immaterial Testimony.**

M&G next complains about the Board's decision to strike Mr. Granatelli's testimony as improper rebuttal evidence. Petition at 7-9. Tellingly, M&G does not argue that Mr. Granatelli's testimony was appropriate rebuttal evidence, and it does not question the correctness of the Board's conclusion that "Mr. Granatelli's testimony could have been presented on opening." Decision at 9 n.24. M&G instead entirely rests its argument on the assertion that the Board was required to consider Mr. Granatelli's testimony because CSXT did not move to strike it. M&G is wrong, and the Board did not materially err by disregarding Mr. Granatelli's testimony.

M&G's argument rests on a fundamental misapprehension of the Board's authority. The Board is the factfinder in this proceeding, and it has full authority to make judgments about what evidence to credit or discredit (so long as such judgments are not arbitrary or capricious). And the Board certainly has the ability to enforce its own rules and to impose sanctions on parties for ignoring those rules. *See, e.g., Expedited Procedures for Processing Rail Rate Reasonableness, Exemption & Revocation Proceedings*, STB Ex Parte 527, at n.10 (served Mar. 22, 1996) ("The

## PUBLIC VERSION

Board has general powers to carry out the provisions of the statute, including the imposition of sanctions.”). Here, the Board made a factual finding – the accuracy of which is undisputed by the Petition – that “Mr. Granatelli’s testimony could have been presented on opening” and that it therefore was improper rebuttal evidence. Decision at 9 n.24. As the factfinder in this proceeding the Board was justified in rejecting such improperly submitted evidence, and as an enforcer of its rules the Board was plainly justified in sanctioning M&G for its misconduct.<sup>5</sup>

Because the Board has independent authority to enforce its rule against improper rebuttal evidence, the fact that CSXT’s September 30, 2011 Motion to Strike did not explicitly request that Mr. Granatelli’s testimony be stricken is of no moment. Indeed, M&G’s focus on the language of CSXT’s Motion to Strike overlooks the fact that CSXT’s Reply Evidence asked the Board not to allow M&G “to supplement its evidence on rebuttal with evidence that could have been presented earlier.” CSXT Reply at II-1. Even if M&G were correct that the Board could not strike improper rebuttal without a CSXT request that the Board do so, CSXT plainly did ask the Board to enforce its rebuttal rules.

Similarly, M&G’s overheated argument that the Board “deprived M&G of its 14th Amendment due process right to present evidence” is meritless. Petition at 8. The Board’s rules on the presentation of evidence in SAC proceedings are not new. On the contrary, the Board has repeatedly warned complainants that their entire case-in-chief must be presented in opening evidence and that rebuttal evidence is “not an opportunity to introduce new evidence that could and should have been submitted on opening to support the opening submissions.” *General*

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<sup>5</sup> M&G’s focus on 49 C.F.R. § 1104.8’s bar on “redundant, immaterial, impertinent, or scandalous matter” is a red herring. Nothing in the Board’s regulations suggests that § 1104.8 is an outer limit on the Board’s authority to disregard improperly submitted evidence or that the Board is required to consider improper rebuttal evidence that is not “redundant, immaterial, impertinent, or scandalous.”

## PUBLIC VERSION

*Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, 5 S.T.B. 441, 446 (2001).<sup>6</sup>

M&G had full knowledge of those rules and full opportunity to present Mr. Granatelli's testimony on opening. M&G thus had the "meaningful opportunity" to present evidence that due process requires.<sup>7</sup> The fact that M&G made a tactical decision to forgo this opportunity in favor of attempting to present Mr. Granatelli's testimony on rebuttal does not implicate due process principles. M&G does not have a constitutional right to disregard the Board's rules with impunity.

In any event, striking Mr. Granatelli's testimony was not material to the Board's decision. M&G does not identify any holding in the Decision that it claims would have been different had the Board considered Mr. Granatelli's testimony. Nor does M&G point to any lanes where it believes the market dominance determination would have been different had the Board considered Mr. Granatelli's testimony. Indeed, M&G purported to present the testimony of Mr. Granatelli primarily to "confirm" arguments made in M&G's opening evidence – not to offer new and independent arguments or evidence. *See* M&G Rebuttal at I-23-24.<sup>8</sup> In short,

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<sup>6</sup> *See also Duke Energy Corp. v. Norfolk Southern Ry. Co.*, 7 S.T.B. 89, 101 (2003) (the shipper must "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."); *Texas Municipal Power Agency v. Burlington N. & S.F. Ry.*, 6 S.T.B. 573, 634 n.94 (2003).

