

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**E.I. DUPONT DE NEMOURS & COMPANY**

**Complainant,**

**v.**

**NORFOLK SOUTHERN RAILWAY COMPANY**

**Defendant.**

**Docket No. NOR 42125  
235000  
ENTERED  
Office of Proceedings  
October 24, 2013  
Part of  
Public Record**

**MOTION TO DISMISS**

Pursuant to 49 U.S.C. § 11701(c), Defendant Norfolk Southern Railway Company (“NS”) respectfully submits this Motion to Dismiss the Complaint filed by E.I. du Pont de Nemours & Company (“DuPont”) on October 7, 2010. Because proceedings in this case have not concluded “with administrative finality by the end of the third year after the date on which it was begun,” the instant proceeding “is dismissed automatically” by operation of statute. 49 U.S.C. § 11701(c). Over three years have passed since DuPont’s Complaint instituted this proceeding (even accounting for the 16-day suspension of Board activities during the recent federal government shutdown). The Board does not have discretion to ignore Section 11701(c)’s command that it dismiss proceedings pending for over three years, and NS has not waived its right to seek enforcement of that statutory mandate. Accordingly, the Board should acknowledge that this proceeding has been terminated by statute by taking the ministerial action of issuing an Order confirming dismissal of the Complaint.

NS recognizes that the Board has refused to apply § 11701(c) in several past cases that have not concluded within three years. But NS respectfully submits that the Board’s past interpretation of § 11701(c) is not a reasonable one, because it would strip § 11701(c) of any

meaning. While the Board has broad discretion to interpret the Interstate Commerce Act, that discretion does not allow the Board to adopt interpretations that would render portions of the Act superfluous.

**I. DUPONT’S OWN CONDUCT HAS CAUSED THE BOARD TO MISS THE STATUTORY DEADLINE.**

The fact that this case is not yet resolved after three years is primarily the result of two factors: (1) DuPont’s repeated requests for extensions of time that added seven months to an already lengthy procedural schedule; and (2) DuPont’s unilateral decisions to amend and supplement its evidence with massive “erratas” and late-filed workpapers that forced NS to seek additional time to respond to that untimely evidence. DuPont has no one but itself to blame for the fact that the Board did not issue a final decision within the statutory time period.

The Initial Procedural Schedule. DuPont filed its Complaint on October 7, 2010, and the Board subsequently adopted DuPont’s proposal for a procedural schedule. *See DuPont v. NS*, STB Docket No. NOR 42125, at 1 (Feb. 23, 2011). While DuPont’s proposed schedule was unusually long,<sup>1</sup> it contemplated that the parties would submit final briefs on August 17, 2012

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<sup>1</sup> For example, under the initial proposed schedule DuPont’s Opening Evidence was due on October 31, 2011—389 days after DuPont filed its Complaint. This was substantially longer than the 240 days for opening evidence provided by the standard *Seminole* schedule and over three times the 120 days for opening evidence provided by the “general procedural schedule” for SAC cases in the Board’s regulations. *See Seminole Elec. Coop., Inc. v. CSX Transp., Inc.*, STB Docket No. NOR 42110, at 3 (Dec. 10, 2008); 49 C.F.R. § 1111.8(a). DuPont’s initial schedule also gave it far more time for opening evidence than did the initial procedural schedules for other recent rate complainants. *See, e.g., South Mississippi Electric Power Ass’n v. Norfolk So. Ry. Co.*, STB Docket No. NOR 42128 (Mar. 14, 2011) (opening evidence due date on September 2, 2011 – 248 days after filing of complaint); *Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, STB Docket No. NOR 42121 (June 23, 2010) (opening due date set for February 16, 2011 – 289 days after May 3, 2010 complaint); *M&G Polymers USA, LLC v. CSX Transp., Inc.*, STB Docket No. NOR 42123 (Aug. 4, 2010) (opening due date set for April 15, 2011 – 301 days after June 18, 2010 complaint).

(over 13 months before the statutory deadline). *See DuPont v. NS*, STB Docket No. NOR 42125, at 1 (Feb. 23, 2011).

