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Defendant.

Docket No. NOR 42142

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Here, Consumers Energy Company (“Consumers”) waited until its Supplemental Rebuttal Evidence to acknowledge and attempt to justify its decision in Supplemental Opening Evidence to abandon the locomotive repositioning methodology that it proposed in its initial evidence. Specifically, Consumers’ Supplemental Opening workpapers altered the approach that both parties used in initial evidence for calculating the additional locomotives and locomotive-unit miles required to reposition units to address traffic imbalances across the CERR network. Consumers’ Supplemental Opening workpapers made the change without any narrative explanation for the shift, making it unclear whether Consumers was making an intentional change or an accidental one. After CSXT’s Reply Evidence noted the workpaper anomaly in a footnote, Consumers then chose to present new arguments on Supplemental Rebuttal attempting to justify its new position. This is a textbook case of a new argument that could and should have been presented in a complainant’s opening evidence, and the Board should strike Consumers’ improper Supplemental Rebuttal Evidence on locomotive repositioning.³

In its Opening Evidence, Consumers determined that handling its SARR traffic group would result in imbalances in train flows on the CERR network, and Consumers calculated the additional locomotive and locomotive-unit mile requirements. In its calculation, Consumers coded westward imbalances (*i.e.*, trains that had more westward movements than eastward movements) with a positive (+)

³ The Board has encouraged defendants to use motions to strike to challenge improper rebuttal evidence. *See SunBelt Chlor Alkali P’ship v. Norfolk Southern Ry. Co.*, STB Docket No. 42130, at 2 (S.T.B. served July 15, 2013); *Total Petrochemicals & Ref. USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121, at 9 (S.T.B. served May 31, 2013).

sign and eastward imbalances with a negative (-) sign.⁴ In total, Consumers calculated an overall net imbalance across the CERR network of +241 trains, in other words, an excess of 241 westbound trains over eastbound trains. Consumers then calculated the additional locomotive hours and locomotive miles that would be necessary to eliminate this imbalance, and included the associated costs of repositioning the CERR locomotives.⁵

CSXT accepted this methodology in Reply,⁶ and Consumers continued to use it in Rebuttal.⁷ In its Supplemental Opening Evidence, Consumers' workpapers continued to calculate the net train imbalance for the revised SARR traffic group and concluded there was a net imbalance of 178 trains in the eastward direction (which it coded as -178 trains). Rather than determining the additional locomotive-unit miles and additional locomotives associated with this imbalance of 178 trains, however, Consumers modified the Excel formulae to treat its calculation of a "negative" overall imbalance as zero.⁸ As a result, despite having determined that

⁴ See Consumers Op. WP "Base Unit Merch Trains v6_Statistics.xlsx," tab "Crew and Loco balancing," cells V7:V19.

⁵ See Consumers Op. WP "Base Unit Merch Trains v6_Statistics.xlsx" tab "Crew and Loco Balancing" cell X30, X33, and X38.

⁶ See CSXT Reply III-D-23 ("CSXT also adopts Consumers' approach to increase the CERR's locomotive requirements to account for imbalances in the CERR train flows and to sustain fluid operations"); CSXT Reply WP "Base Year Trains.xlsx" tab "Crew and Loco Balance_Reply" cells X30, X33, and X38.

⁷ See Consumers Rebuttal WP "Base Unit Merch Trains v6_Statistics_Rebuttal.xlsx" tab "Crew and Loco Balancing" cells X30, X33, and X38.

⁸ See Consumers Op. Supplemental WP "Base Unit Merch Trains v6_Statistics_Supplemental.xlsx" tab "Crew and Loco Balancing" cells X31, X34, X38.

the revised traffic group also results in an imbalance in train flows on the CERR network, Consumers' supplemental operating expense calculations do not include costs for repositioning the CERR locomotives.

CSXT pointed out in its Supplemental Reply that it was not clear whether the omission of the repositioning was inadvertent or intentional. *See* CSXT Supp. Reply III-C-7 at n.14. CSXT noted that if the adjustment were intentional, "the removal of the repositioning adjustment in Consumers' Supplemental evidence is not permissible because CSXT adopted Consumers' proposed methodology on Reply."⁹

In its Supplemental Rebuttal Evidence, Consumers acknowledged the omission, asserted that it was intentional, and attempted to justify its new methodology. *See* Consumers Supp. Rebuttal III-C-5 through III-C-7. But Consumers does not even attempt to explain why it waited until rebuttal to first acknowledge and attempt to justify its methodological change. In any event, none of Consumers' arguments have any merit.

