

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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CANADIAN PACIFIC RAILWAY LIMITED, ET AL.

– CONTROL –

KANSAS CITY SOUTHERN, ET AL.

APPLICANTS' REPLY TO CSX TRANSPORTATION, INC.'S MOTION TO COMPEL

Applicants¹ file the following Reply to CSX Transportation, Inc. ("CSXT")'s Motion to Compel Answers to Interrogatories and Production of Documents, served on Applicants on January 20, 2022 (the "Motion to Compel" or "Motion").

I. INTRODUCTION AND BACKGROUND

To support their proposed transaction in which CP will control KCS, on October 29, 2021 Applicants filed a 4,342-page Application that includes detailed supporting statements and studies from 20 different fact and expert witnesses, and includes over 26 GBs of supporting Workpapers (collectively, the "Application"). Armed with this vast trove of detailed information and data, any interested party such as CSXT may evaluate the proposed public interest benefits of the Application, supplemented of course by their right to seek appropriate discovery of additional information and documents.

¹ Applicants are Canadian Pacific Railway Limited, Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. (collectively, "CP") and Kansas City Southern, the Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively, "KCS").

Subsequent to filing the Application, and in response to a literal avalanche of discovery requests from CSXT, other Class I railroads, and a number of other interested parties, Applicants made eight productions² in the past three months, culminating in a production of a total of 2,388 (29,773 pages of) responsive documents³ over and above the data supplied with the Application and Workpapers, supported by many dozens of narrative interrogatory responses. Applicants conducted a long series of meet-and-confers with some of the interested parties as part of the process of understanding their requests and finding ways to supply the information they were seeking without undue burden. Applicants worked diligently and in good faith—spending an enormous amount of management and attorney time, money and resources—in order to produce this information given the large volume of uncoordinated requests, many of which were very burdensome and unwieldy in scope.

Unlike all but one other party, CSXT began its discovery before the Application was filed. (“CSXT First Requests,” Ex. B). The CSXT First Requests were unusually overbroad and vague.⁴ Applicants timely responded and objected to the First Set of Requests on November 9, 2021 (“R&Os to First Requests,” Ex. C). The parties met and conferred on November 16, 2021. After receiving Applicants’ R&Os to First Requests and meeting and conferring with Applicants, CSXT opted not to file a motion to compel.

² These productions occurred on December 7, 2021, December 13, 2021, December 17, 2021, January 7, 2022, January 19, 2022, and January 22, 2022, with two smaller productions on January 29, 2022 and January 30, 2022.

³ All produced documents are loaded into a virtual data room that makes the discovery materials available to all parties of record in a repository that is carefully organized and indexed for maximum accessibility. See Ex. A.

⁴ For example, after a series of requests for production, CSXT included an interrogatory stating, “If any of the documents requested above by CSXT does [sic] not provide a full response to the referenced issue, please instead offer a more complete description.” Ex. B at 6.

Then, almost two full months after the Application was filed, CSXT served an extensive new set of requests (“CSXT Second Requests,” Ex. D)—totaling 75 “interrogatories” that were document requests in disguise—on Christmas Eve (with the 15-day period for a response thus spanning the Christmas and New Year’s holiday season). As CSXT acknowledges, many of its new requests simply repeat what was requested in October and discussed with Applicants in November, and which CSXT chose not to pursue. Applicants dutifully responded to CSXT’s new discovery on January 10, 2022 (“R&Os to Second Requests,” Ex. E). Applicants offered to meet and confer with CSXT regarding its least-focused interrogatories, but CSXT refused.

Instead, CSXT proceeded to file its Motion to Compel on January 20, the last date for such a motion, claiming the need for expedited treatment and taking issue with no fewer than 68 out of Applicants’ 74 responses. In the Motion, CSXT appears surprisingly unfamiliar with the Application, Workpapers, and Applicants’ numerous document productions—the same documents that, only eight days earlier, CSXT had represented to the Board that it had reviewed in forming its decision not to sponsor a responsive application. CSXT also acknowledges that it filed the Motion before reviewing the full contents of Applicants’ productions.⁵

CSXT’s motion comes despite its acknowledgement that it saw no basis for filing a responsive application in this proceeding. On January 12, 2022, CSXT opted not to file the requisite description of an anticipated responsive application but instead asked the Board—after close of business on the January 12, 2022 due date—to waive its obligation to provide notice. See Ex. F. In that Motion, CSXT represented to the Board that, “[b]ased on the Applicants’