DuPont's First Three-Month Extension. In August 2011 DuPont asked for a three-month extension of time, citing the fact that NS's traffic data was not produced until August 3 (34 days after the initial close of discovery) because of the time the parties spent awaiting the Federal Railroad Administration's order authorizing NS to produce traffic data that was Sensitive Security Information.<sup>2</sup> *See Motion to Modify Procedural Schedule, DuPont v. NS*, STB Docket No. NOR 42125 (Aug. 9, 2011). The Board granted that motion, which resulted in closing briefs being due on November 2, 2012 (over 11 months before the statutory deadline). *See DuPont v. NS*, STB Docket No. NOR 42125, at 1 (Aug. 25, 2011).

DuPont's Second Three-Month Extension. A few months later DuPont sought yet another extension, this time claiming that difficulties in understanding NS's traffic data required another 90-day extension of its deadline to file opening evidence.<sup>3</sup> NS opposed the requested extension, and showed that DuPont had substantially exaggerated its difficulties (and in fact had admitted six weeks earlier to being able to "review[] the traffic data" with sufficient precision to identify selected traffic for which it wanted NS to produce contracts).<sup>4</sup> NS also reminded the Board that 49 U.S.C. § 11701 "requires a final Board decision (or dismissal of this case) by October 7, 2013" and that DuPont's requested extension would jeopardize the Board's ability to

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<sup>2</sup> *See* FRA SSI Order 2011-06-FRA-01 (confirming that certain NS traffic data was SSI prohibited from disclosure without FRA authorization); Memorandum from FRA Administrator Joseph C. Szabo, "Authorization to Share Sensitive Security Information (SSI) With Complainants and Other Parties Involved in Surface Transportation Board (STB) Administrative Proceedings" (July 29, 2011) (setting forth rules authorizing the production of SSI traffic data in rate proceedings).

<sup>3</sup> *See* Motion to Modify Procedural Schedule, *DuPont v. NS*, STB Docket No. NOR 42125 (filed Dec. 12, 2011).

<sup>4</sup> *See* Reply to Complainant's Second Motion to Modify Procedural Schedule at 7-16 & Ex. 1, *DuPont v. NS*, STB Docket No. NOR 42125 (filed Dec. 20, 2011).

comply with that statutory deadline.<sup>5</sup> The Board ultimately granted DuPont’s motion and ordered it to file its opening evidence by April 30, 2012. *See DuPont v. NS*, STB Docket No. NOR 42125, at 1 (Aug. 25, 2011).

DuPont’s Unilateral “Errata” Extension. While DuPont finally did file some of its Opening Evidence on April 30, 2012, 17 days later it filed an extensive “errata” containing a new RTC simulation, thirty-five revised workpapers, and 160 changed narrative pages.<sup>6</sup> DuPont’s substantial revision of its evidence nullified much of the work done by NS’s consultants based on the April 30 evidence—particularly work relating to RTC modeling—and NS was therefore compelled to seek a modest extension of time to file its Reply Evidence.<sup>7</sup> The Board granted NS a 29-day extension of time to file its Reply Evidence and also granted DuPont’s request for an additional week for its Rebuttal Evidence. *See DuPont v. NS*, STB Docket No. NOR 42125, at 1 (June 11, 2012).

Further Delays From DuPont’s Incomplete Opening and Late-Produced Workpapers. The Opening Evidence that DuPont finally filed with its May 17, 2012 “errata” was substantially incomplete and required NS to completely reconstruct many operating plan elements that DuPont neglected to include, including feasible plans for local operations and yard operations. NS requested an extension of time to allow it to fully address these deficiencies.<sup>8</sup> In response, DuPont decided on August 27, 2012 to produce two additional workpapers to NS that DuPont claimed were “inadvertently omitted” from the Opening Evidence that was due nearly four

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<sup>5</sup> *Id.* at 24.

<sup>6</sup> *See* Errata to Opening Evidence of Complainant E.I. du Pont de Nemours & Co., *DuPont v. NS*, STB Docket No. NOR 42125 (filed May 17, 2012).

<sup>7</sup> *See* Norfolk Southern Railway Company’s Motion for Modification of Procedural Schedule at 3-4, *DuPont v. NS*, STB Docket No. NOR 42125 (filed May 24, 2012).

<sup>8</sup> *See* Norfolk Southern Railway Company’s Motion for Modification of Procedural Schedule at 3-4, *DuPont v. NS*, STB Docket No. NOR 42125 (filed Aug. 16, 2012).

months earlier.<sup>9</sup> The Board granted NS’s request for a 60-day extension, holding that “[t]he delayed workpaper production by DuPont combined with the complexity of this case is sufficient to justify the extension that NSR seeks.” *See DuPont v. NS*, STB Docket No. NOR 42125, at 1 (June 11, 2012).

