42065 SERVICE DATE – LATE RELEASE DECEMBER 9, 2011
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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42125

E.I. DUPONT DE NEMOURS AND COMPANY
v.
NORFOLK SOUTHERN RAILWAY COMPANY

Decided: December 9, 2011

This decision grants a petition for issuance of a subpoena directing third-party discovery.

E.I. du Pont de Nemours and Company (DuPont) challenges the reasonableness of rates established by Norfolk Southern Railway Company (NSR) for the transportation of 27 different commodities between 139 origin and destination pairs.[1] DuPont alleges that NSR possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed pursuant to the Board's stand-alone cost test.

On October 31, 2011, NSR filed its second motion to compel discovery from DuPont. DuPont replied to NSR's second motion to compel discovery on November 10, 2011. Pursuant to 49 C.F.R. § 1114.31(a)(3), Board staff conducted a discovery conference with the parties on November 18, 2011, to discuss the motion.

Related to its second motion to compel discovery, on November 23, 2011, NSR filed a petition for a third-party subpoena pursuant to 49 U.S.C. § 721(c) and 49 C.F.R. § 1117.1.[2] NSR requests that the Board issue a subpoena directing discovery from Sentinel Transportation, LLC (Sentinel), an affiliate of DuPont that operates a private truck fleet. As Exhibit 1 to its petition, NSR attaches a proposed subpoena setting forth the information sought. NSR states that counsel for DuPont has authorized counsel for NSR to represent that DuPont consents to the petition. On November 30, 2011, Sentinel filed a reply, stating that it does not intend to file a substantive reply in opposition to NSR's petition for subpoena.

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[1] On December 5, 2011, DuPont filed a third amended complaint, removing numerous origin and destination pairs that were included in its second amended complaint.

[2] In its petition, NSR also requests that the Board hold its second motion to compel discovery in abeyance while NSR pursues third-party discovery. That request was granted by a decision served November 25, 2011.

Based on the consent of the parties and Sentinel, NSR's petition for issuance of a subpoena will be granted. Sentinel will be directed to comply with the subpoena attached as Exhibit 1 to NSR's petition and produce the requested information to NSR and DuPont. Any information produced pursuant to this subpoena may be designated confidential or highly confidential under the protective order entered by the Board in this proceeding, if appropriate. Designating material as highly confidential will ensure that it is provided only to outside counsel or outside consultants for NSR and DuPont.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. NSR's petition for issuance of a subpoena is granted.

2. Sentinel is directed to comply with the subpoena attached as Exhibit 1 to NSR's petition and produce the requested information to NSR and DuPont.

3. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.