

BEFORE THE
SURFACE TRANSPORTATION BOARD

234614
ENTERED
Office of Proceedings
July 31, 2013
Part of
Public Record

TOTAL PETROCHEMICALS & REFINING
USA, LLC

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

Docket No. NOR 42121

**CSXT'S REPLY IN OPPOSITION TO COMPLAINANT'S
MOTION FOR LEAVE TO FILE SUPPLEMENTAL REPLY**

Defendant CSX Transportation, Inc. ("CSXT") respectfully submits this Reply in Opposition to Complainant Total Petrochemicals & Refining USA, LLC's ("TPI's") "Motion for Leave to File Supplemental Reply to Petition for Reconsideration of CSX Transportation, Inc." ("Motion"). While the Motion claims to seek leave to file a "Supplemental Reply" to "new arguments" that TPI alleges CSXT asserted in support of CSXT's Petition for Reconsideration, in fact the sole purpose of TPI's "supplemental" filing is to make new arguments to support a claim TPI made in its own Petition for Reconsideration. As such, the Supplemental Reply is an impermissible reply to reply, and TPI's Motion should be denied. *See* 49 C.F.R. § 1104.13(c).

TPI's Petition for Reconsideration claimed that the Board erred by not using {{
}} to find that rail-truck service to Cherokee on Lane B-112 was not practically feasible. In response, CSXT's Reply showed that {{
}} was an unreliable basis for finding that truck service to Cherokee was practically infeasible, in part because Cherokee receives 100% of the issue shipments via rail-truck transloading. *See* CSXT Reply to TPI Petition for Reconsideration at 9-10. CSXT further

argued that the {{ }} should be disregarded for the same reasons that {{ }} should be disregarded, as explained in CSXT’s Reply Evidence and its Petition for Reconsideration. *See id.* at 2, 10.

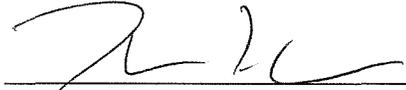
Nowhere did CSXT’s Reply to TPI’s Petition advance a “new argument[] . . . in support of its own Reconsideration Petition.” Motion at 1. Indeed, all TPI does to support its claim that CSXT made “new arguments” is to compare the titles of sections from CSXT’s Petition and its Reply to TPI’s Petition and declare that they involve the same issue. *See id.* at 2. But the unremarkable fact that both CSXT’s and TPI’s Petition involved {{ }} provides no support for TPI’s claim that it is responding to a new argument in support of CSXT’s Petition that CSXT made “under the pretext of replying to the TPI Petition.” TPI Supplemental Reply at 1. On the contrary, CSXT’s Petition for Reconsideration did not ask the Board to reconsider its finding that CSXT lacked market dominance over the Cherokee movement, and the only “new” arguments in CSXT’s Reply to TPI’s Petition are specific responses to TPI’s arguments about Cherokee and {{ }}. Such arguments are plainly proper reply to TPI’s claim that the Board should reconsider its market dominance finding as to Cherokee.

Moreover, the contents of the proposed “Supplemental” Reply belie TPI’s claim that it seeks to respond to new arguments made in support of CSXT’s Petition. TPI’s proffered reply is entirely about the Cherokee movement and the Cherokee {{ }} that was the subject of TPI’s Petition for Reconsideration. TPI’s arguments about why {{ }} and why CSXT should be found market dominant for this movement even though “Cherokee receives all of its polymer by truck” are plainly intended to

supplement TPI's Petition for the Board to reconsider its treatment of Cherokee, not to rebut any arguments CSXT made in support of its Petition for Reconsideration. *Id.* at 2.¹

Other than TPI's incorrect claim that its Supplemental Reply is necessary to rebut supposed new arguments CSXT made in support of its Petition, TPI provides no reason why the Board should depart from its ordinary rule that replies to replies are not permitted. 49 C.F.R. § 1104.13. That rule is all the more important in the context of petitions for reconsideration, where the Board's rules require that "the nature of and reasons for the relief requested" be stated in the petition itself. *Id.* § 1115.3(c). TPI's attempt to use a reply to reply to introduce new arguments in support of its Petition is impermissible, and TPI's Motion for leave to file that reply to reply should be denied.

Respectfully submitted,



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

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

Counsel to CSX Transportation, Inc.

Dated: July 31, 2013

¹ Put differently, while TPI styles its filing as a "Supplemental Reply" to CSXT's Petition, TPI's pleading has no relevance to any of the lanes that CSXT's Petition asks the Board to reconsider. CSXT's Petition did not ask the Board to reconsider its finding as to the Cherokee movement. Only TPI's Reconsideration Petition addressed the Cherokee movement, and thus the "Supplemental Reply" only could have relevance to TPI's Petition.

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July, 2013, I served a copy of the foregoing Reply in Opposition to Complainant's Motion for Leave to File Supplemental Reply by email and first-class mail upon:

Jeffrey O. Moreno
David E. Benz
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036


Matthew J. Warren