

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings

	)	May 23, 2017
CONSUMERS ENERGY COMPANY	)	Part of
Complainant,	)	Public Record
v.	)	Docket No. NOR 42142
CSX TRANSPORTATION, INC.	)	
Defendant.	)	

REPLY TO MOTION TO STRIKE

Complainant, Consumers Energy Company (“Consumers”), pursuant to 49 C.F.R. Part 1104.13(a), hereby replies to the Motion to Strike filed by Defendant, CSX Transportation, Inc. (“CSXT”) on May 3, 2017 (“Motion”). As explained below, CSXT’s Motion is predicated on a misapplication of Board precedent regarding the legitimate scope of rebuttal evidence, a mischaracterization of Consumers’ Supplemental Evidence concerning locomotive repositioning on the CERR,¹ and a misreading of the Board’s December 9, 2016 Decision (“*December 9 Decision*”) in this proceeding. The Motion is wholly without merit, and should be denied.

¹ As with Consumers’ Opening and Rebuttal Supplemental Evidence, acronyms used in this Reply have the same meaning as those used in Consumers’ May 20, 2016 Rebuttal Evidence and June 24, 2016 Brief.

INTRODUCTION

Consumers' Opening Supplemental Evidence modified the CERR traffic group in response to the Board's *December 9 Decision*,² a modification that CSXT accepted in its Supplemental Reply. As part of the process, Consumers re-ran its RTC Model to determine the changes in traffic flows and, *inter alia*, locomotive requirements that resulted from the reduction in CERR trains. As Consumers showed, the effect was to reduce the number of locomotive hours – and, thus, locomotives – required by the CERR.³ The changes were fully documented in Consumers' workpapers.⁴

Among the effects of the reduction in the number of merchandise trains handled by the CERR was the elimination of any need to reposition locomotives at Dolton Yard to meet the requirements of westbound trains. Consumers' Opening and Rebuttal Evidence and supporting workpapers showed that the original CERR traffic group had more trains leaving Dolton and moving west to Chicago than trains arriving at Dolton. Since the trains arriving at Dolton were providing locomotives for the trains leaving Dolton for Chicago, there were not enough locomotives to service all of the trains departing Dolton.⁵ This deficit of locomotives was offset somewhat by locomotives from

² The modification involved the removal of 897 merchandise trains from the CERR's base year traffic group.

³ Consumers Op. Supp. at III-C-2, III-D-2.

⁴ See Consumers Op. Supp. e-workpaper "CERR Operating Statistics_Supplemental.xlsx," cell F28.

⁵ See Consumers Reb. e-workpaper "Base Unit Merch Trains v6_Statistics_Rebuttal.xlsx," tab "Crew and Loco Balancing," cell X26.

surplus trains at Curtis,⁶ but the westbound trains needing locomotives departing Dolton still exceeded the arriving eastbound trains by 241 trains.⁷ This imbalance of 241 trains consisted of 339 trains needing equipment at Dolton, offset by 98 surplus trains at Curtis that could provide equipment at Dolton for westbound trains.⁸

As shown in Consumers' Opening Supplemental Evidence, application of the same locomotive assignment methodology used by Consumers on Opening and Rebuttal (and accepted by CSXT in its Reply Evidence) to the modified traffic group showed that the removal of 897 base year merchandise trains increased the number of surplus trains at Curtis that were available to provide equipment for trains departing Dolton and heading west.⁹ The higher number of trains at Curtis resulted in a *surplus* of locomotives available to move trains westward from Dolton to Chicago. In Consumers' Opening Supplemental Evidence, this surplus equaled 178 trains.¹⁰ With more trains available to meet the locomotive needs of trains departing Dolton for Chicago, there was

⁶ See Consumers Reb. e-workpaper "Base Unit Merch Trains v6_Statistics_Rebuttal.xlsx," tab "Crew and Loco Balancing," cell Y28.

⁷ See Consumers Reb. e-workpaper "Base Unit Merch Trains v6_Statistics_Rebuttal.xlsx," tab "Crew and Loco Balancing," cell X30.

