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SERVICE DATE - DECEMBER 15, 1997

SURFACE TRANSPORTATION BOARD

No. 41670

SHELL CHEMICAL COMPANY and SHELL OIL COMPANY

v.

BOSTON & MAINE CORPORATION, ET AL.

Decision No. 23

Decided: December 8, 1997

On July 31, 1997, defendants submitted their "supplemental set of interrogatories" to complainants, and asked complainants to respond by August 15, 1997. On August 15, 1997, complainants responded in part but, on account of certain difficulties arising from the United Parcel Service (UPS) strike, were unable, at that time, to make a complete response. On August 20, 1997, the difficulties caused by the UPS strike apparently having been resolved, complainants submitted their "revised objections and responses" to defendants.¹

This decision addresses: defendants' motion (filed August 27, 1997) to compel answers to their Supplemental Interrogatories Nos. 2, 3, 4, 5, 8, 11, 12, 13, and 15;² complainants' reply (filed

¹ Defendants' "supplemental set of interrogatories" will hereinafter be referred to as defendants' 7/31/97 supplemental interrogatories. Complainants' "revised objections and responses" will hereinafter be referred to as complainants' 8/20/97 responses.

² As of August 15, 1997, there are 16 remaining defendants: Boston & Maine Corporation (B&M); Buffalo & Pittsburgh Railroad, Inc. (B&P); Consolidated Rail Corporation (Conrail); CSX Transportation, Inc. (CSXT); Gateway Western Railway Company (GWWR); Great Walton Railroad Company, Inc. (GWRC); Illinois Central Railroad Company (IC); Indiana Harbor Belt Railroad Company (IHB); Louisville & Indiana Railroad Company (L&I); Modesto and Empire Traction Company (M&E); Providence and Worcester Railroad Company (P&W); Salt Lake, Garfield and Western Railway Company (SLG&W); South Carolina Central Railroad Company, Inc. (SCC); ST Rail System (ST); The Columbus & Ohio River Rail Road Company (C&OR); and Washington Central Railroad Company, Inc. (WCRC). See Decision No. 19, slip op. at 1-2; Decision No. 20; Decision No. 22. The motion filed by defendants on August 27, 1997, and also defendants' two subsequent pleadings noted in the text, were apparently filed on behalf of all of the 16 remaining defendants except GWWR (the "non-litigating" defendant) and IHB, L&I, and WCRC (the "held in abeyance" defendants). See Decision No. 19, slip op. at 2 n.7 (status of GWWR) and 3 (continued...)

September 16, 1997);³ defendants' "reply" (filed September 26, 1997) in support of their motion to compel; complainants' motion (filed October 16, 1997) to strike or, in the alternative, to accept their surrebuttal statement; and defendants' reply (filed November 5, 1997).⁴

DISCUSSION AND CONCLUSIONS

The 8/27/97 Motion to Compel. Complainants have suggested, see complainants' 9/16/97 reply at 2 (second full paragraph), that defendants' 8/27/97 motion to compel was filed "belatedly." We disagree, (i) because it was not until August 20, 1997, that complainants submitted their complete responses (i.e., their so-called "revised objections and responses") to defendants' 7/31/97 supplemental interrogatories, and (ii) because defendants' 8/27/97 motion is timely as respects complainants' 8/20/97 responses.

The 9/26/97 Reply. The 9/26/97 reply is, in essence, an impermissible "reply to a reply." However, because the 9/26/97 reply narrows, to a certain extent, the issues in dispute, we shall accept it as part of the record and deny complainants' 10/16/97 motion insofar as that motion seeks to strike the 9/26/97 reply.

The 10/16/97 Motion. Because the information presented in the "surrebuttal" portion of the 10/16/97 motion narrows, to a certain extent, the issues in dispute, we shall grant the 10/16/97 motion insofar as that motion seeks acceptance of complainants' surrebuttal material.

Supplemental Interrogatory No. 2. At the core of the complaint filed by complainants on December 24, 1995, is the allegation that the defendant railroads are charging unreasonable rates on complainants' shipments of polyethylene terephthalate (PET) from and to certain points. The most important point named in the complaint is complainants' facility at Apple Grove, WV. Complainants named six individuals in response to defendants' Supplemental Interrogatory No. 1, which asked complainants to identify, for the period 1992 to the present, all personnel whose positions included any day-to-day or supervisory responsibilities related to the transportation of PET. Defendants' Supplemental Interrogatory No. 2 asks complainants: to state, for each of these individuals, whether that individual's files or documents in his or her possession were searched in response to defendants'

²(...continued)
n.14 (status of IHB, L&I, and WCRC).

³ The two complainants are Shell Chemical Company and Shell Oil Company (referred to collectively as complainants or Shell). See Decision No. 19, slip op. at 1 & n.3.

⁴ The five pleadings addressed in this decision will hereinafter be referred to as: the 8/27/97 motion; the 9/16/97 reply; the 9/26/97 reply; the 10/16/97 motion; and the 11/5/97 reply.

first set of interrogatories⁵ and August 21, 1996 follow-up questions; to identify, by Bates numbers, which documents, if any, came from each individual's files; and, if an individual's files were not previously searched, to identify and summarize the contents of all documents in the individual's files that are responsive to defendants' first set of interrogatories and August 21, 1996 follow-up questions.

Complainants responded to defendants' Supplemental Interrogatory No. 2 by stating, in essence: that the files of each of the six named individuals had been searched in response to defendants' first set of interrogatories and August 21, 1996 follow-up questions; that any responsive documents disclosed by that search had previously been furnished to defendants; and that, to the extent that defendants seek to have complainants "review all produced documents and [] identify by Bates stamp number each and every document authored or received by said individuals, Complainants object to such a request as being unduly burdensome, noting that Defendants can as readily as Complainants review the documents, in the possession [of defendants] for no less than ten months' time, to make such identification." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 3-4.

Defendants, in their 8/27/97 motion to compel, argue that Supplemental Interrogatory No. 2 asks only that complainants identify by Bates range either the individual files (if these individuals maintain their own files) or the department files wherein documents authored or received by these individuals are maintained. This, defendants maintain, is "similar to the request that Complainants made of Defendants, and for those individuals who maintained separate files, Defendants identified the bates ranges." See defendants' 8/27/97 motion at 10-11 (emphasis added).

Complainants, in their 9/16/97 reply, argue, in essence, that our action with respect to this aspect of defendants' 8/27/97 motion to compel should be governed by the action we took with respect to the "document index" aspect of complainants' own "second motion to compel." See Decision No. 19, slip op. at 5-6 (in that decision, complainants' second motion to compel was referred to as the 4/3/97 motion).