⁵ See Mot. at 11, n.12 (acknowledging that on January 19, 2022, Applicants “produced 872 new documents” which respond at the very least “partially to some of the requests herein,” and that CSXT had undertaken only a “preliminary review of those documents, which is not complete,” before filing their Motion to Compel the following day, on January 20, 2022).

representations in their Application and the materials Applicants have produced in discovery, [CSXT] has discerned no need to seek conditions that would require a responsive application.” See Ex. F at 1 (emphasis added). On January 26, 2022, the Board denied CSXT’s request for a “waiver,” holding that doing so would “interject needless uncertainty into the procedural schedule and would undermine the Board’s ability to efficiently conduct a timely review of the Transaction.” See Ex. H.

CSXT’s Motion to Compel seeks expedited treatment despite CSXT having waited until almost two months after Applicants filed the Application to serve the Second CSXT Requests—on Christmas Eve, no less—and then waiting the maximum number of days allowed under 49 CFR § 1114.31(a) to bring this Motion. In an effort to maintain the schedule set by the Board, and to spare Your Honor and the Board’s time and resources, Applicants agreed to this expedited timeframe on January 25, 2022 even though Applicants do not believe any matter in CSXT’s Motion warrants expedition. See Ex. G.

For reasons we explain in this Reply, CSXT’s demand for an order compelling production are misguided and should be rejected.⁶

II. CSXT’S MOTION TO COMPEL SHOULD BE REJECTED

A. CSXT’s Motion to Compel Fails at the Threshold

CSXT’s 41-page, sweeping Motion fails, at the outset, for a number of simple reasons.

1. CSXT Fails to Meet Its Burden of Proof

As movant, CSXT bears the burden of proof to establish that Applicants’ production and responses are incomplete and that CSXT is entitled to more information, despite the further burden to Applicants. Conclusory, generalized statements that the production or response is

⁶ For a comprehensive list of defective CSXT Second Requests regarding which CSXT has moved to compel, see Appendix 1.

insufficient, or that more information or documents are allegedly necessary, do not meet that burden of proof. *Canadian Pacific Railway Company—Control—Dakota, Minnesota & E. Railroad Corp.*, Finance Docket No. 35081 (STB Decision No. 8 served Mar. 27, 2008) (“CP/DME Dec. No. 8”) at 5 (Movant “urges the Board to compel [Canadian Pacific] to . . . supply all responsive documents The information provided by applicants’ witnesses is responsive to this . . . document request. [Movant] does not articulate why further production under this request is necessary, except to say that it is ‘vital.’ . . . [W]e will not compel a further response.”). For many Requests, specifically including CSXT Interrogatories Nos. 5, 8, 25, 50, 54 and 68, CSXT’s Motion makes no effort to meet its burden beyond such conclusory statements. *See, e.g.* Mot. at 22 (“The response cites Paragraph 59 through 71 of the Majure Verified Statement which CSXT found to be insufficient in addressing the issue.”). This, alone, is sufficient grounds to deny the Motion as to these Requests.

2. CSXT Effectively Asks Applicants to Produce Every Document in Applicants’ Possession or Admit that Applicants Have No Documents

Throughout the Motion to Compel, CSXT seeks information and/or analysis underlying the Application. In responses and objections, Applicants respond that this information is contained in the Application and accompanying Workpapers, which is true. CSXT responds that Applicants must identify and produce *all* other documents or analyses (seemingly even including analyses that were not reduced to writing or no longer exist) that in any way support the Application, or admit that there are none. Ultimately, Applicants’ entire business and knowledge of the industry, markets and the years of experience of its employees and consultants are factored into the Application. Thus, CSXT is asking Applicants to produce all of that (which would encompass every document in Applicants’ possession) or admit that Applicants have no documents. This is improper. Applicants cannot produce every document they possess. Nor can

they falsely state that no other documents that in any way support the Application exist. CSXT could have drafted more specific discovery requests, in which case it might be possible for Applicants to comply, but Applicants cannot produce every document they possess. And CSXT surely knows this. CSXT's goal appears not to be to learn more about the Application and supporting facts, but to force Applicants to falsely state that there are no other supporting documents and analyses, which is untrue, or to force endless delay by compelling production of every single document belonging to Applicants.