DuPont’s Rebuttal Extension. After NS filed its Reply Evidence on November 30, 2012, the then-existing schedule gave DuPont 118 days to file its Rebuttal Evidence—nearly three times longer than the forty-five day schedule for Rebuttal Evidence set forth in *Seminole*. *See Seminole v. CSXT*, STB Docket No. NOR 42110, at 3 (Dec. 10, 2008). But even this was not enough for DuPont, which asked for and received an additional eighteen day extension that gave it a full 136 days to prepare Rebuttal Evidence. *See DuPont v. NS*, STB Docket No. NOR 42125, at 1 (Mar. 5, 2013).

DuPont’s Rebuttal Errata. Over three months after it filed Rebuttal Evidence and after both parties had filed final briefs, DuPont awarded itself a final do-over by filing a so-called “Errata” on July 18, 2013. This Errata made substantial changes to DuPont’s Rebuttal Evidence in an attempt to remedy some of the deficiencies that NS pointed out in its brief. While the Board has not yet ruled on NS’s Motion to Strike this improper pleading, it is further evidence of DuPont’s utter indifference to the delays that its conduct has caused in this proceeding and of its ultimate responsibility for the fact that the Board did not issue an administratively final decision before the statutory deadline of October 7, 2013.

## **II. SECTION 11701 MANDATES THE DISMISSAL OF DUPONT’S COMPLAINT.**

The language of Section 11701(c) is unambiguous: “A formal investigative proceeding begun by the Board under subsection (a) of this section is dismissed automatically unless it is

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<sup>9</sup> *See* P. Hemmersbaugh Letter to C. Brown at 2-3, *DuPont v. NS*, STB Docket No. NOR 42125 (filed Aug. 31, 2012).

concluded by the Board with administrative finality by the end of the third year after the date on which it was begun.” And it is equally unambiguous that rate reasonableness cases brought on complaint are “formal investigative proceeding[s] begun by the Board under subsection (a).”<sup>10</sup> After ICCTA, subsection (a) only authorizes Board investigations that are initiated by complaint. See § 11701(a) (“Except as otherwise provided in this part, the Board may begin an investigation under this part only on complaint.”). While the first clause of subsection (a) recognizes that some other provisions of the Interstate Commerce Act can authorize Board-initiated investigations,<sup>11</sup> the only investigative proceedings begun by the Board under subsection (a) are complaint proceedings. To say that § 11701(c) does not apply to complaint-initiated investigations is to say that it applies to nothing at all.

While the Board has discretion to interpret the Interstate Commerce Act, that discretion does not allow it to disregard the clear provisions of § 11701(a) and (c) that complaint proceedings are the only investigative proceedings begun by the Board pursuant to subsection (a) and that such proceedings must be dismissed if they are not concluded after three years. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”); *Genesee &*

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<sup>10</sup> Indeed, *Rate Regulation Reforms* explicitly acknowledged that rate cases are complaint-initiated investigations. See *Rate Regulation Reforms*, Ex Parte 715 (July 18, 2013) (noting that “[w]hen a complaint is filed, the Board may investigate the reasonableness of the challenged rate” and citing § 11701(a)).

<sup>11</sup> For example, other provisions of Part A, Subtitle IV of Title 49 authorize Board-initiated investigations of certain matters relating to exemptions (§ 10502(b)); rate agreements (§ 10706(a)(4) & (d)); transportation services or facilities furnished by a shipper (§ 10745); situations requiring immediate action to serve the public (§ 11123(b)(1)); and pooling agreements (§ 11322(c)). Because each of these investigative actions is authorized by other provisions of the Interstate Commerce Act, none of them could be “a formal investigative proceeding begun by the Board under subsection (a) of this section” within the meaning of § 11701(c).

*Wyoming, Inc.—Continuance in Control Exemption—Illinois & Midland R.R., Inc.*, 2 S.T.B. 651, 654 (“If the meaning of a statute is clear, both we and the reviewing court are obliged to follow it.”). Here, the statute mandates dismissal of DuPont’s Complaint, and “that is the end of the matter.” *Chevron*, 467 U.S. at 842-43.