In Decision No. 19, we considered, among other things, complainants' request that defendants be ordered to produce an index which would identify, by interrogatory, the produced documents said to be responsive thereto. We noted defendants' contentions: that the transmittal letters for the documents provided by defendant CSXT (the key defendant as respects document production) clearly indicated the interrogatories to which those documents were primarily intended to respond; that most if not all of the CSXT documents included both "file covers" indicating the files from which such documents were produced and also "sheets" indicating the person or persons responsible for those files; that the time-consuming task of reviewing and preparing a written index

⁵ These were the interrogatories defendants submitted to complainants on March 18, 1996. See Decision No. 19, slip op. at 3.

for the "thousands of documents" produced by defendants generally, and indicating, for each document, each interrogatory to which it was responsive, would be far more onerous and burdensome for the defendants than it would be for complainants simply to review the documents to identify the specific information that they wanted; and that defendants had in fact provided a "list" of the documents produced by all defendants through July 1996, indicating, for each document or related group of documents, the primary interrogatories to which those documents were responsive.

We noted, in Decision No. 19, that, given the substantial number of documents produced by defendants in general and defendant CSXT in particular, it would have been better had complainants requested and defendants provided a more formal "index" or "list." We added, however, that, at the then present stage of this proceeding, the crucial question was not what would have been better at an earlier stage but, rather, what should be done at the then present stage. We pointed out that complainants had not explained why they simply could not do as defendants had suggested, i.e., review the documents theretofore produced to ascertain the relevant information contained therein. We concluded, accordingly, that, under the circumstances, complainants' 4/3/97 motion to compel should be denied insofar as complainants sought to compel defendants to provide a formal index, because it appeared to us that a review of the documents by complainants would be no more difficult or burdensome than a review of the documents by defendants. See Decision No. 19, slip op. at 6.

We will deny the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 2, because we agree with complainants that our action with respect to this aspect of the 8/27/97 motion to compel should be governed by the action we took with respect to the "document index" aspect of complainants' 4/3/97 motion to compel. Given the substantial number of documents produced both by defendants and by complainants, it would have been better had production been accompanied by formal "indices" or "lists," and, if the parties had not been able to reach agreement respecting such matters, it would have been better had they formally requested, at a much earlier stage of this proceeding, that such indices or lists be required. At the present stage of this proceeding, however, the crucial question is not what would have been better at an earlier stage but, rather, what should be done now. Defendants have not explained why they simply cannot do what they themselves once suggested that complainants should do, i.e., review the documents heretofore produced to ascertain the relevant information contained therein.

The burdens imposed by the necessity of categorizing documents produced in discovery are meant to be reciprocal, not unilateral. In Decision No. 19, we allowed defendants to impose, upon complainants, the burdens of categorizing the documents produced by defendants. In this decision, therefore, we simply cannot allow defendants to impose, upon complainants, the burdens of categorizing the documents produced by complainants.⁶

⁶ We are not persuaded otherwise by defendants' assertion that, as respects documents produced by defendants, "for those individuals who maintained separate files, Defendants identified (continued...)"

Supplemental Interrogatory No. 3. Defendants' Supplemental Interrogatory No. 3 asks complainants to state whether they have ever used consultants to assist in the procurement, solicitation of bids, negotiations of rates and terms, or costing of transportation of PET. If complainants indeed have thus used consultants, Supplemental Interrogatory No. 3 further asks that they identify each such consultant, state the dates on which such services were provided, briefly describe the nature of the consultant's services, and identify and summarize all studies, reports, analyses, or recommendations made by such consultants, whether orally or in writing.

Complainants responded to defendants' Supplemental Interrogatory No. 3 by stating that they "will be pleased to respond to interrogatories relating to the rates, terms and costing of PET transportation during the rate phase of this proceeding.¹⁷¹ In the meantime, however, Complainants object to this interrogatory on the ground that it is irrelevant to the question whether Defendants were constrained in [] establishing their rates applicable on Complainants' PET shipments to or from Apple Grove, WV, by intramodal, intermodal, product or geographic competition or other factors negating market dominance in the transportation to which the assailed rates applied; nor is the interrogatory reasonably calculated to lead to the discovery of admissible evidence." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 4-5.

Defendants, in their 8/27/97 motion to compel, argue that Supplemental Interrogatory No. 3 is not directed toward the level of defendant railroads' rates, but is intended to elicit information concerning options that are available to complainants for the transportation of PET, the terms at which such options are available to complainants, and the extent to which complainants could use such options as leverage in their dealings with the defendant railroads. The options defendants have

⁶(...continued)

the bates ranges." See defendants' 8/27/97 motion at 10. As noted in Decision No. 21, most of the documents produced by defendant CSXT (the key defendant as respects document production) apparently came from "office" files, not from "personal" files. See Decision No. 21, slip op. at 3.

⁷ By motion filed February 20, 1996, defendants requested: that this proceeding be bifurcated into separate market dominance and rate reasonableness phases; and that a procedural schedule be established to govern the market dominance phase. By reply filed March 1, 1996, complainants indicated that they agreed that the proceeding should be bifurcated. See Decision No. 19, slip op. at 2 & n.11. By decision served April 15, 1996: a procedural schedule was established for the submission of evidence and argument on the issue of market dominance; but the motion to bifurcate was ordered held in abeyance, pending receipt of the submissions on the market dominance issue. See Decision No. 19, slip op. at 3. Although the parties have since worked out a *de facto* suspension of the procedural schedule, see Decision No. 19, slip op. at 4 n.17, it has been understood by all concerned that the discovery now under way is limited to the market dominance issue.

in mind include the availability of other transportation modes, the threat of a build-out to another carrier, or the threat of serving certain customers from another plant (other than Apple Grove).

Complainants, in their 9/16/97 reply, have supplemented their response to Supplemental Interrogatory No. 3 to state "that no transportation consultant has been used by Complainants to aid them in identifying transportation options, the availability of other transportation modes, the threat of a build-out to another carrier or the threat of serving certain customers from another plant as a means of constraining Defendants' rates." See complainants' 9/16/97 reply at 3.

Defendants, in their 9/26/97 reply, note that complainants, in their 9/16/97 reply, "responded for the first time" to Supplemental Interrogatory No. 3. See defendants' 9/26/97 reply at 1.

We will deny the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 3. Although defendants have not formally withdrawn their motion to compel a response to Supplemental Interrogatory No. 3, the context suggests, and we therefore conclude, that complainants have fully answered this interrogatory.

Supplemental Interrogatories Nos. 4 & 5. Defendants' Supplemental Interrogatory No. 4 asks complainants to state whether they have ever solicited bids from, or engaged in negotiations with, non-rail transportation companies (including trucking and barge companies) for the transportation of PET where those companies were unsuccessful in obtaining complainants' business. If indeed complainants have solicited such bids or engaged in such negotiations, Supplemental Interrogatory No. 4 further asks complainants to identify each such company and briefly describe the services considered and the reason the company did not secure the business. Defendants' Supplemental Interrogatory No. 5 asks complainants to identify and summarize, for each company identified in response to Supplemental Interrogatory No. 4, the contents of all such bids and documents relating to such bids.