⁸ See Consumers Reb. e-workpaper "Base Unit Merch Trains v6_Statistics_Rebuttal.xlsx," tab "Crew and Loco Balancing," cells X26 and Y28.

⁹ See Consumers Op. Supp. e-workpaper "Base Unit Merch Trains v6_Statistics_Supplemental.xlsx," tab "Crew and Loco Balancing," cell Y29.

¹⁰ See Consumers Op. Supp. e-workpaper "Base Unit Merch Trains v6_Statistics_Supplemental.xlsx," tab "Crew and Loco Balancing," cell X31. This cell includes the shortage of 339 trains at Dolton (cell X26) plus the surplus of 517 trains at Curtis (cell Y29).

no need for repositioning locomotives. Rather than introduce a new issue – whether a net surplus of locomotives available at Dolton should lead to a net *reduction* in Dolton-Chicago locomotive costs that flowed from the traffic group adjustment – Consumers eliminated the prior repositioning adjustment and conservatively held other costs constant. This was clearly shown in Consumers’ Opening Supplemental workpapers.¹¹

CSXT understood that the previous westbound train imbalance had been eliminated, but professed not to understand the reason why.¹² In its Rebuttal Supplemental Evidence, therefore, Consumers responded to CSXT’s request for a further explanation of the repositioning adjustment,¹³ and directly rebutted CSXT’s incorrect claim that Board precedent prohibited Consumers from eliminating the locomotive unit-hours related to repositioning when the stipulated methodology showed that they no longer were needed.¹⁴ However, no new evidence was introduced by Consumers.

CSXT’s Motion to Strike wrongly asserts that a reference in the relevant Consumers workpaper spreadsheet to “-178” trains means that “there was a net imbalance of 178 trains in the eastward direction”¹⁵ that required a repositioning adjustment for those trains. From that misrepresentation, CSXT jumps to the equally wrong conclusion

¹¹ See Consumers Op. Supp. e-workpaper “Base Unit Merch Trains v6_Statistics_Supplemental.xlsx,” tab “Crew and Loco Balancing,” cell X38.

¹² CSXT Supp. Reply at III-C-7, n.14.

¹³ Consumers Reb. Supp. at III-C-5.

¹⁴ *Id.* at III-C-6-7.

¹⁵ Motion at 3.

that Consumers' revision of the previous westbound imbalance to "zero" amounted to the use of a new methodology, and that Consumers improperly raised new arguments for the first time in its Rebuttal Supplemental Evidence.¹⁶

CSXT's claims are contrary to the facts, misstate the record, and mischaracterize Board precedent. Its Motion should be denied.

ARGUMENT

The Board's precedents on the question of the proper scope of rebuttal evidence make clear that "rebuttal may not be used in SAC cases as an opportunity to introduce new evidence that could and should have been submitted on opening."

December 9 Decision at 3 (citing *Duke Energy Corp. v. Norfolk S. Ry.*, 7 S.T.B. 89, 101 (2003) and *Gen. Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, 5 S.T.B. 441, 446 (2001)). However, the cases also make clear that a party in Consumers' position properly can present arguments that are directly responsive to claims made by the opposing party, if *no new evidence* is sought to be introduced.

Potomac Elec. Power Co. v. CSX Transp., Inc., STB Docket No. 41989 (STB served Nov. 24, 1997) at 6; *Burlington N. Inc. & Burlington N. R.R. – Control & Merger – Santa Fe Pac. Corp. & The Atchison, T. & S.F. Ry. Co.*, 10 I.C.C. 2d 661, 731 (1995). *See also*, *December 9 Decision* at 4, 7-8; *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121 (STB served Sept. 14, 2016) at 20 ("Because CSXT's arguments were responsive to claims made by TPI in its compliance and

¹⁶ Motion at 4-6.

supplemental evidence . . . , CSXT’s response was proper . . .”). Consumers’ Supplemental Rebuttal Evidence concerning locomotive repositioning easily meets this standard.