<sup>7</sup> "Due process generally requires a 'meaningful opportunity' to be heard before one is deprived of life, liberty, or property." *Blumenthal v. F.E.R.C.*, 613 F.3d 1142, 1145 (D.C. Cir. 2010) (rejecting complainant's argument that it had been deprived of its due process rights to be heard before the agency, noting that complainant had submitted objections and FERC had considered them).

<sup>8</sup> *See also* II-B-24 ("M&G Witness Granatelli confirms the Opening Evidence of M&G as to the prevalence of rail transportation across the polymer industry.") (emphasis added); *id.* ("Mr. Granatelli, however, confirms that these are not issues manufactured by M&G . . ."); *id.* at II-B-27 ("Mr. Granatelli has reviewed the additional activities associated with trucks that M&G described at pages II-B-43 to 46 of its Opening Evidence. The activities for rail and truck shipments that M&G outlines in Table 1 are a mirror image to his experience at LBI."); *id.* ("Mr. Granatelli confirms that those concerns are very real . . ."); *id.* at II-B-61 (Granatelli "validates the credibility of M&G's opening evidence testimony . . ."); II-B-64 ("M&G witness

**PUBLIC VERSION**

M&G has not presented any evidence that striking Mr. Granatelli's testimony affected the outcome of the Decision. The Board's having done so therefore cannot constitute a "material error."

**C. The Board Did Not "Disregard" M&G's Traffic Evidence.**

M&G next accuses the Board of "disregard[ing]" M&G's evidence about the use of trucks to transport PET. Petition at 9. But the Petition utterly fails to support that accusation. In fact, the Decision demonstrates that the Board fully and carefully considered the parties' evidence about the relative frequency of truck and rail transportation of PET and the reasons for that frequency. The fact that the Board ultimately found CSXT's evidence to be more persuasive does not justify M&G's groundless accusations and certainly does not warrant reconsideration.

M&G's Opening Evidence admitted that M&G frequently used trucks to transport PET, but argued that most PET is transported via rail, that many of its PET truck shipments were to customers without rail access, and that many other truck shipments were in "emergency" situations where the customer needed quick delivery. On Reply CSXT noted that M&G's current use of trucks strongly supported a finding that truck transportation was feasible, *see* CSXT Reply at II-14 through II-16, and that M&G's arguments about the significance of the relative frequency of truck shipments were belied by {{

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Granatelli confirms M&G's opening testimony that processing an equivalent volume of PET in trucks requires four times the work of a rail car.").

**PUBLIC VERSION**

}} Simply put, M&G argued that the Board could infer market dominance from the fact that more PET is shipped via rail than via truck; CSXT argued that the amount of PET shipped via truck showed that trucking was a feasible alternative, particularly in light of the substantial qualitative evidence that trucking was a real, workable option that M&G actually uses.

The Board carefully considered the parties' arguments and concluded that {

{{ }}

} M&G's claim that the Board "improperly dismissed or failed to consider" its traffic volume evidence is thus belied by the clear language of the Decision. The Board considered M&G's and CSXT's evidence and reached the reasonable conclusion that trucking was in fact a feasible alternative for the issue movements

M&G also suggests that the Board must have "ignored" M&G's evidence about the "circumstances" in which it has used truck transportation because the Decision did not recount that evidence in detail. Petition at 10. Once again, it is not reasonable for M&G to accuse the Board of "ignoring" evidence simply because the Board did not recite it in the Decision. *See Lorion*, 785 F.2d at 1042. In any event, the excuses M&G makes for its past use of trucks are

## PUBLIC VERSION

beside the point. The issue is whether the Board reasonably concluded that trucking PET is feasible, and the fact that M&G has shipped many thousands of truckloads of PET certainly supports that conclusion regardless of the “circumstances” of those individual shipments.

Finally, M&G immoderately claims that the Board’s alleged refusal to consider some of M&G’s traffic evidence evinces a “blatant disregard for its own precedent.” Petition at 12. But as demonstrated above the premise of M&G’s argument is false – the Board most certainly did consider the traffic evidence. The fact that it was convinced by CSXT’s evidence does not prove that it ignored M&G’s evidence. M&G’s citation of decisions criticizing the ICC for “disregarding” evidence thus attacks a strawman. See Petition at 12 (citing *Arizona Public Service Co. v. United States*, 742 F.2d 644 (D.C. Cir. 1984)).<sup>9</sup> And M&G’s attempts to distinguish cases cited by the Board on the grounds that its traffic volume evidence was different from the evidence in those cases misses the point. Every case presents different factual circumstances, and the distinctions claimed by M&G do not affect the correctness of the Board’s conclusion that trucks are a viable alternative for many issue movements. Indeed, the analysis of the feasibility of a transportation alternative does not require any evidence that the alternative was used in the past<sup>10</sup> – M&G’s arguments that its reliance on trucks is not comparable to that from other cases is thus utterly irrelevant.