Complainants responded to defendants' Supplemental Interrogatories Nos. 4 & 5 by stating that "[i]nsofar as there are any, documents responsive to these interrogatories have been produced in response to, among others, Interrogatories Nos. 3, 4, 5, 13, 14, 25, 37 and 38 of Defendants' First Set of Interrogatories to Complainants. See, for example, Shell's Bates stamped document nos. 07426, 07427 and 02748." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 5.⁸

Defendants, in their 8/27/97 motion to compel, argue that complainants' response is inadequate in that it addresses only the request for identification of documents in Supplemental Interrogatory No. 5 but completely ignores the information requirements of Supplemental

⁸ The last Bates number reference is apparently incorrect. The correct reference appears to be 07428. See complainants' 9/16/97 reply at 4 (line 6).

Interrogatory No. 4. Defendants maintain that they cannot ascertain from the documents that have been produced, including the documents cited by complainants as responsive, whether there were any carriers that were unsuccessful in obtaining complainants' business and if so, the reason(s) for their lack of success.

Complainants, in their 9/16/97 reply, assert that Supplemental Interrogatories Nos. 4 and 5 ask questions that have already been asked and answered, in that Interrogatories Nos. 3, 4, 5, 13, 14, 25, 37 and 38 of Defendants' First Set of Interrogatories covered the same ground as do Interrogatories Nos. 4 and 5 of Defendants' Supplemental Set of Interrogatories. Complainants maintain that the documents they produced in response to the earlier interrogatories, as, for example, the documents Bates stamped nos. 07426, 07427 and 07428, gave the defendants the very information they now seek again (i.e., the identities of the carriers that were unsuccessful in bidding for complainants' traffic). One such carrier, complainants note, was CCC Carriers of Barbourville, WV.

Defendants, in their 9/26/97 reply, insist: that it is not apparent from the face of the documents, including those cited by complainants, whether the carrier whose bid was produced was successful or unsuccessful; that defendants have found no documents that address the reasons for unsuccessful bids; and that complainants' statement that CCC Carriers was unsuccessful does not satisfactorily respond to the interrogatory.

Complainants, in their 10/16/97 motion, argue: that it stands to reason that complainants would maintain files relating only to the motor or water carriers they in fact have dealt with and no others; that it would make no sense for complainants to keep records relating to the unsuccessful bidders for their transportation business or the reasons why they were unsuccessful in soliciting that business; and that complainants know of no shipper that, in the normal course of business, would keep such records. These considerations, complainants apparently mean to suggest, explain why defendants have been unable to find, among the documents produced by complainants, more than a few documents (if any at all) that appear to be responsive to Supplemental Interrogatories Nos. 4 & 5.

Defendants, in their 11/5/97 reply, claim that Supplemental Interrogatory No. 4 remains unanswered. Complainants, defendants note, have discussed what would or would not make sense, but have not discussed whether complainants actually have information, not documents, concerning trucking companies that have unsuccessfully bid for complainants' traffic. Complainants, defendants add, should be compelled either to provide affirmative narrative responses to Supplemental Interrogatory No. 4 or to state affirmatively that complainants have no such information.

We will grant the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 4. We agree with complainants' observations that it would make no sense for complainants to keep records relating to the unsuccessful bidders for their transportation business or the reasons why they were unsuccessful in soliciting that business, and we agree that this explains

why complainants have produced few, if any, documents responsive to Supplemental Interrogatory No. 4. In our judgment, however, this does not explain why complainants have not provided answers responsive to Supplemental Interrogatory No. 4, which asks, in essence: that complainants identify any transportation companies from which they solicited bids, or engaged in negotiations, respecting PET transportation, which solicitations or negotiations did not actually result in any such transportation; and that complainants briefly describe the services considered and the reasons why any such companies did not secure the business. The regulation that provides that production of a document is a sufficient answer to an interrogatory where the answer to the interrogatory may be derived or ascertained from the document, see 49 CFR 1114.26(b) (cited in Decision No. 19, slip op. at 4), is not applicable in this context; the failure to produce any, or more than a very few, documents does not provide an adequate answer to Supplemental Interrogatory No. 4.

We will deny the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 5. The fact that defendants did not address this interrogatory in their two most recent pleadings (their 9/26/97 reply and their 11/5/97 reply) represents, in the context of this proceeding, an indication that complainants have indeed provided, through the medium of document production, satisfactory answers to this interrogatory.

Supplemental Interrogatory No. 8. Defendants' Supplemental Interrogatory No. 8 asks complainants to state whether they have made or have had made any studies of rail rates or services, other than certain "benchmarking" studies and Commonwealth Rail Costing System studies referred to in Supplemental Interrogatories Nos. 6 and 7. If in fact there have been such studies, Supplemental Interrogatory No. 8 further asks complainants to identify each such study and its participants, and to identify and summarize the contents of any documents relating to each such study.

Complainants responded to defendants' Supplemental Interrogatory No. 8 by stating that "[i]nsofar as there are any, documents responsive to this interrogatory have been produced in response to, among others, Interrogatories Nos. 9, 11, 12, 13, 25, 28 and 37 of Defendants' First Set of Interrogatories to Complainants. See, for example, Shell's Bates Stamped document nos. 07757-07793." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 7.

Defendants, in their 8/27/97 motion to compel, argue: that the purpose of Supplemental Interrogatory No. 8 is to elicit information concerning other rail options available to complainants (e.g., barge/rail or truck/rail); that this information is germane to the question of intermodal competition; that the documents cited by complainants consist of lists of their movements by various modes, including hopper cars, but certainly do not constitute "a study of rail rates or services" as requested; and that complainants should be compelled to state affirmatively whether or not any other studies were made and, if so, to identify and summarize them.

Complainants, in their 9/16/97 reply, contend that Supplemental Interrogatory No. 8 asks a question that has already been asked and answered, in that Interrogatories Nos. 9, 11, 12, 13, 25, 28 and 37 of Defendants' First Set of Interrogatories covered the same ground as does Interrogatory No. 8 of Defendant's Supplemental Set of Interrogatories. Complainants maintain that the documents they produced in response to the earlier interrogatories, as, for example, the documents with Bates stamp nos. 07757-07793, gave defendants the very information they now seek again. Complainants add that the intermodal option information referenced in defendants' 8/27/97 motion was not in fact asked for in Supplemental Interrogatory No. 8.