Contrary to CSXT’s claims in its Motion, Consumers’ Supplemental Evidence did not change the methodology that it used on Opening and Rebuttal (and CSXT accepted) to assess the CERR’s locomotive repositioning needs. As Consumers further clarified in response to CSXT’s request,¹⁷ when the agreed-upon methodology was applied after the 897 merchandise trains were removed from the CERR traffic group, the westbound power imbalance disappeared, leaving no need for repositioned locomotives. In its Motion, CSXT misrepresents a Consumers workpaper to claim that what had been a westbound imbalance shifted to an *eastbound* imbalance,¹⁸ but this simply and obviously is not the case. As Consumers’ RTC Model runs throughout this proceeding show, eastbound trains arriving at Dolton from Chicago *already are equipped with locomotives*, so there can be no shortfall in required power as there was for the westbound Dolton-Chicago traffic prior to the removal of the 897 merchandise trains. Simply put, an eastbound “imbalance” at Dolton is not possible since eastbound trains only arrive at Dolton with locomotives; they do not depart Dolton in the eastbound direction needing locomotives. The “-178” workpaper notation means that the traffic group adjustment results in there being 178 more eastbound trains than westbound at

¹⁷ Consumers Reb. Supp. at III-C-5

¹⁸ Motion at 3.

Dolton – a reversal of the situation prior to the adjustment. While CSXT appears to recognize this,¹⁹ it wrongly equates the surplus with an “imbalance” that requires the CERR to reposition locomotives for eastbound movements. CSXT may be assuming that a surplus of equipment at Dolton means that there must be a deficit of equipment at Chicago, but that assumption would be false. Consumers’ Opening and Rebuttal Evidence showed that there were more westward trains arriving in Chicago than eastward trains leaving Chicago.²⁰ Thus, there never was a need to calculate imbalances at Chicago, a fact that CSXT implicitly accepted when it applied Consumers’ approach to calculating repositioning needs at Dolton only, and not at Chicago.²¹ Indeed, if not adjusted by Consumers in its Opening Supplemental Evidence to prevent repositioning locomotive needs from going below zero, the methodology that both parties used in their Opening, Reply and Rebuttal Evidence would have led to a locomotive cost *savings* as a result of the modified traffic group. However, that would have required Consumers to proffer both a methodology for calculating the savings and a quantification of their impact. By merely translating a surplus of available trains into the recognition that no repositioned locomotives were needed, Consumers avoided introducing a new issue for the Board to resolve, and actually favored CSXT by not claiming the savings.

¹⁹ Motion at 5.

²⁰ See Consumers Reb. e-workpaper “Base Unit Merch Trains v6_Statistics_Rebuttal.xlsx,” tab “Crew and Loco Balancing,” cells J4-R21.

²¹ See CSXT’s Reply e-workpaper “CERR Base Year Trains.xlsx,” tab “Crew and Loco Balancing_Reply.”

Similarly unfounded is CSXT's argument that elimination of the prior locomotive repositioning adjustment was not permitted under the *December 9 Decision*.²² As Consumers explained in its Rebuttal Supplemental narrative, no changes were made in the methodology used to determine whether repositioning was needed.²³ The only change was the result reached using that methodology, which is not surprising given that 897 fewer trains were moving over the CERR. Consumers applied the same agreed-upon methodology in the same way that it did in its Opening and Rebuttal Evidence. Because of the stipulated traffic group modification, however, that methodology no longer showed any need to reposition locomotives at Dolton (or anywhere else), so Consumers adjusted the calculation of needed repositioning locomotives to go no lower than zero. This result fits squarely within the scope of "issues directly affected by [Consumers'] modification of [Consumers'] traffic group,"²⁴ and contrary to the claim in CSXT's Motion, Consumers did not "silently change course" without explanation.²⁵ Consumers stated in its Opening Supplemental narrative that "[d]ue to the reduction in the number of trains transported by the CERR, and based on Consumers' revised RTC Model run,"²⁶

²² Motion at 5-6.