M&G’s assertion that the Board is required to find market dominance unless there is evidence that “substantial PET volumes” were transported by trucks to the issue destinations is

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<sup>9</sup> In *Arizona Public Service*, the Court of Appeals criticized the ICC for dismissing probative evidence with a “bald statement that such evidence is not absolutely conclusive on the issue.” *Id.* at 650. In contrast, the Board here carefully weighed M&G’s and CSXT’s competing evidence on traffic volumes and reached a reasonable conclusion based on all the evidence.

<sup>10</sup> See *Market Dominance Determinations*, 365 I.C.C. 118, 131 (1981) (“We emphasize that it need not be demonstrated that transportation alternatives, other than the one in question, have actually been used in the past.”).

## PUBLIC VERSION

thus erroneous and utterly meritless. Petition at 14. Indeed, M&G's arguments about the meaning of the Board's precedents are just a warmed-over version of arguments it made in its evidence. *See* M&G Rebuttal at II-B-55 through II-B-57. The Board should not permit M&G to use the reconsideration process to relitigate evidence and arguments that the Board has already decided.

### **D. The Board Did Not Fail to Consider the Relative Advantages and Disadvantages of Rail Transportation.**

Similarly meritless is M&G's claim that the Board ignored "unrefuted" evidence of the "intangible" advantages of rail transportation, primarily related to using railcars as storage devices. Petition at 15-16. In the first place, M&G's evidence was not "unrefuted" – on the contrary, CSXT presented detailed evidence about the relative advantages and disadvantages of rail transportation and specifically addressed M&G's storage arguments. Second, the Board explicitly considered the parties' evidence on this issue, and it rejected M&G's arguments not because it ignored them but rather because M&G "submitted no direct evidence to support its theory." Decision at 28.

CSXT directly and forcefully addressed M&G's claims that railcars are necessary for storage. As CSXT demonstrated in its Reply Evidence, "M&G does not identify a single customer who lacks silo space for storage." CSXT Reply at II-51 (emphasis in original). CSXT acknowledged that the convenience of railcar storage is a potential advantage that may weigh in a shipper's consideration of whether to use rail or another mode. But CSXT demonstrated that trucks have comparative advantages as well, such as speed, flexibility, and reduced labor costs. *See id.* at II-51 through 52. Indeed, M&G's claim that CSXT did not refute M&G's evidence is predicated on a selective misquotation of CSXT's Reply. M&G claims that "CSXT itself admits that 'the convenience of rail car storage . . . might make rail transportation an attractive option,'" "

## PUBLIC VERSION

Petition at 15, but it blatantly disregards the following sentences, where CSXT pointed out that “M&G has not offered any evidence that this factor prevents trucks from being an effective constraint on CSXT’s rail rates” and detailed the advantages that truck transportation has over rail transportation. CSXT Reply at II-51-52.

Nor is there any merit to the notion that the Board “erroneously ignored” M&G’s evidence of the storage advantage of rail transportation. On the contrary, the Board acknowledged M&G’s claim {

} The Board had good cause to reject M&G’s unsupported assertions about alleged storage needs. Furthermore, M&G has no grounds to seek reconsideration of the Board’s decision in light of its failure to submit direct evidence to support its storage allegations.

**E. The Board Did Not Materially Err By Accepting CSXT’s Product Integrity Evidence.**

M&G next argues that the Board erred by accepting CSXT’s evidence that product integrity concerns did not preclude transloading of PET more than once. *See* Petition at 17-22. Once again, M&G falsely accuses the Board of “ignoring” its evidence. *Id.* at 18, 19. But what the Board actually did was to accept CSXT’s extensive and well-supported evidence on product integrity issues as more persuasive than that presented by M&G. CSXT presented two experts in transloading chemicals, Ron Akard and John Scheeter, who demonstrated that PET could be

**PUBLIC VERSION**

transloaded more than once without adversely affecting product quality. *See* CSXT Reply at II-58 through 62. As both Mr. Akard and Mr. Scheeter explained, using best practice quality controls for PET transloading substantially mitigates concerns about product degradation. *Id.* at II-61. CSXT also presented evidence of multiple instances where M&G itself considered transportation options involving multiple PET transloads. *See* CSXT Reply at II-54 through 58.