Defendants, in their 9/26/97 reply, state that they have been unable to locate, in the documents produced by complainants, any studies of rail rates or services other than those referenced in Supplemental Interrogatory No. 8. Defendants add that they seek affirmation that there are no other such studies.

Complainants, in their 10/16/97 motion, state: that the only railroad transporting PET shipments from and to complainants' Apple Grove plant is CSXT; that the entire contents of the files of complainants' land transportation department pertaining to CSXT have been produced (complainants cite, in this respect, the documents with Bates stamp nos. 07757-08703); and that "[w]hatever documents were included in those files comprise the only analyses of railroad rates and services pertaining to Shell's PET shipment[s] that there are, and Shell cannot conceive why Defendants seem to believe that there are others." See complainants' 10/16/97 motion at 2-3.

Defendants, in their 11/5/97 reply, state that, because complainants, in their 10/16/97 motion, have identified the Bates range and source of the files which comprise the only analyses of railroad rates and services pertaining to complainants' PET shipments, complainants "have now satisfactorily responded" to Supplemental Interrogatory No. 8. See defendants' 11/5/97 reply at 3.

In light of defendants' statement that complainants have provided a satisfactory response to Supplemental Interrogatory No. 8, we will deny the 8/27/97 motion to compel insofar as it respects this interrogatory.

Supplemental Interrogatory No. 11. Defendants' Supplemental Interrogatory No. 11 asks complainants to state whether they have any written or unwritten policies (including guidelines, directives, manuals, memoranda, or practices, and specifically including both general policies that would encompass PET and any specific policies addressed to PET) providing instructions, strategies, or goals for securing transportation rates. If complainants do indeed have such policies, Supplemental Interrogatory No. 11 further asks that they identify and summarize the contents of any such written documents and identify and describe briefly any such non-written policies, practices, directives, or guidelines. Supplemental Interrogatory No. 11 adds that, if complainants contend that documents responsive to this interrogatory have already been produced, complainants should identify such documents by Bates numbers.

Complainants responded to defendants' Supplemental Interrogatory No. 11 by stating that "[i]nsofar as there are any, documents responsive to this interrogatory have been produced in response to, among others, Interrogatories Nos. 9, 10, 11, 25, 28 and 29 of Defendants' First Set of Interrogatories to Complainants. See, for example, Shell's Bates stamped document nos. 07825, 07826, 07851, 07853 and 07854. To the extent that the request seeks to have Complainants review all produced documents and identify [by] Bates number each and every document produced in response to Interrogatories Nos. 9, 10, 11, 25, 28 and 29 of Defendants' First Set of Interrogatories to Complainants, Complainants object to such a request as unduly burdensome, noting that Defendants can as readily review the documents, in their possession for no less than ten months' time, to make such identification." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 8.

Defendants, in their 8/27/97 motion to compel, state: that the five documents cited by complainants as examples of responsive documents are Commonwealth Rail Costing System Reports, apparently prepared by a consultant, which analyze rail costs and provide an estimate of the revenue to variable cost of the rail transportation for a movement; that these documents are simply not responsive to a request asking whether complainants have any written or unwritten policies; and that complainants should be compelled to affirmatively state whether they have any written or unwritten policies, and if they do, to state the policy or more definitely identify a document that does so.

Complainants, in their 9/16/97 reply, contend that Supplemental Interrogatory No. 11 asks a question that has already been asked and answered, in that Interrogatories Nos. 9, 10, 11, 25, 28 and 29 of Defendants' First Set of Interrogatories covered the same ground as does Interrogatory No. 11 of Defendant's Supplemental Set of Interrogatories. Complainants maintain that the documents they produced in response to the earlier interrogatories gave defendants the very information they now seek again. Complainants indicate that among the documents they had previously produced were documents that disclosed that complainants hoped to obtain rates that would yield defendants 180% of their variable costs. Complainants add, in essence, that our action with respect to this aspect of defendants' 8/27/97 motion to compel should be governed by the action we took with respect to the "document index" aspect of complainants' own 4/3/97 motion to compel.

Defendants, in their 9/26/97 reply, note: that Supplemental Interrogatory No. 11 asks whether complainants have any written or unwritten policies or goals for securing transportation rates; that the documents cited by complainants were prepared by consultants and provide an estimate of the carriers' variable costs and a projected rate based on 180% of those costs; and that if it is complainants' policy to obtain a rate at 180% of a carrier's variable costs, complainants should so state affirmatively and should also indicate whether that is their sole policy.

Complainants, in their 10/16/97 motion, state that they desire to obtain the lowest possible transportation rates and the best possible transportation services, consistent with, and responsive to, the demands and desires of their customers.

Defendants, in their 11/5/97 reply, claim that Supplemental Interrogatory No. 11 remains unanswered. Complainants, defendants note, have discussed their transportation policies only in the most general terms, but have not discussed whether complainants actually have information concerning any particular policy or goal put forth or adopted by complainants for securing transportation rates. Complainants, defendants add, should be compelled either to provide affirmative narrative responses to Supplemental Interrogatory No. 11 or to state affirmatively that complainants have no such information.

We will grant the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 11. That interrogatory asks, in essence, that complainants: state whether they have any policies, written or unwritten, that provide instructions, strategies, or goals for securing transportation rates; identify and describe any such policies; and identify, by Bates numbers, any previously produced responsive documents. Complainants have already described what might be called their primary policy in this field (the policy of obtaining the best possible services at the lowest possible rates), and they should complete their response to Supplemental Interrogatory No. 11 by identifying and describing any other policies they may have, if indeed they have any other policies at all, that provide instructions, strategies, or goals for securing transportation rates. The regulation that provides that production of a document is a sufficient answer to an interrogatory where the answer to the interrogatory may be derived or ascertained from the document, see 49 CFR 1114.26(b), is not applicable in this context; the failure to produce any, or more than a very few, documents does not provide an adequate answer to Supplemental Interrogatory No. 11.

Our action with respect to this aspect of defendants' 8/27/97 motion to compel is not governed by the action we took with respect to the "document index" aspect of complainants' 4/3/97 motion to compel. The subject matter of Supplemental Interrogatory No. 11 is such that there are likely to be few, if any, documents that are responsive to this interrogatory. Accordingly, complainants, in providing a further answer to Supplemental Interrogatory No. 11, should identify any previously produced documents by Bates numbers.

Supplemental Interrogatory No. 12. Defendants' Supplemental Interrogatory No. 12 asks complainants to state whether they have any written or unwritten policies (including guidelines, directives, manuals, memoranda or practices, and specifically including both general policies that would encompass PET and any specific policies addressed to PET) providing instructions, strategies, or goals for reducing costs, including but not limited to transportation costs. If complainants indeed have such policies, Supplemental Interrogatory No. 12 further asks that they identify and summarize the contents of any such written documents and identify and describe briefly any such non-written policies, practices, directives, or guidelines. Supplemental Interrogatory No. 12 adds that, if complainants contend that documents responsive to this interrogatory have already been produced, complainants should identify such documents by Bates numbers.