Even if § 11701 were ambiguous (and it is not), *Chevron* prohibits the Board from adopting an interpretation of the statute that is unreasonable. *See id.* at 843 (if statute is ambiguous, “the question for the court is whether the agency’s answer is based on a permissible construction of the statute”). It is impossible to permissibly interpret § 11701(c) to not apply to complaint proceedings, for such an interpretation would rob § 11701(c) of any meaning. The only “formal investigative proceedings [that can be] begun by the Board under subsection (a)” are complaint proceedings, and to hold that the statute does not encompass those proceedings would render it “superfluous, void, [and] insignificant.” *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“A cardinal principle of statutory interpretation [is] that a statute ought, upon the whole, be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” (internal quotation marks omitted)).<sup>12</sup>

Congress’s purpose in requiring complaint proceedings to be terminated within three years was not an unreasonable one. The Interstate Commerce Act gives railroads ratemaking discretion, and a railroad’s rates are presumed to be reasonable unless the Board finds otherwise. The three-year limitation of § 11701(c) ensures that railroads’ ratemaking initiative is preserved and that they are not exposed to unlimited reparations because of agency delay or a complainant’s inability to timely demonstrate that the rate is unreasonable. That purpose is

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<sup>12</sup> *See Burlington Northern, Inc.—Control & Merger—St. Louis-San Francisco Ry. Co.*, 360 I.C.C. 788, 948 (1980) (“In statutory construction, significance and effect shall, if possible, be accorded to every word. No clause, sentence, or word shall be superfluous, void, or insignificant.”).

logical and reasonable in light of the history of deregulation of rail rates,<sup>13</sup> and the fact that complainants would prefer a statutory scheme that allowed for never-ending reparations is a matter for Congress, not the Board.<sup>14</sup>

NS acknowledges that the Board has held that § 11701(c) does not apply to rate cases initiated on complaint, but respectfully submits that interpretation is not justified. First, the Board's past reliance on the ICC's decision in *Complaints Filed Pursuant to the Savings Provisions of the Staggers Rail Act of 1980*, 367 I.C.C. 406 (1983), ignores the fact that the ambiguity the ICC found in the Staggers version of § 11701 was eliminated by ICCTA.<sup>15</sup> The ICC found that because the Staggers version of § 11701(a) provided that the ICC "may begin an investigation under this subtitle on its own initiative or on complaint," the term "formal investigative proceeding" could be interpreted to apply only to "investigative proceedings in which the Commission is the prime mover prompted by its own investigative resources." *Id.* at 407. But ICCTA removed that perceived ambiguity by stripping the agency of its authority to act as the "prime mover" in investigative proceedings. The amendment of § 11701(a) to apply

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<sup>13</sup> The Interstate Commerce Commission Termination Act changed the statute in a way that is significant here. Since the Staggers Act of 1980, railroads have had the rate-making initiative. Prior to ICCTA, however, that initiative was limited by the agency's authority to suspend the rate established by the railroad pending an investigation of its lawfulness. *Arizona Electric Power v. ICC*, 675 F.2d 303, 304 n.1 (D.C. Cir. 1982). By adopting ICCTA, "Congress further facilitated railroads' rate-making initiative by repealing the rate suspension procedures under which rate adjustments were sometimes prohibited from taking effect without first being investigated." *Arizona Pub. Serv. Co. v. BNSF Ry. Co.*, STB Docket No. 42077, at 7 (Oct. 14, 2003). Congress's decision to retain the requirement that rate investigations be completed within three years is a complementary step to solidify the railroad's rate-making initiative and to minimize regulatory intervention.

<sup>14</sup> Moreover, § 11701(c) does not provide railroads with an unfair windfall. A shipper whose complaint is dismissed under § 11701(c) is free to refile that complaint and to seek reparations dating back two years from the refiling.

<sup>15</sup> See, e.g., *AEP Texas North Co. v. BNSF Ry. Co.*, STB Docket No. 41191 (Sub-No. 1), at 3 (Nov. 13, 2006) (relying on *Complaints Filed Pursuant to the Savings Provisions of the Staggers Rail Act of 1980*); *Western Fuels Ass'n v. BNSF Ry. Co.*, STB Docket No. 42088, at 9 (Feb. 18, 2009) (same).

only to investigative proceedings initiated on complaint abrogates the rationale for the ICC's interpretation. The current statute cannot be reasonably interpreted to apply only to a category of investigative proceedings that ICCTA eliminated.