The Board found CSXT’s evidence to be more persuasive than M&G’s. As the Board explained, {

} Decision at 34. M&G’s claim that “the only reason provided by the Board for concluding that double-transloading is feasible is the Alternative Logistics Plan” is therefore demonstrably false. Petition at 20. The Board plainly considered {

} in its analysis, and it was entitled as the factfinder to credit CSXT’s experts instead of M&G’s. And the Board’s reliance on M&G’s Alternative Logistics Plan was not material error. As M&G admits in its Petition, {{

}} To disagree with M&G is not to ignore its evidence. M&G’s complaints that the Board “ignored significant evidence” about product integrity are meritless. Petition at 19.<sup>11</sup>

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<sup>11</sup> M&G’s assertion that the Board’s analysis of truck-to-railcar transloading is inconsistent with its treatment of potential transloading at Belpre for Apple Grove-to-Belpre movements ignores clear logistical distinctions between staging railcars at a storage track to accommodate

**PUBLIC VERSION**

**F. CSXT Used the Correct Transportation Rates in Lanes J-5 and J-50 and the Change Proposed by M&G Is Immaterial.**

M&G's final complaint is a claim that the Board should have used M&G's calculations for alternative transportation prices on Lanes J-5 and J-50. *See* Petition at 22-23. While M&G professes confusion about the reason for the differences between its rate calculations and CSXT's, the explanation is simple. CSXT used motor carrier rates and fuel surcharges in effect on May 9, 2011 – the date on which M&G claimed to base its cost calculations. *See* CSXT Reply at II-37 & n.41; M&G Opening at II-B-58 n.43. M&G, on the other hand, claimed to make cost calculations as of May 9, 2011, but actually cherry-picked contracts from different dates to use the highest rates it could find. *See* CSXT Reply at II-37 & n.41. For example, for Lanes J-5 and J-50, M&G used a {{ }} contract rate that went into effect in late May 2011. That is the primary explanation for the difference between CSXT's and M&G's calculations as to J-5 and J-50. CSXT's cost calculations on these lanes were supported by the evidence, and the Board did not err by relying upon them.<sup>12</sup>

In any event, M&G certainly does not identify a material error. The difference between the CSXT and M&G truck cost calculations for these lanes are merely {{ }} per truck. *See* M&G Reply WP "Alternative Rates Restated.xls," at Cells Z78, Z79, Z80, and Z81. The

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transloading on a high-volume lane like the Apple Grove-Belpre lane and staging railcars at transload facilities for occasional truck shipments on lower-volume lanes. Indeed, every transload process requires pre-positioning and coordination of railcars and trucks, and the logistics are not affected by whether the pre-positioned railcars are empty or loaded. And M&G's own extensive utilization of transloading options demonstrates that pre-positioning railcars is logistically feasible. *See* CSXT Reply at II-16.

<sup>12</sup> M&G's claim that "CSXT did not support its rate with detailed citations to sources" is incorrect. CSXT's workpapers included a workpaper with a detailed overview of its cost calculations (CSXT Reply WP "Backup for CSXT Reply Ex\_II\_B\_3.xls"); an explanation of its contract sources, fuel surcharge calculations, and accessorial charges (CSXT Reply WP "CSX M G Rail Rates Contract Sources 6 22 2011.xls"); and the contracts themselves (for Lanes J-5 and J-50, the relevant {{ }} contracts were provided in CSXT Reply WP folder {{ " " }}).

## PUBLIC VERSION

Board's limit price calculation using CSXT's transportation costs found that the limit price R/VC ratio for the two lanes was {        }; using M&G's transportation costs produced a limit price R/VC ratio of {        }. Petition at 22-23. While using M&G's costs would increase the limit price R/VC to {        }, such a slight change would be insufficient to overcome the Board's holding that the intangible features of these movements support a lack of market dominance. *See* Decision at 56-57. In short, even if M&G were correct, its proposed minor adjustment of the transportation cost calculations for these lanes would not materially affect the Board's conclusions.

## CONCLUSION

For the reasons described above, M&G's Petition for Reconsideration should be denied.

Respectfully submitted,



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Dated: November 6, 2012

**PUBLIC VERSION**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of November, 2012, I served a copy of the foregoing CSX Transportation, Inc.'s Reply to M&G Polymers USA, LLC's Petition for Reconsideration by email and hand-delivery upon:

Jeffrey O. Moreno  
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A handwritten signature in black ink, appearing to read 'Matthew J. Warren', written over a horizontal line.

Matthew J. Warren