Complainants responded to defendants' Supplemental Interrogatory No. 12 by stating that they objected on the ground that, "pursuant to the stipulation of the parties [hereinafter referred to as

the 6/5/96 stipulation], as set forth in a letter agreement, dated June 5, 1996, Defendants agreed that during the market dominance phase of this proceeding they would pose no interrogatory or [and] seek the production of no document pertaining to the costs of Shell's production of PET or the profitability of its sales." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 8-9.

Defendants, in their 8/27/97 motion to compel, argue that Supplemental Interrogatory No. 12 does not ask for information concerning complainants' costs or profitability but merely asks whether complainants have any policies, etc., for reducing their costs. This interrogatory, defendants claim, is intended to elicit generic information concerning the way in which complainants seek to reduce their costs and the extent to which transportation is a factor in their cost reduction program.

Complainants, in their 9/16/97 reply, insist that the 6/5/96 stipulation covers any question and any document relating to any study, report, or analysis, whether prepared by complainants, outside consultants, or any other person, which refers to or relates to complainants' PET production and marketing costs.

Defendants, in their 9/26/97 reply, insist that Supplemental Interrogatory No. 12 does not ask for information respecting complainants' costs of marketing or producing PET, but asks only for information respecting the cost-containment policies, practices, and procedures followed and advocated by complainants' purchasing department, their transportation services purchasing department or group, and any other department which purchases goods and services and has strategies for reducing such costs.

Complainants, in their 10/16/97 motion, insist that the information sought in Supplemental Interrogatory No. 12 falls squarely within the scope of the 6/5/96 stipulation.

Defendants, in their 11/5/97 reply, insist that complainants should be compelled to respond to Supplemental Interrogatory No. 12.

The 6/5/96 stipulation is apparently set out at p. 2, in the first two sentences of the second full paragraph, of the letter signed by Samuel M. Sipe, Jr., and addressed to Fritz R. Kahn, and dated June 5, 1996, which appears in the record as Attachment 2 to the pleading, also dated June 5, 1996, that is titled "Joint Status Report on Resolution of Discovery Disputes and Motion to Adopt Stipulated Protective Order." The stipulation provides, in essence, that, during the "market dominance phase" of this proceeding, defendants will not seek information respecting the component costs of complainants' production of PET and the profitability of complainants' sales of PET. Relying upon this stipulation, we will deny the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 12, but only insofar as that interrogatory seeks (as indeed it does seek) information respecting the costs of complainants' production of PET or the profitability of complainants' sales of PET.

The fact remains, however, that Supplemental Interrogatory No. 12 also seeks cost information that has nothing to do with the matters covered by the 6/5/96 stipulation. We will therefore grant the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 12, but only insofar as that interrogatory seeks (as indeed it does seek) information not covered by the 6/5/96 stipulation. As defendants note, "the disclosure of generic company policies or strategies concerning cost reductions would not reveal any specific Shell costs. Any specific cost information on a responsive document could be redacted." See defendants' 8/27/97 motion at 5 (emphasis added).

Supplemental Interrogatory No. 13. Defendants' Supplemental Interrogatory No. 13 has reference to certain meetings or discussions held by complainants' personnel and CSXT personnel on certain dates in 1994, 1995, and 1996. With respect to each such meeting or discussion, this interrogatory asks that complainants: identify the complainants' personnel involved; state whether complainants made any presentations or handed out any materials at such meetings or during such discussions; identify and summarize the contents of any such presentations or handouts; identify and summarize the contents of all documents, notes, calendar entries, journal entries, or other memorializations of such meetings or discussions; and identify by Bates numbers any previously produced responsive documents.

Complainants responded to defendants' Supplemental Interrogatory No. 13: by identifying the complainants' personnel who had attended these meetings or discussions; by indicating that there had been no handouts; and by stating that "[i]nsofar as there are any documents, notes, calendar entries, journal entries or other memorializations of such meetings [or] discussions, they have been produced in response to, among others, Interrogatories Nos. 10, 11, 26, 28, 29, 33 and 37 of Defendants' First Set of Interrogatories to Complainants. See, for example, Bates stamp nos. 07895-07897. To the extent that the request seeks to have Complainants review all produced documents and identify by Bates stamp number each and every document produced in response to Interrogatories Nos. 10, 11, 26, 28, 29, 33 and 37 of Defendants' First Set of Interrogatories to Complainants, Complainants object to such a request as unduly burdensome, noting that Defendants can as readily review the documents, in their possession for no less than ten months' time, to make such identification." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 9-10.

Defendants, in their 8/27/97 motion to compel, maintain that complainants should be compelled to provide the Bates ranges of the department or files from which the documents called for by Supplemental Interrogatory No. 13 can be found.

Complainants, in their 9/16/97 reply, contend, in essence, that our action with respect to this aspect of defendants' 8/27/97 motion to compel should be governed by the action we took with respect to the "document index" aspect of complainants' 4/3/97 motion to compel.

Defendants, in their 9/26/97 reply, state that they have been unable to locate, from among the documents previously produced by complainants, any documents concerning the Supplemental Interrogatory No. 13 meetings or discussions. Defendants maintain that complainants should be compelled either to affirmatively state that there are no responsive documents or to indicate the Bates range within the documents previously produced where such documents would most likely be found.

Complainants, in their 10/16/97 motion, state that they "certainly have no way of disputing Defendants' assertion [that defendants have located no documents responsive to Supplemental Interrogatory No. 13] and can only conclude that, since the entire contents of the files of Shell's land transportation department pertaining to CSX Transportation were produced, see documents Bates stamped nos. 07757-08703, [] there must not be any." See complainants' 10/16/97 motion at 4.

Defendants, in their 11/5/97 reply, state that complainants "have now satisfactorily responded" to Supplemental Interrogatory No. 13, because complainants, in their 10/16/97 motion, (a) have indicated that any documents responsive to Supplemental Interrogatory No. 13 would be kept in the department files identified in response to Supplemental Interrogatory No. 8, and (b) have concluded that there must not be any such documents. See defendants' 11/5/97 reply at 3.

In light of defendants' statement that complainants have provided a satisfactory response to Supplemental Interrogatory No. 13, we will deny the 8/27/97 motion to compel insofar as it respects this interrogatory.

Supplemental Interrogatory No. 15. Defendants' Supplemental Interrogatory No. 15 asks complainants to state whether they have undertaken any of the proposed expansion plans that were discussed with defendant CSXT in April 1996. Supplemental Interrogatory No. 15 further asks that complainants: (a) for each expansion facility under construction or in existence, identify its location, the date it became or is expected to become operable, its capacity, the product(s) produced, and the anticipated geographic areas or customers to be served; (b) with respect to any facility in Mexico, state the percentage of its output that will be exported and the countries to which it will be exported; and (c) identify and summarize the contents of any documents relating to the impact of such facilities on defendants' rail services.

