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Chief of Case Administration
Office of Chief Counsel
Surface Transportation Board
395 E Street S.W.
Washington, D.C. 20423-0001

Re: Ex Parte No. 790, *Review of Replies to Replies*

Dear Chief of Case Administration:

In response to the Board's Decision in this proceeding served May 18, 2026, I write to offer certain observations solely in my personal capacity and without reference to any pending proceeding. I have practiced before the Board and the ICC for more than three decades, and as a result I have considerable experience with the longstanding rule that "replies to replies" are not permitted under the Board's generally applicable procedural rules (*see* 49 C.F.R. § 1104.13) and the varying approaches over time to that rule's enforcement.

As the Board's decision states, there are "advantages and disadvantages" to both "a strict prohibition to allowing rebuttals as of right in all motion practice." From my perspective, the principal advantage of a rule barring rebuttals is to discourage sandbagging by requiring parties filing motions to include their entire argument and supporting evidence in their initial submission, rather than laying back and submitting additional argument or supporting evidence only after the responding party has filed its reply. A prohibition on rebuttals also in theory can bring motions practice to a close more quickly by eliminating the time between the reply and a Board (or ALJ) decision.

At the same time, however, there are real disadvantages to a blanket prohibition. The most effective advocacy—and likely the record that best supports sound Board decision-making—arises when the issues are effectively joined (or crystallized) so that each party can muster the best possible points and evidence for its position and against that of the other side. In the absence of a rebuttal opportunity, the moving party must try to anticipate the arguments and evidence offered by opposing parties, but often that is hard to do. The result can be submissions that pass like ships in the night, or motions that must imagine every conceivable argument and try to knock them all down. And some kinds of reply arguments can never fairly be anticipated, such as flaws with (or mischaracterizations of) data used to support an opponent's reply. The

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Board's consideration of rebuttal submissions is often important to support fairness and sound decision-making in many cases.

For many years the Board (and ICC before it) maintained its strict "no replies to replies" rule while in practice recognizing the disadvantages and accepting rebuttal submissions fairly regularly so as to permit a more "complete record." This approach at times allowed for moving parties to submit argument or evidence that more effectively addressed points made in replies, but at the same time it also at times led to a procedural free-for-all, with some parties repeatedly seeking to have the last word.

The other extreme—prohibiting rebuttals outright or allowing them only on an affirmative showing of good cause—is problematic as well, for it can keep from the Board material that may be important to the Board reaching the correct decision, or can inefficiently require yet a further round of motions practice litigating whether to allow an individualized exception to the general prohibition.

I would urge the Board to consider a compromise approach that allows rebuttals as a matter of right, but with strict limits on what can be submitted without affirmative leave of the Board. My recommendation would be to revise Section 1104.13 to state that replies to replies are disallowed without leave of the Board, except for rebuttals:

- Addressing only matters raised in the reply that were not, and could not reasonably have been, anticipated by the movant in its motion;
- Filed within 5 (or 7) business days of the service of a reply; and
- Of no more than 7 (or 10) pages in length, plus (where appropriate) a verified statement of up to 7 (or 10) pages.

I have considered whether as-of-right rebuttals should be permitted more liberally, perhaps concerning any argument *raised in* a reply. Such an approach strikes me as likely to encourage the filing of underdeveloped bare bones motions that would fail to address obvious issues posed by the relief being sought—perhaps including arguments that had been raised directly by the opponent in a meet-and-confer process preceding the filing of the motion. A rule this permissive might conflict with a movant's obligation to fully support the relief it is seeking up front, rather than later in the process. *Cf. Lake Providence Port Commission – Feeder Line Application – Line of Delta Southern R.R. Located in East Carroll & Madison Parishes, LA*, Finance Docket No. 36447 (STB served Aug. 23, 2022) at 8 (cautioning applicant that its "amended application must include all historical information *known or reasonably available* to [it] in support of its case-in-chief" rather than at a later stage) (emphasis added). Were a movant to know ahead of time that *any argument* raised in a reply would make it fair game for the movant to file a further rebuttal submission, the risks of sandbagging would seem material. A

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rule disallowing rebuttal only on argument and evidence that reasonably could not have been anticipated, along with strict adherence to page limits and a tight timeline for the submission of any rebuttal, would help to discourage such sandbagging while simultaneously contributing to the more efficient and expeditious handling of proceedings by the Board.

As a corollary to a rule allowing rebuttals in certain circumstances, the Board should remind practitioners that it will not hesitate promptly to strike rebuttal material (sua sponte or in response to a motion) that does not conform to the parameters of permitted rebuttal, so as to encourage movants to present their full arguments and evidence up-front and resist the temptation to sandbag their opponents. *See, e.g., CP/KCS*, Finance Docket No. 36500 (STB Decision No. 24, served Sept. 13, 2022) at 4 (striking material “outside the scope of evidence permitted as a response,” which party had “every opportunity to submit earlier”); *Duke Energy Corp. v. CSX Transportation, Inc.*, Docket No. NOR 42070 (STB served Mar. 25, 2003) at 4 (striking rebuttal evidence based on the principle that “[r]ebuttal may not be used . . . as an opportunity to introduce new evidence that could and should have been submitted in the party’s case-in-chief”); *Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. – Control – Chicago & North Western Transportation Co. & Chicago & North Western Ry.*, Finance Docket No. 32133, 1994 WL 670136 (ICC Decision No. 24, served Dec. 2, 1994), at *8 (denying reconsideration of order striking improper rebuttal evidence).

Thank you very much for your consideration of these comments.

Respectfully submitted,



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