

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E.I. DUPONT DE NEMOURS & COMPANY

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant

Docket No. NOR 42125

Expedited Consideration Requested

232360

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May 24, 2012
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**NORFOLK SOUTHERN RAILWAY COMPANY'S
MOTION FOR MODIFICATION OF PROCEDURAL SCHEDULE**

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Dated: May 24, 2012

Defendant Norfolk Southern Railway Company (“NS”) hereby moves the Board to adjust the procedural schedule in the above-captioned case to provide an additional 30 days for NS to file its Reply Evidence responding to Complainant E.I. Du Pont de Nemours and Company (“DuPont”)’s Opening Evidence, as modified by its 170-page “Errata” filed late last week. NS also proposes a parallel 30-day extension to the deadline for DuPont to file its Rebuttal evidence, to preserve the time intervals in the Board’s existing procedural schedule.

Under the Board’s current procedural schedule for this maximum rate reasonableness case, Complainant DuPont filed its Opening Evidence on April 30, 2012. DuPont filed that Evidence only after it had obtained two significant extensions of time for its opening submission, extensions totaling a full six months more than the Board initially had determined appropriate in its February 24, 2011 Decision establishing a schedule for this proceeding. *See* Decision, *DuPont v. Norfolk Southern*, STB Docket 42125 (served Aug. 25, 2011) (granting DuPont a three-month extension of time to file its opening evidence, to January 31, 2012);¹ Decision, *DuPont v. Norfolk Southern*, STB Docket 42125 (served Jan. 13, 2012) (granting DuPont’s second motion for three-month extension of opening evidence filing deadline to April 30, 2012, and indicating that extension should be ample to allow DuPont to develop its evidence “without shortcuts.”). When the Board granted the second extension over NS’s objection, it advised NS that it would have an opportunity to seek additional time to file its Reply evidence if necessary, once DuPont filed its Opening Evidence. *See Dupont v. NS*, STB Docket No. 42125, Decision at 2 (served Jan. 13, 2012).

¹ NS did not object to DuPont’s first extension request, which was necessitated by factors beyond the parties’ control, namely FRA and TSA deliberations regarding whether and under what conditions NS could produce to DuPont certain Sensitive Security Information.

As a result of its schedule extensions, DuPont had more than one-and-a-half years after the filing of its Complaint to develop, revise, check, and submit its case-in-chief. Nonetheless, more than two weeks after filing its Opening Evidence, without seeking permission from the Board, and without any prior notice to Norfolk Southern, DuPont filed an extensive “Errata” to that Opening Evidence, significantly changing numerous elements of its case-in-chief. *See* “Errata to Opening Evidence of Complainant E.I. DuPont de Nemours & Company,” STB Docket No. 42125 (filed May 17, 2012). DuPont’s so-called “Errata” – consisting of 170 pages not including voluminous new workpapers—is unprecedented in length and scope, and includes, inter alia, entirely new RTC simulation analyses, modeling and evidence. As the Board knows, RTC modeling is complex and time-consuming. Moreover, DuPont claims in this case that its RTC modeling proves the feasibility of its operating plan.

Upon receipt of DuPont’s very extensive “Errata,” Norfolk Southern expeditiously distributed that information to the experts who are assisting NS in its defense of this extremely large and complex case, and asked them to determine what DuPont had changed through its “Errata.” NS’s team is presently engaged in the time-intensive process of comparing DuPont’s Opening Evidence with its “Errata” and workpapers to determine for each section and sub-section of the evidence how and to what extent the “Errata” changed DuPont’s case-in-chief.² NS anticipates it will take significant additional time to fully understand the changes made by DuPont’s extensive May 17 submission, and their effects on this case. When they have completed that analysis, NS’s consultants and experts must re-start their analyses using DuPont’s

² DuPont’s “Errata” provide only the most cursory “summary” of the changes it made, and essentially no explanation of why or how it made those changes. *See* DuPont Errata at 1 (summarily listing a few general components of the SAC evidence that it changed and concluding by stating “[i]n addition, the errata corrects other errors DuPont identified in the course of its review,” without meaningful identification or explanation of those purported errors).

new evidence (DuPont's Opening Evidence as substantially revised by the "Errata"). The analysis and work done by the NS team over the 17 days following DuPont's filing of its Opening Evidence (particularly those aspects of the case that depend on RTC modeling and evidence) was for naught, because DuPont's "Errata" substituted new RTC runs and evidence. Not only was this a waste of effort and resources, but it also deprived NS of approximately a month (17 days between the filing of the Opening Evidence and the "Errata," plus at least two more weeks to determine how that extensive "Errata" changed DuPont's case-in-chief) of its already-short time to analyze DuPont's evidence and to develop NS's Reply Evidence. NS also lost additional time because it had to re-distribute DuPont's revised evidence and workpapers to NS's numerous and geographically dispersed consultants and experts. All-in-all, NS conservatively estimates that the amount of time it will lose as a result of DuPont's extensive "Errata" will be at least 30 days.