Consumers first suggests that the locomotive repositioning approach it took on Supplemental Opening is the same process that "Consumers performed both in its Opening and Rebuttal Evidence" and that it just happened that on Supplemental Opening that this process "resulted in a calculation of zero locomotives needed for

⁹ CSXT Supp. Reply III-C-7, citing *FMC Wyoming Corp. v. Union Pac. R.R. Co.*, 4 S.T.B. 699, 790 (2000) (complainant's proposal to triple track segment on Opening that was accepted by defendant in Reply could not be modified on Rebuttal); *Duke Energy Corp v. Norfolk S. Ry. Co.*, 7 S.T.B. 89, 101 n. 18 (2003); *Public Service Co. of Colorado d/b/a Xcel Energy v. Burlington N. & Santa Fe Ry. Co.*, 7 S.T.B. 589, 683-84 (2004).

repositioning.” *Id.* at III-C-5. This is deeply misleading at best. Consumers’ Supplemental Opening workpapers only “resulted in a calculation of zero locomotives” because Consumers altered the spreadsheet formula to transform a negative repositioning calculation into zero. But as explained above, a negative result only means that the imbalance is an eastward imbalance (*i.e.*, more eastbound trains than westbound trains)—not that there is not an imbalance that would require repositioning. As Consumers’ own workpapers show, the revised traffic group produces an eastward imbalance of 178 trains.¹⁰ Editing workpaper formulas so that Consumers can pretend that the revised traffic group actually has no imbalances is plainly not using the same approach that Consumers used (and that CSXT accepted) in initial evidence.

Second, Consumers argues that the Board’s December 9, 2016 Decision¹¹ allowed for changes to evidence and that “the reduction in traffic and related adjustments to the on-SARR/off-SARR traffic flows changes made in the Opening Supplemental Evidence [resulted in] the need for zero locomotives for repositioning.” Consumers Supp. Reb. III-C-7. In the first place, this argument is beside the point, because even if the *December 9 Decision* allowed Consumers to alter its repositioning methodology, it certainly did not allow it to silently change course in a workpaper and then save its explanation for rebuttal. Moreover, the

¹⁰ See Consumers Opening Supplemental WP “Base Unit Merch Trains v6_Statistics_Supplemental.xlsx” tab “Crew and Loco Balancing” cells X31, X34, X38.

¹¹ Decision, *Consumers Energy Co. v. CSX Transp., Inc.*, STB Docket No. 42142 (served December 9, 2016) (“*December 9 Decision*”).

December 9 Decision did not authorize this sort of methodological change. Rather, the Board explicitly provided that “Consumers may also submit evidence on those issues directly affected by its modification of its traffic group, though it may not modify unaffected issues or costs (e.g., while certain quantities may change, unit costs should remain the same).” *December 9 Decision* at 20. Here, Consumers did more than change the “quantity” (e.g., the number of locomotives needing repositioning). It altered the formula upon which the locomotive repositioning costs were calculated; a change not contemplated by the *December 9 Decision*. *Id.*

Third, Consumers makes a convoluted argument that it is somehow inconsistent for CSXT to not object to Consumers’ removal of a yard track in its Supplemental evidence but to object to Consumers’ attempt to change its locomotive repositioning methodology. But this compares apples and oranges. Consumers proposed a reduction in Barr yard tracks as a direct result of the reduced amount of merchandise traffic in the SARR traffic group—this change flows directly from the altered traffic group and is plainly authorized by the *December 9 Decision*. But nothing in the *December 9 Decision* can justify a methodological change in how Consumers calculates the need for locomotive repositioning (particularly a methodological change that inexplicably assumes that no repositioning could ever be required for eastward imbalances)

Finally, Consumers argues that CSXT was not prejudiced because “it had a fair opportunity to address this issue substantively in its Supplemental Reply.” Consumers Supp. Reb. III-C-7. This is utter nonsense. Consumers did not say one word in its narrative about its apparent decision to change a methodology that the

parties agreed upon in their initial evidence. And even Consumers' workpapers were ambiguous as to whether Consumers was changing positions or had made an error, since they performed calculations of locomotive repositioning only to change a formula to zero out any calculation of an eastward imbalance. The idea that it was somehow CSXT's responsibility to address a substantive reply to an argument that Consumers failed to articulate on Opening is nonsensical.

CONCLUSION

For the foregoing reasons, the impermissible Supplemental Rebuttal regarding locomotive repositioning at pages III-C-5 through III-C-7 of Consumers' Supplemental Rebuttal should be stricken from the record, and the Board should not rely on any such evidence in its resolution of this case.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May 2017, I caused a copy of the foregoing Motion to Strike to be served by hand delivery or more expeditious means upon:

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