One egregious example is Interrogatory No. 63. CSXT asked in Interrogatory No. 63 that Applicants: "Identify all Analyses or other Documents Concerning Applicant's determination of what effects of the Transaction constitute or generate Cognizable Public Benefits." Ex. D at 22. Applicants responded by directing CSXT to review the Application and Workpapers—which set forth, throughout the whole of the Application, why Applicants believe the transaction will generate public benefits. Ex. E at 63. CSXT responded in its Motion that: "Applicants respond that information requested is in the Application and Workpapers but do not provide a location. They must be compelled to do so or confirm that it is not in those documents." See Mot. at 36. Again, the expected impact that Applicants' merger will have on public benefits is precisely the topic of the entire 4,342-page Application, and any party that has made any attempt to review it will know that. CSXT seems to be implying that more documentary support than the 4,342-page Application and the underlying Workpapers is needed, but to ask for more without specificity is to ask Applicants to produce every document concerning their knowledge about the industry, markets and experience, and Applicants can neither do this nor concede that this knowledge and experience does not exist.

But this strategy by CSXT first of claiming that clearly responsive documents are nonresponsive and then of asking Applicants to “boil the ocean” to locate further support or admit in writing that the “ocean” does not exist is not limited to Interrogatory No. 63. A quick look at CSXT’s motion to compel reveals just how pervasive this strategy is.⁷ Your Honor and the Board should reject this “gotcha” attempt by CSXT.

3. CSXT’s Motion is Untimely as to Requests it “Reissued” in Its Christmas Eve Delivery

The Motion is also untimely as to many other Requests. A motion to compel must be filed within 10 days of the deadline to respond to the discovery request. 49 CFR § 1114.31(a); CP/DME Decision No. 8 at 2 (applying § 1114.31(a)’s moving deadline to both interrogatories and document requests). As CSXT acknowledges, it propounded its First Requests on October 20, 2021, received Applicants’ R&Os to the First Requests on November 9, 2021, and did not move to compel—opting instead “to include many of the requests made in the First Set within the Second Set,” which it re-served on Christmas Eve. (See Mot. at 2, n.2.) CSXT received the same objections from Applicants that Applicants provided in response to the First Requests, of course. CSXT then moved to compel on January 20, 2022. CSXT concedes that the Second Requests’ Interrogatories Nos. 7, 21, 26, 27, 30-32, 39, 55, 59 overlap with its First Requests. (See Mot. at n.13, n.15-22.) CSXT was required to file its Motion to Compel by November 19, 2021 as to its First Requests, and after that date any motion to compel responses to those requests was untimely. CSXT may not simply re-serve the same requests 45 days later, wait ten days after it receives the same responses and objections, and then move to compel and

⁷ See, e.g., Motion to Compel (making the same argument regarding Interrogatories Nos. 1, 2, 5, 8, 10-17, 20-23, 25, 27-31, 35-38, 41-43, 47, 49, 50, 52, 54-55, 57-58, 64, 71-74).

argue timeliness. If a party is permitted to reset the clock whenever it pleases, then in effect there is no 10 day time limit.

4. CSXT's Motion Should Be Rejected for Its Failure to Meet and Confer With Applicants

Finally, CSXT's baffling refusal to meet and confer should, by itself, warrant the denial of this wasteful Motion—as CSXT should know, having been subject to a motion that was denied for this very reason a few years ago. *See Consumers Energy Co. v. CSX Transportation, Inc.*, 2015 WL 1505277 (S.T.B., April 2, 2015). It is improper for CSXT to waste both your Honor (and the Board) and Applicants' resources by refusing even to entertain a possible compromise in advance of filing a motion to compel. *See id.* (“Because the parties have not yet conferred on the issues raised in Consumers’ motion to compel discovery [from CSXT], and because it appears that many of these issues can be resolved without Board intervention, the parties are directed to meet and confer on these discovery issues.”); *see also CF Indus., Inc. v. Kaneb Pipe Line Partners, L.P.*, 2004 WL 2669795 (S.T.B., November 23, 2004) (finding, in the context of a motion to compel discovery requests, that “the parties should discuss and attempt to resolve the disputed discovery requests. As a general rule, the Board expects parties to try to resolve their differences on their own before involving the Board. There is no indication that has occurred here.”).