Complainants responded to defendants' Supplemental Interrogatory No. 15 by stating that, "[i]nsofar as there are any, documents responsive to this interrogatory have been produced in response to Interrogatories Nos. 6 and 7 of Defendants' First Set of Interrogatories to Complainants. See, for example, Shell's Bates stamped documents nos. 01433-01482 and 02342-02358." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 11.

Defendants, in their 8/27/97 motion to compel, argue that the documents referenced by complainants do not answer Supplemental Interrogatory No. 15 insofar as it seeks information on whether any of the planned plant expansions have in fact been constructed and/or are operational.

Complainants, in their 9/16/97 reply, have supplemented their response to Supplemental Interrogatory No. 15 to state: that it is anticipated that their PET plant at Altamira, Mexico, will not come on line until some time in the fourth quarter of 1997; that the plant is expected to have a capacity of approximately 190,000,000 pounds of PET annually; that the output of the plant is targeted for sales in Mexico City, Monterey, and Guadalajara; that approximately 30% of the production of the plant is expected to be exported; and that it is anticipated that orders for PET from several South American countries will be filled from the Altamira PET plant, rather than from the Apple Grove PET plant.

Defendants, in their 9/26/97 reply, note that complainants, in their 9/16/97 reply, "responded for the first time" to Supplemental Interrogatory No. 15. See defendants' 9/26/97 reply at 1.

We will deny the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 15. Although defendants have not formally withdrawn their motion to compel a response to Supplemental Interrogatory No. 15, the context suggests, and we therefore conclude, that complainants have fully answered this interrogatory.

Conclusion. This decision should resolve all outstanding discovery disputes. We urge the parties to complete discovery expeditiously so that this proceeding can finally move toward resolution.

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

It is ordered:

1. Complainants' 10/16/97 motion is denied insofar as it seeks to strike defendants' 9/26/97 reply, and defendants' 9/26/97 reply is accepted for filing and made part of the record in this proceeding.
2. Complainants' 10/16/97 motion is granted insofar as it seeks acceptance of complainants' surrebuttal material, and that material is accepted for filing and made part of the record in this proceeding.
3. Defendants' 8/27/97 motion to compel is granted as to Supplemental Interrogatories Nos. 4 and 11, and is granted in part, as explained in the text, as to Supplemental Interrogatory No. 12. Complainants should furnish their responses to defendants by December 29, 1997.
4. Except as indicated in ordering paragraph no. 3, defendants' 8/27/97 motion to compel is denied.

No. 41670

5. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

28602
EB

SERVICE DATE - DECEMBER 15, 1997

SURFACE TRANSPORTATION BOARD

No. 41670

SHELL CHEMICAL COMPANY and SHELL OIL COMPANY

v.

BOSTON & MAINE CORPORATION, ET AL.

Decision No. 23

Decided: December 8, 1997

On July 31, 1997, defendants submitted their "supplemental set of interrogatories" to complainants, and asked complainants to respond by August 15, 1997. On August 15, 1997, complainants responded in part but, on account of certain difficulties arising from the United Parcel Service (UPS) strike, were unable, at that time, to make a complete response. On August 20, 1997, the difficulties caused by the UPS strike apparently having been resolved, complainants submitted their "revised objections and responses" to defendants.¹

This decision addresses: defendants' motion (filed August 27, 1997) to compel answers to their Supplemental Interrogatories Nos. 2, 3, 4, 5, 8, 11, 12, 13, and 15;² complainants' reply (filed

¹ Defendants' "supplemental set of interrogatories" will hereinafter be referred to as defendants' 7/31/97 supplemental interrogatories. Complainants' "revised objections and responses" will hereinafter be referred to as complainants' 8/20/97 responses.

² As of August 15, 1997, there are 16 remaining defendants: Boston & Maine Corporation (B&M); Buffalo & Pittsburgh Railroad, Inc. (B&P); Consolidated Rail Corporation (Conrail); CSX Transportation, Inc. (CSXT); Gateway Western Railway Company (GWWR); Great Walton Railroad Company, Inc. (GWRC); Illinois Central Railroad Company (IC); Indiana Harbor Belt Railroad Company (IHB); Louisville & Indiana Railroad Company (L&I); Modesto and Empire Traction Company (M&E); Providence and Worcester Railroad Company (P&W); Salt Lake, Garfield and Western Railway Company (SLG&W); South Carolina Central Railroad Company, Inc. (SCC); ST Rail System (ST); The Columbus & Ohio River Rail Road Company (C&OR); and Washington Central Railroad Company, Inc. (WCRC). See Decision No. 19, slip op. at 1-2; Decision No. 20; Decision No. 22. The motion filed by defendants on August 27, 1997, and also defendants' two subsequent pleadings noted in the text, were apparently filed on behalf of all of the 16 remaining defendants except GWWR (the "non-litigating" defendant) and IHB, L&I, and WCRC (the "held in abeyance" defendants). See Decision No. 19, slip op. at 2 n.7 (status of GWWR) and 3 (continued...)

September 16, 1997);³ defendants' "reply" (filed September 26, 1997) in support of their motion to compel; complainants' motion (filed October 16, 1997) to strike or, in the alternative, to accept their surrebuttal statement; and defendants' reply (filed November 5, 1997).⁴

DISCUSSION AND CONCLUSIONS

The 8/27/97 Motion to Compel. Complainants have suggested, see complainants' 9/16/97 reply at 2 (second full paragraph), that defendants' 8/27/97 motion to compel was filed "belatedly." We disagree, (i) because it was not until August 20, 1997, that complainants submitted their complete responses (i.e., their so-called "revised objections and responses") to defendants' 7/31/97 supplemental interrogatories, and (ii) because defendants' 8/27/97 motion is timely as respects complainants' 8/20/97 responses.

The 9/26/97 Reply. The 9/26/97 reply is, in essence, an impermissible "reply to a reply." However, because the 9/26/97 reply narrows, to a certain extent, the issues in dispute, we shall accept it as part of the record and deny complainants' 10/16/97 motion insofar as that motion seeks to strike the 9/26/97 reply.

The 10/16/97 Motion. Because the information presented in the "surrebuttal" portion of the 10/16/97 motion narrows, to a certain extent, the issues in dispute, we shall grant the 10/16/97 motion insofar as that motion seeks acceptance of complainants' surrebuttal material.