Therefore, DuPont's modification of its case-in-chief in the form of an "Errata" necessitates a modest extension of at least 30 days to allow NS to evaluate DuPont's newly revised evidence, re-start its analysis, and determine whether a more substantial extension of time for the filing of its Reply Evidence may be required. Because Norfolk Southern is mindful of the fact that the schedule for this case has already been extended for six months, this Motion requests only the minimum amount of time NS believes is necessary to account for the disruption of its efforts caused by DuPont's "Errata." At this juncture, Norfolk Southern is not in a position to determine whether it will require additional time in order to: (i) fully understand and evaluate DuPont's modified Opening Evidence in this large, complex case; and then (ii) develop and

submit Reply Evidence addressing DuPont's revised evidence.³ Due to the complexity of this case, Norfolk Southern believes it is entirely possible that, once it has an opportunity to fully evaluate DuPont's revised evidence, NS may need to seek more time to prepare its Reply Evidence.⁴ To avoid the possibility of extending this case longer than absolutely necessary, however, at this time NS seeks only the minimum amount of additional time it believes is necessary to analyze the "Errata" filing.

In sum, Norfolk Southern requests that the Board promptly grant a 30-day extension of time to permit Norfolk Southern a reasonable opportunity to analyze DuPont's revised evidence, with the understanding that Norfolk Southern may determine it is necessary to seek a further extension of time within which to file its Reply Evidence.⁵ NS fully reserves its rights to seek further extension of time or other modification of the procedural schedule should it be necessary. Accordingly, Defendant Norfolk Southern Railway Company requests an extension of time until September 28, 2012 to afford it adequate time to analyze and respond to DuPont's Opening

³ The Board should bear in mind that DuPont had more than eighteen months from the filing of its Complaint to develop its Opening Evidence, while the current schedule affords NS only four months to evaluate DuPont's submission and develop its own Reply Evidence. And, nearly a quarter of that time will be consumed by DuPont's revision of its evidence and NS's review of those changes so it can re-start its analysis of DuPont's evidence as revised by the Errata.

⁴ To cite but one example, it is not clear that the RTC model, run properly with all appropriate inputs and factors included, has sufficient computing power and data capacity to model the huge and complex SARR network and traffic group DuPont has selected in this case.

⁵ Counsel for NS conferred with counsel for DuPont and requested that DuPont consent to a 30 day extension of time in light of DuPont's extensive Errata filing. DuPont refused such consent, indicating that it would not agree to an extension of more than 17 days (the number of days elapsed between the deadline for DuPont to file its Opening Evidence and the date that it filed its "Errata"). NS submits that in the circumstances of this case, including the lengthy extensions which DuPont has sought and obtained—not to mention its self-conferred extension to develop and file revisions to its evidence in the form of an "Errata"—DuPont's inappropriate position should be rejected.

Evidence as revised by its "Errata" evidence, exhibits, and workpapers.⁶ To preserve the time intervals in the Board's existing schedule, NS further requests that the dates for filing of DuPont's Rebuttal Evidence and for filing of final briefs each be extended by a commensurate 30 days. The following table details the schedule changes that NS seeks.

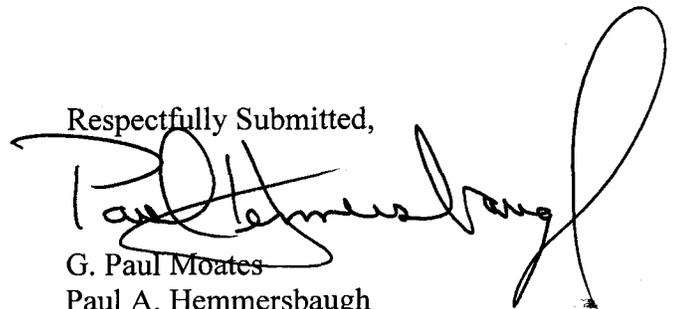
	Due Date Under Current Procedural Schedule	Due Date Under Proposed Amended Procedural Schedule
NS's Reply Evidence	August 30, 2012	September 29, 2012
DuPont Rebuttal Evidence	December 21, 2012	January 21, 2013
Final Briefs	January 31, 2013	March 1, 2013

CONCLUSION

For the foregoing reasons, NS requests that the Board act expeditiously to modify the governing procedural schedule to extend the date for filing of NS's Reply Evidence to September 28, 2012, to extend the date for filing DuPont's Rebuttal Evidence to January 21, 2013, and to extend the deadline for final briefs to March 1, 2013.

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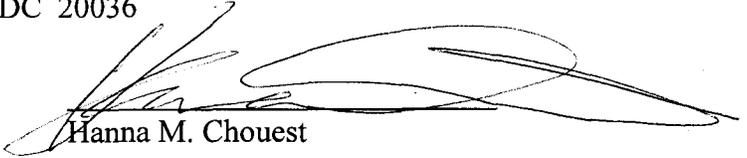
Dated: May 24, 2012

⁶This would actually constitute a 29-day extension, because a 30 day extension would run to September 29, which is a Saturday.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2012, I caused a copy of the foregoing Motion for Modification of Procedural Schedule to be served by email and by first class mail, postage prepaid, or more expeditious method of delivery on:

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