B. There is No Basis to Compel Any Further Response to CSXT's Most Overly Broad and Burdensome Requests, Which CSXT Refused to Narrow

CSXT's Motion implies that there are no limits to the scope of discovery. It quotes the first part of 49 C.F.R. § 1114.21(a), which concerns discovery of “relevant” information and documents (*see* Mot. at 5). Yet CSXT truncates the quotation before it reaches subpart (c), which cabins the discovery of relevant information or documents by various principles, including to the extent discovery would impose “undue burden or expense.” 49 C.F.R. § 1114.21(c); *see*

also *Tongue River Railroad Co., Inc.—Rail Construction & Operation—In Custer, Powder River & Rosebud Counties, Mont.*, 2014 WL 4457251, at *3 (“[D]iscovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought.”). Nowhere in its 41-page Motion does CSXT contend with, or even acknowledge, the principle that it is not entitled to discover information even when potentially relevant if doing so would impose an undue burden on Applicants.

There are, of course, limits to discovery for important reasons related to fairness, efficiency and proportionality. CSXT’s Second Requests plainly exceed them. Board precedent is very clear that, “discovery requests must be narrowly drawn, directed toward a relevant issue, and not used for a general fishing expedition. Moreover, it is unduly burdensome to require a party to produce information that is available from public records or through less intrusive means.” *Duke Energy Corp. v. Norfolk So. Rwy. Co.*, 2002 WL 1730020, at *3 (S.T.B., July 26, 2002); *Sierra Railroad Co. v. Sacramento Valley Railroad Co.*, 2012 WL 1413150, at *4 (S.T.B. Apr. 23, 2012) (“[T]he Board requires ‘more than a minimal showing of potential relevancy’ before granting a motion to compel discovery. Furthermore, parties must demonstrate a real, practical need for the information.”).

CSXT made no serious effort to comply with this obligation. It instead drafted broad, categorical requests that would have forced Applicants first to guess at what relevant information is sought, and then expend massive resources searching for it while sifting through irrelevant materials. For example, Interrogatory No. 26 demands that Applicants “Identify all Analyses or other Documents Concerning each Applicants’ pre-Transaction participation in Movements of traffic between Mexico and the U.S. or Canada.” See Ex. D at 9. Read literally, CSXT demands every document “Concerning” participation in moving traffic between Mexico and the

U.S. or Canada. This is in no way reasonable, narrowly drawn or directed towards a relevant issue. The request would cover nearly every business document because this is what Applicants do: Applicants are railroads that move traffic and, especially for KCS, much of this traffic is from Mexico to the U.S. and Canada. The interrogatory lacks any reasonable limitation and would include wholly irrelevant information such as maintenance records, invoices, billing disputes, customer service requests, IT trackers, crew staffing, safety records, and proprietary customer information that is irrelevant to this proceeding.⁸

Although it was CSXT's obligation to draft reasonable requests, Applicants responded to CSXT's most overbroad requests, (*see* Interrogatories Nos. 3, 22, 23, 26, 46, 51, 68, 70 and 73), by offering to meet-and-confer regarding a narrowing construction to the requests. Applying a narrowing construction is a permissible response to an overly broad request. *See Tongue River*, 2014 WL 4457251, at *4 ("The motion to compel as it concerns Interrogatories 3-10 is denied. As TRRC asserts, these interrogatories, which seek identification of 'every person who was or is responsible for' certain activities, are overly broad, unduly burdensome, and vague. Moreover, with regard to Interrogatories 3-5, TRRC has provided the names of the persons who appear to have primary responsibility over the activities in question."); CP/DME Dec. No. 8 at 4-5 ("It is possible that DM&E might have business documents regarding its grain traffic that would shed

⁸ And, this is without considering the burden imposed by CSXT's definitions, word choice, and instructions. CSXT defines 'Concerning' so broadly that any document that hints at 'participation' is included. "Participation" is not defined and it is left for Applicants to determine what degree of interaction is "participation." And finally, CSXT's request for production masquerading as an interrogatory requires that Applicants "Identify" each document, meaning that for every document produced under Interrogatory No. 26, Applicants must also "(i) provide a description of such Document or thing sufficient to support a request for production, (ii) state is author(s), addressee(s), recipient(s), title, subject matter, date, present location and custodian, (iii) specify the place where the Document or thing may be inspected, and (iv) if the Document was produced in This Matter, specify the Document by Bates number(s). If a Document once existed and has since been lost, destroyed, or is otherwise missing or unavailable, You shall Identify the Document and state the details Concerning the unavailability of such Document." Ex. D at 27-28. The breadth of this demand is not reasonable.

light on the issue of with whom and where it expects to interchange such traffic. However, [the] request is so broad that it would require DM&E to review and potentially submit all of its documents that pertain to grain in order to determine whether such documents exist. That would be an undue burden on DM&E, and it would likely result in the collection of many documents that have no relevance. However, we will require that the applicants submit all documents prepared in connection with this transaction that otherwise meet the criteria of these requests.”).