Supplemental Interrogatory No. 2. At the core of the complaint filed by complainants on December 24, 1995, is the allegation that the defendant railroads are charging unreasonable rates on complainants' shipments of polyethylene terephthalate (PET) from and to certain points. The most important point named in the complaint is complainants' facility at Apple Grove, WV. Complainants named six individuals in response to defendants' Supplemental Interrogatory No. 1, which asked complainants to identify, for the period 1992 to the present, all personnel whose positions included any day-to-day or supervisory responsibilities related to the transportation of PET. Defendants' Supplemental Interrogatory No. 2 asks complainants: to state, for each of these individuals, whether that individual's files or documents in his or her possession were searched in response to defendants'

²(...continued)
n.14 (status of IHB, L&I, and WCRC).

³ The two complainants are Shell Chemical Company and Shell Oil Company (referred to collectively as complainants or Shell). See Decision No. 19, slip op. at 1 & n.3.

⁴ The five pleadings addressed in this decision will hereinafter be referred to as: the 8/27/97 motion; the 9/16/97 reply; the 9/26/97 reply; the 10/16/97 motion; and the 11/5/97 reply.

first set of interrogatories⁵ and August 21, 1996 follow-up questions; to identify, by Bates numbers, which documents, if any, came from each individual's files; and, if an individual's files were not previously searched, to identify and summarize the contents of all documents in the individual's files that are responsive to defendants' first set of interrogatories and August 21, 1996 follow-up questions.

Complainants responded to defendants' Supplemental Interrogatory No. 2 by stating, in essence: that the files of each of the six named individuals had been searched in response to defendants' first set of interrogatories and August 21, 1996 follow-up questions; that any responsive documents disclosed by that search had previously been furnished to defendants; and that, to the extent that defendants seek to have complainants "review all produced documents and [] identify by Bates stamp number each and every document authored or received by said individuals, Complainants object to such a request as being unduly burdensome, noting that Defendants can as readily as Complainants review the documents, in the possession [of defendants] for no less than ten months' time, to make such identification." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 3-4.

Defendants, in their 8/27/97 motion to compel, argue that Supplemental Interrogatory No. 2 asks only that complainants identify by Bates range either the individual files (if these individuals maintain their own files) or the department files wherein documents authored or received by these individuals are maintained. This, defendants maintain, is "similar to the request that Complainants made of Defendants, and for those individuals who maintained separate files, Defendants identified the bates ranges." See defendants' 8/27/97 motion at 10-11 (emphasis added).

Complainants, in their 9/16/97 reply, argue, in essence, that our action with respect to this aspect of defendants' 8/27/97 motion to compel should be governed by the action we took with respect to the "document index" aspect of complainants' own "second motion to compel." See Decision No. 19, slip op. at 5-6 (in that decision, complainants' second motion to compel was referred to as the 4/3/97 motion).

In Decision No. 19, we considered, among other things, complainants' request that defendants be ordered to produce an index which would identify, by interrogatory, the produced documents said to be responsive thereto. We noted defendants' contentions: that the transmittal letters for the documents provided by defendant CSXT (the key defendant as respects document production) clearly indicated the interrogatories to which those documents were primarily intended to respond; that most if not all of the CSXT documents included both "file covers" indicating the files from which such documents were produced and also "sheets" indicating the person or persons responsible for those files; that the time-consuming task of reviewing and preparing a written index

⁵ These were the interrogatories defendants submitted to complainants on March 18, 1996. See Decision No. 19, slip op. at 3.

for the "thousands of documents" produced by defendants generally, and indicating, for each document, each interrogatory to which it was responsive, would be far more onerous and burdensome for the defendants than it would be for complainants simply to review the documents to identify the specific information that they wanted; and that defendants had in fact provided a "list" of the documents produced by all defendants through July 1996, indicating, for each document or related group of documents, the primary interrogatories to which those documents were responsive.

We noted, in Decision No. 19, that, given the substantial number of documents produced by defendants in general and defendant CSXT in particular, it would have been better had complainants requested and defendants provided a more formal "index" or "list." We added, however, that, at the then present stage of this proceeding, the crucial question was not what would have been better at an earlier stage but, rather, what should be done at the then present stage. We pointed out that complainants had not explained why they simply could not do as defendants had suggested, i.e., review the documents theretofore produced to ascertain the relevant information contained therein. We concluded, accordingly, that, under the circumstances, complainants' 4/3/97 motion to compel should be denied insofar as complainants sought to compel defendants to provide a formal index, because it appeared to us that a review of the documents by complainants would be no more difficult or burdensome than a review of the documents by defendants. See Decision No. 19, slip op. at 6.

We will deny the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 2, because we agree with complainants that our action with respect to this aspect of the 8/27/97 motion to compel should be governed by the action we took with respect to the "document index" aspect of complainants' 4/3/97 motion to compel. Given the substantial number of documents produced both by defendants and by complainants, it would have been better had production been accompanied by formal "indices" or "lists," and, if the parties had not been able to reach agreement respecting such matters, it would have been better had they formally requested, at a much earlier stage of this proceeding, that such indices or lists be required. At the present stage of this proceeding, however, the crucial question is not what would have been better at an earlier stage but, rather, what should be done now. Defendants have not explained why they simply cannot do what they themselves once suggested that complainants should do, i.e., review the documents heretofore produced to ascertain the relevant information contained therein.

The burdens imposed by the necessity of categorizing documents produced in discovery are meant to be reciprocal, not unilateral. In Decision No. 19, we allowed defendants to impose, upon complainants, the burdens of categorizing the documents produced by defendants. In this decision, therefore, we simply cannot allow defendants to impose, upon complainants, the burdens of categorizing the documents produced by complainants.⁶

⁶ We are not persuaded otherwise by defendants' assertion that, as respects documents produced by defendants, "for those individuals who maintained separate files, Defendants identified (continued...)"

Supplemental Interrogatory No. 3. Defendants' Supplemental Interrogatory No. 3 asks complainants to state whether they have ever used consultants to assist in the procurement, solicitation of bids, negotiations of rates and terms, or costing of transportation of PET. If complainants indeed have thus used consultants, Supplemental Interrogatory No. 3 further asks that they identify each such consultant, state the dates on which such services were provided, briefly describe the nature of the consultant's services, and identify and summarize all studies, reports, analyses, or recommendations made by such consultants, whether orally or in writing.

Complainants responded to defendants' Supplemental Interrogatory No. 3 by stating that they "will be pleased to respond to interrogatories relating to the rates, terms and costing of PET transportation during the rate phase of this proceeding.¹⁷¹ In the meantime, however, Complainants object to this interrogatory on the ground that it is irrelevant to the question whether Defendants were constrained in [] establishing their rates applicable on Complainants' PET shipments to or from Apple Grove, WV, by intramodal, intermodal, product or geographic competition or other factors negating market dominance in the transportation to which the assailed rates applied; nor is the interrogatory reasonably calculated to lead to the discovery of admissible evidence." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 4-5.