²³ Consumers Reb. Supp. at III-C-6-7. For this reason, CSXT's reliance on *Duke Energy Corp. v. CSX Transp., Inc.*, STB Docket No. 42070 (STB served Mar. 25, 2003) at 4 (*see* Motion at 1, n.2) is misplaced. In that case, the shipper altered both the route of the SARR and its infrastructure on rebuttal. Consumers made no such changes here.

²⁴ *December 9 Decision* at 20.

²⁵ Motion at 5.

²⁶ Consumers Op. Supp. at III-C-2.

reductions in locomotive requirements and costs were realized. The associated workpapers detailed all adjustments with sufficient clarity that CSXT identified the locomotive positioning adjustment and objected to it.²⁷ Consumers' Rebuttal Supplemental Evidence responded²⁸ without the introduction of any new evidence, or any arguments beyond those concerning the scope of the *December 9 Decision* that Consumers previously had raised, which directly rebutted CSXT's claims in its Supplemental Reply.²⁹ Consumers' treatment of the locomotive repositioning issue in its Rebuttal Supplemental Evidence falls solidly within the scope of proper rebuttal under applicable precedent.³⁰

Finally, Consumers' position in its Rebuttal Supplemental narrative that CSXT had a fair opportunity to address the locomotive repositioning issue in its Supplemental Reply³¹ was and is completely valid. CSXT plainly was aware of

²⁷ CSXT Supp. Reply at III-C-7, n.14.

²⁸ Consumers Reb. Supp. at III-C-5-7.

²⁹ See Consumers Op. Supp. at I-4-5, III-C-2, III-D-2-3; Consumers Reb. Supp. at III-C-6-7.

³⁰ See *December 9 Decision* at 9, 13 (where Consumers' opening calculations were not changed and its arguments responded "directly to the arguments CSXT made on reply," rebuttal was proper). See also, *Duke Energy Corp. v. Norfolk S. Ry.*, 7 S.T.B. 89, 101 (2003). The falsity of CSXT's insistence that Consumers changed the repositioning methodology – as opposed to simply presenting the result and making an adjustment that actually favors CSXT – undermines its effort to distinguish its acceptance of changes in the CERR yard tracks as well. Motion at 6. Both the yard track reductions and the elimination of a repositioning adjustment directly flow from Consumers' "modification of its traffic group." *December 9 Decision* at 20.

³¹ Consumers Reb. Supp. at III-C-7.

Consumers' adjustment to prevent the calculation of needed repositioning locomotives from going negative – which was a methodological *outcome*, not a change – and it specifically addressed the point in its Supplemental Reply.³² That CSXT did so in a footnote that offered no counter-evidence, and asserted a flawed legal claim that Consumers was fully entitled to rebut directly,³³ was the carrier's own choice. While CSXT now might wish that it had offered something more,³⁴ that cannot provide justification to strike any part of Consumers' otherwise proper Rebuttal Supplemental Evidence.

CONCLUSION

For the reasons set forth above, CSXT's May 3, 2017 Motion to Strike should be denied.

³² CSXT Supp. Reply at III-C-7, n.14.

³³ *Total Petrochemicals* at 20.

³⁴ This is not to suggest that there is any legitimate basis to retain a Dolton locomotive repositioning adjustment, when the changes to the CERR traffic group (which CSXT accepted) show that it no longer is necessary.

Respectfully submitted,

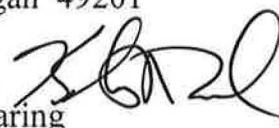
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CERTIFICATE OF SERVICE

I hereby certify that this 23rd day of May, 2017, I caused copies of the Reply to Motion to Strike of Complainant Consumers Energy Company to be served by hand upon counsel for Defendant CSX Transportation, Inc. as follows:

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A handwritten signature in black ink, appearing to read "A. Williams", is written over a horizontal line.

A. Rebecca Williams