Incredibly, CSXT refused to meet-and-confer, stating instead that Applicants’ offer was a “delay tactic.”⁹ See Mot. at 14; 21. The Motion does not even acknowledge that Applicants offered to meet-and-confer as to Interrogatories No. 73(b) and (d). Compare Mot. at 39-40 with Ex. D at 73. CSXT referred to some of its most overly broad requests such as Interrogatories Nos. 3¹⁰ and 26 as “straightforward,” Mot. at 14, 26, and suggests the “information could easily be produced,” Mot. at 14 (emphasis added), and demanded that Applicants produce all responsive documents to Interrogatory No. 3 in ten days.

These arguments suggest a willful blindness by CSXT to the burden its requests impose on Applicants. CSXT has not complied with its obligation to “narrowly draw[]” discovery requests and avoid “fishing expedition[s],” *Duke Energy Corp. v. Norfolk So. Rwy. Co.*, 2002 WL 1730020, at *3 (S.T.B., July 26, 2002). Even where Applicants have given CSXT the chance to rectify its error through the meet and confer process, CSXT declined. CSXT’s refusal

⁹ In their Motion, CSXT stated with respect to only two interrogatories, Interrogatory No. 46 and Interrogatory No. 51 that, “Applicants have offered to meet and confer regarding this Interrogatory and it is not the subject of this Motion.” CSXT still has not, however, reached out to Applicants to set up a meet and confer regarding even these two requests.

¹⁰ Interrogatory No. 3 seeks all documents concerning any of the Applicant rail carriers moving any of a large variety of commodities over the span of more than 3.5 years. See Ex. D at 4.

to propound proper discovery or to narrow these Requests, despite numerous opportunities to do so, means any Motion on them should be denied.

C. Applicants Are Not Obligated To Perform More Than a Reasonable Search

In response to CSXT's demands, Applicants produced additional documents responsive to CSXT's requests on January 19, 2022 and January 22, 2022. Even in the fifteen instances where Applicants agreed to search for and produce any non-privileged and non-duplicative documents they found through a reasonable search,¹¹ CSXT argues the supplemented productions are insufficient.

Despite their voluminous nature—due to the sweeping breadth of the CSXT Requests—CSXT claims Applicants must certify production of every single document in existence that might be responsive to each of their Requests, or must certify in writing that no other responsive documents exist anywhere beyond what has been produced. CSXT makes the same argument regarding instances where Applicants referred CSXT to the Application and Workpapers or other available information or documents produced in discovery.

This demand goes well beyond Applicants' obligations. Applicants are not required to undertake anything more than a reasonable search for non-duplicative and non-privileged responsive documents. *Tongue River*, 2014 WL 4457251, at *4 (“This request to expand the number of employees whose files should be reviewed will be denied for the most part Given that the TRRC Parties have already provided responsive, non-duplicative documents from the employees likely to possess them, requiring a search of documents from additional employees not shown to be likely to possess such documents is unnecessary and would be overly burdensome.”); *Duke Energy Corp. v. Norfolk So. Railway Co.*, 2002 WL 1730020 (S.T.B. July

¹¹ See CSXT Second Requests, Interrogatories Nos 4, 5, 18-19, 32-34, 43-45, 48, 56, 59, 60, 67.

26, 2002) (denying a motion to compel despite the fact that the party subject to the motion to compel “has not denied that such responsive documents exist”). Applicants have already produced over 29,000 pages of additional documents after filing the Application. CSXT is not entitled to demand that Applicants search further for more duplicative documents until it can guarantee it has found and produced them all, or to demand that Applicants certify there are no other duplicative documents anywhere beyond the large volume already produced.