Second, the Board's belief that the doctrine of constitutional avoidance requires it to interpret § 11701(c) to not apply to rate cases is incorrect. In the first place, the doctrine of constitutional avoidance only applies to statutes that are ambiguous on their face and cannot be applied to statutes whose meaning is clear. *See Clark v. Suarez Martinez*, 543 U.S. 371, 385 (2005) ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction."). Unambiguous statutes like § 11701(c) must be enforced by their terms unless they are unconstitutional as applied. *Id.* at 381 n.5.

Moreover, § 11701(c) does not implicate constitutional due process, because shippers do not have a protected property interest in a rate reasonableness case. The D.C. Circuit has explained that whether or not a statutory cause of action generates a property interest is a function of how much discretion the administrative scheme provides to the factfinder. *See Griffith v. FLRA*, 842 F.2d 487, 495-96 (D.C. Cir. 1988). Here, the Board has wide discretion over both DuPont's request for a prescription and its request for reparations. The Board plainly has discretion over whether to grant prospective rate prescriptions. *See* 49 U.S.C. § 10704(a)(1) (Board "*may* prescribe" a maximum rate after determining that a rate is unreasonably high) (emphasis added). And agency precedent holds that the Board also has discretion over whether to order reparations. *See Potomac Elec. Power Co. v. Penn Cent. Transp. Co.*, 359 I.C.C. 222, 241 (1977) ("The issue of reparations is addressed to [the agency's] discretion and [it] may deny

reparation even though a rate is unreasonable when there is good and sufficient reason for doing so.”). As a result, DuPont has no constitutionally protected property interest.

Most importantly, DuPont has received all the process it was due, because the agency’s failure to meet the statutory deadline is primarily attributable to DuPont’s own decisions. After delaying the outcome of this case by proposing an extraordinarily long schedule, requesting multiple extensions, and repeatedly granting itself the right to supplement its evidence with “erratas” and additional late-filed workpapers, DuPont hardly can complain that it has not received due process.

Third, the Board’s recent interpretations of § 11701 have never been upheld by a court of appeals on the merits. Rather, the D.C. Circuit’s affirmance of those holdings have relied heavily on findings that the defendant railroad’s conduct waived any ability to assert rights under the statute.<sup>16</sup> As demonstrated in Section I, that is not the case here. NS alerted the Board and DuPont of the need to conform the procedural schedule to § 11701’s strictures early in this case,<sup>17</sup> and it urged the Board to reject poorly-justified extension requests that would threaten the Board’s ability to meet the statutory deadline. And NS did not seek any extension in this case that was not directly necessitated by DuPont’s decisions to submit voluminous erratas, to late-file workpapers, and to submit patently deficient opening evidence.

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The extensive record in this case conclusively demonstrates that DuPont’s Complaint is meritless. The Board lacks jurisdiction over most of the rates DuPont has challenged due to

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<sup>16</sup> See, e.g., *BNSF Ry. Co. v. STB*, 604 F.3d 602, 610-11 (D.C. Cir. 2010); *BNSF Ry. Co. v. STB*, 453 F.3d 473, 479 (D.C. Cir. 2006); *AEP Texas North Co. v. BNSF Ry. Co.*, STB Docket No. 41191 (Sub-No. 1), at 6 (Nov. 13, 2006).

<sup>17</sup> See Reply to Complainant’s Second Motion to Modify Procedural Schedule at 24, *DuPont v. NS*, STB Docket No. 42125 (filed Dec. 20, 2011).

DuPont's failure to demonstrate NS's market dominance for those rates. And NS's Reply Evidence shows that all the challenged rates are reasonable under a properly constructed SAC analysis that accounts for all the costs of handling DuPont's selected traffic. But while NS is confident that it would prevail on the merits, the Board no longer has the discretion to consider the merits because of the clear mandate of 49 U.S.C. § 11701(c).

**CONCLUSION**

For the foregoing reasons, the Board should issue an Order confirming that DuPont's Complaint has been dismissed automatically pursuant to 49 U.S.C. § 11701(c).

Respectfully submitted,



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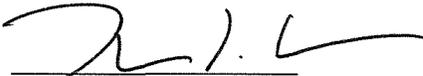
Dated: October 24, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of October, 2013, I caused a copy of the foregoing

Motion to Dismiss to be served by email and hand-delivery upon:

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