D. Referring CSXT to the Application, Workpapers or Other Documents Available to CSXT is an Acceptable Response

In many of its Requests, CSXT sought information that Applicants had already provided in its Application and accompanying Workpapers. In response to 26¹² of the Second CSXT Requests, Applicants responded—as the Board has previously ruled they are entitled to do—that this information CSXT seeks is found in the Application; all CSXT has to do is read it. CSXT views this response as inadequate because Applicants did not pinpoint for CSXT exactly where in the Application to look.

CSXT’s position runs contrary to well-established Board precedent. Applicants are entitled to direct CSXT back to the Application or to its supporting Workpapers. CP/DME Dec. No. 8 at 5 (“[Movant]’s motion urges the Board to compel CPRC to respond individually to this request and supply all responsive documents. Applicants state that CPRC has already produced documents related to CPRC’s projected post-transaction revenue from DM&E-originated grain traffic, including the workpapers of CPRC witness Ray Foot and a traffic study performed by consultant John Williams [W]e will not compel a further response from CPRC.”).

¹² See CSXT Second Requests, Interrogatories Nos. 1-2, 4-7, 10-12, 21, 27-28, 35-36, 43, 47, 50, 52, 54, 57, 63-64, 71-74.

Similarly, in some of its requests, CSXT sought information that was already available to it either because it is publicly available, or because it had been produced in response to other discovery requests, and CSXT has access to these productions.¹³ Applicants likewise advised CSXT that it can simply review this publicly available information and/or documents that had already been produced in response to other discovery requests. Again, this is permissible under Board precedent. *Duke Energy Corp. v. Norfolk So. Rwy. Co.*, 2002 WL 1730020, at *3 (S.T.B., July 26, 2002) (“[I]t is unduly burdensome to require a party to produce information that is available from public records or through less intrusive means [I]t is unnecessary to require [a party] to provide information that the defendants already possess or have ready access to.”).

CSXT’s Motion strongly suggests that CSXT has not done the work that it is expected to do, to review the Application, the supporting Workpapers, and Applicants’ subsequent document productions, asking Applicants for example to “provide a location . . . in the Application and Workpapers” for “Analyses or other Documents Concerning Applicant’s determination of what effects of the Transaction constitute or generate Cognizable Public Benefits”—apparently unaware that this is the topic of the entire 4,342 page Application. *See supra* Section II.A.2.

CSXT’s requests with respect to expert reports similarly provide a compelling example of the unreasonable nature of its demands. Interrogatory No. 12, for example, asks Applicants, “[r]egarding customers served by KCSM or KCS,” to “Identify all Analyses or other Documents You contend support the claim that ‘A combined CP/KCS would not be expected to have any incentive to affect the competitive terms available to a Solely-served shipper because KCS would already be collecting the full measure of returns associated with its existing marker power,’ as stated in the Majure V.S. ¶ 24.” *See* Ex. D at 7. In response, Applicants informed

¹³ See Second CSXT Requests Nos. 1, 7, 36, 47, 54, 62, 73.

CSXT that documents responsive to this request are contained in the Application and accompanying Workpapers. The Majure Verified Statement is a document exceeding 100 pages in length. It contains 86 footnotes citing directly to all materials relied upon, in addition to Appendix B, which is an entire section devoted to mapping out the materials relied upon in forming the expert report. In light of the clear and complete information CSXT already has about what the expert relied on in forming his opinions, to the extent CSXT wants to challenge the expert on the merits of his opinions or the adequacy of the information relied upon in the report, the upcoming deposition is the appropriate forum to do so.¹⁴

E. Even Where Applicants Provided the Specific Responses CSXT Claims It Wants, CSXT Still Moved to Compel

There are more than a dozen CSXT requests for which Applicants provided robust responses that include specific pin-cites to the Application, Workpapers, or already produced documents, and narrative interrogatory responses. Where it was readily discernible to Applicants what precise factual information CSXT needed help to identify—as opposed to legal argument, new expert analysis, or sweeping categorical materials—Applicants provided it. In fourteen different instances,¹⁵ Applicants provide CSXT with specific pin-cites to the relevant parts of the Application or Workpapers where responsive information could be found. Yet, in every instance, CSXT still moved to compel, claiming that these exact pin-cites were insufficient.¹⁶ This demonstrates CSXT’s facial unreasonableness and shows that, even if Applicants had

¹⁴ The other instances where Applicants contend CSXT’s requests with respect to information derived from expert reports are unreasonable include Interrogatories Nos. 13-17, 20, 24, and 40.

¹⁵ See CSXT Second Requests, Interrogatories Nos. 8, 25, 29-31, 37-38, 41-42, 49, 55, 57, 68, 69.

¹⁶ Of the requests for which Applicants responded with specific pincites, there were only three requests, CSXT Second Requests, Interrogatories Nos. 41, 55, and 57, where CSXT claimed they were “prepared to accept this response as adequate,” but with the caveat, “provided that Applicants confirm that no other such data exists.” See Mot. at 28, 33, 34.

hunted through all the documents to point CSXT to exact pin-cites, Applicants would still be facing a Motion.

F. Referring CSXT to the Application and Workpapers or Other Documents Available to CSXT Does Not Cease to be an Acceptable Response Just Because CSXT Calls Its Discovery Requests “Interrogatories”

Finally, Applicants are permitted to refer CSXT to the same body of information, whether the Request is framed as a document request or an interrogatory. CSXT argues that because it frames its Requests as “contention interrogatories,” it is entitled to demand narrative responses regarding where information is located. This is a misreading of Board precedent. In prior cases where the Board has ruled that Applicants may properly direct a third party to the Application and Workpapers, Applicants had done so in response to interrogatory discovery. CP/DME Dec. No. 8 at 3 (holding CP need not provide information in response to Interrogatory No. 1 where that information was already contained in its Workpapers).

Your Honor and the Board should not allow CSXT to do an end-run around the concept of what a request for production of documents is merely by calling it an interrogatory. It would be unduly burdensome to ask Applicants to review the voluminous Application and Workpapers that they have already provided to third parties, just so they could tell the third parties where to look for the information they want, especially given the number of discovery requests Applicants have received. Furthermore, it would be an “undue expense,” *see* 49 C.F.R. § 1114.21(c), to require Applicants to pay their lawyers to review documents on behalf of CSXT and other companies. Companies like CSXT can pay their own lawyers to perform this review, and weigh the cost of performing the review against its value to them – something they will not consider if they can compel Applicants to perform document review for them.

III. CONCLUSION

For the foregoing reasons, Applicants respectfully request that this Court deny CSXT's Motion to Compel in its entirety.

Respectfully submitted,

Dated: January 31, 2022

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Applicants' Reply to CSX Transportation, Inc. Motion to Compel to be served electronically or by first-class mail, postage pre-paid, on all parties of record in these proceedings.

/s/ Sonia Gupta
Sonia Gupta

January 31, 2022

Appendix 1: List of CSXT Defective Second Requests Regarding Which CSXT Has Moved to Compel

Category of Request	Interrogatory (CSXT Second Requests)
CSXT makes no effort to meet its burden of proof through use of conclusory, generalized statements that the production or response is insufficient	Nos. 5, 8, 25, 50, 54 and 68
CSXT concedes that several interrogatories overlap with its First Requests that it did not move to compel regarding	Nos. 7, 21, 26, 27, 30-32, 55, 59
CSXT did not accept Applicants' offer to meet and confer	Nos. 3, 22, 23, 26, 68, 70 and 73
Applicants agreed to search for and produce any non-privileged and non-duplicative documents found through a reasonable search	Nos 4, 5, 18-19, 32-34, 43-45, 48, 56, 59, 60,
The information CSXT seeks is found in the Application	Nos. 1-2, 4-7, 10-12, 21, 27-28, 35-36, 43, 47, 50, 52, 54, 57, 63-64, 71-74
CSXT sought information that was already available to it either because it is publicly available, or because it had been produced in response to other discovery requests, and CSXT has access to these productions	Nos. 1, 7, 36, 47, 54, 62, 73
CSXT sought information that was already contained in expert reports or in accompanying materials	Nos. 12-17, 20, 24, and 40
Applicants provided CSXT with specific pin-cites to the relevant parts of the Application or Workpapers where responsive information could be found	Nos. 8, 25, 29-31, 37-38, 41-42, 49, 55, 57, 68, 69 ¹⁷

¹⁷ Of the requests for which Applicants responded with specific pin-cites, there were only three requests, CSXT Second Requests, Interrogatories Nos. 41, 55, and 57, where CSXT claimed they were "prepared to accept this response as adequate," but with the caveat, "provided that Applicants confirm that no other such data exists." See Mot. at 28, 33, 34.