Defendants, in their 8/27/97 motion to compel, argue that Supplemental Interrogatory No. 3 is not directed toward the level of defendant railroads' rates, but is intended to elicit information concerning options that are available to complainants for the transportation of PET, the terms at which such options are available to complainants, and the extent to which complainants could use such options as leverage in their dealings with the defendant railroads. The options defendants have

⁶(...continued)

the bates ranges." See defendants' 8/27/97 motion at 10. As noted in Decision No. 21, most of the documents produced by defendant CSXT (the key defendant as respects document production) apparently came from "office" files, not from "personal" files. See Decision No. 21, slip op. at 3.

⁷ By motion filed February 20, 1996, defendants requested: that this proceeding be bifurcated into separate market dominance and rate reasonableness phases; and that a procedural schedule be established to govern the market dominance phase. By reply filed March 1, 1996, complainants indicated that they agreed that the proceeding should be bifurcated. See Decision No. 19, slip op. at 2 & n.11. By decision served April 15, 1996: a procedural schedule was established for the submission of evidence and argument on the issue of market dominance; but the motion to bifurcate was ordered held in abeyance, pending receipt of the submissions on the market dominance issue. See Decision No. 19, slip op. at 3. Although the parties have since worked out a *de facto* suspension of the procedural schedule, see Decision No. 19, slip op. at 4 n.17, it has been understood by all concerned that the discovery now under way is limited to the market dominance issue.

in mind include the availability of other transportation modes, the threat of a build-out to another carrier, or the threat of serving certain customers from another plant (other than Apple Grove).

Complainants, in their 9/16/97 reply, have supplemented their response to Supplemental Interrogatory No. 3 to state "that no transportation consultant has been used by Complainants to aid them in identifying transportation options, the availability of other transportation modes, the threat of a build-out to another carrier or the threat of serving certain customers from another plant as a means of constraining Defendants' rates." See complainants' 9/16/97 reply at 3.

Defendants, in their 9/26/97 reply, note that complainants, in their 9/16/97 reply, "responded for the first time" to Supplemental Interrogatory No. 3. See defendants' 9/26/97 reply at 1.

We will deny the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 3. Although defendants have not formally withdrawn their motion to compel a response to Supplemental Interrogatory No. 3, the context suggests, and we therefore conclude, that complainants have fully answered this interrogatory.

Supplemental Interrogatories Nos. 4 & 5. Defendants' Supplemental Interrogatory No. 4 asks complainants to state whether they have ever solicited bids from, or engaged in negotiations with, non-rail transportation companies (including trucking and barge companies) for the transportation of PET where those companies were unsuccessful in obtaining complainants' business. If indeed complainants have solicited such bids or engaged in such negotiations, Supplemental Interrogatory No. 4 further asks complainants to identify each such company and briefly describe the services considered and the reason the company did not secure the business. Defendants' Supplemental Interrogatory No. 5 asks complainants to identify and summarize, for each company identified in response to Supplemental Interrogatory No. 4, the contents of all such bids and documents relating to such bids.

Complainants responded to defendants' Supplemental Interrogatories Nos. 4 & 5 by stating that "[i]nsofar as there are any, documents responsive to these interrogatories have been produced in response to, among others, Interrogatories Nos. 3, 4, 5, 13, 14, 25, 37 and 38 of Defendants' First Set of Interrogatories to Complainants. See, for example, Shell's Bates stamped document nos. 07426, 07427 and 02748." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 5.⁸

Defendants, in their 8/27/97 motion to compel, argue that complainants' response is inadequate in that it addresses only the request for identification of documents in Supplemental Interrogatory No. 5 but completely ignores the information requirements of Supplemental

⁸ The last Bates number reference is apparently incorrect. The correct reference appears to be 07428. See complainants' 9/16/97 reply at 4 (line 6).

Interrogatory No. 4. Defendants maintain that they cannot ascertain from the documents that have been produced, including the documents cited by complainants as responsive, whether there were any carriers that were unsuccessful in obtaining complainants' business and if so, the reason(s) for their lack of success.

Complainants, in their 9/16/97 reply, assert that Supplemental Interrogatories Nos. 4 and 5 ask questions that have already been asked and answered, in that Interrogatories Nos. 3, 4, 5, 13, 14, 25, 37 and 38 of Defendants' First Set of Interrogatories covered the same ground as do Interrogatories Nos. 4 and 5 of Defendants' Supplemental Set of Interrogatories. Complainants maintain that the documents they produced in response to the earlier interrogatories, as, for example, the documents Bates stamped nos. 07426, 07427 and 07428, gave the defendants the very information they now seek again (i.e., the identities of the carriers that were unsuccessful in bidding for complainants' traffic). One such carrier, complainants note, was CCC Carriers of Barbourville, WV.

Defendants, in their 9/26/97 reply, insist: that it is not apparent from the face of the documents, including those cited by complainants, whether the carrier whose bid was produced was successful or unsuccessful; that defendants have found no documents that address the reasons for unsuccessful bids; and that complainants' statement that CCC Carriers was unsuccessful does not satisfactorily respond to the interrogatory.

Complainants, in their 10/16/97 motion, argue: that it stands to reason that complainants would maintain files relating only to the motor or water carriers they in fact have dealt with and no others; that it would make no sense for complainants to keep records relating to the unsuccessful bidders for their transportation business or the reasons why they were unsuccessful in soliciting that business; and that complainants know of no shipper that, in the normal course of business, would keep such records. These considerations, complainants apparently mean to suggest, explain why defendants have been unable to find, among the documents produced by complainants, more than a few documents (if any at all) that appear to be responsive to Supplemental Interrogatories Nos. 4 & 5.

Defendants, in their 11/5/97 reply, claim that Supplemental Interrogatory No. 4 remains unanswered. Complainants, defendants note, have discussed what would or would not make sense, but have not discussed whether complainants actually have information, not documents, concerning trucking companies that have unsuccessfully bid for complainants' traffic. Complainants, defendants add, should be compelled either to provide affirmative narrative responses to Supplemental Interrogatory No. 4 or to state affirmatively that complainants have no such information.

We will grant the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 4. We agree with complainants' observations that it would make no sense for complainants to keep records relating to the unsuccessful bidders for their transportation business or the reasons why they were unsuccessful in soliciting that business, and we agree that this explains

why complainants have produced few, if any, documents responsive to Supplemental Interrogatory No. 4. In our judgment, however, this does not explain why complainants have not provided answers responsive to Supplemental Interrogatory No. 4, which asks, in essence: that complainants identify any transportation companies from which they solicited bids, or engaged in negotiations, respecting PET transportation, which solicitations or negotiations did not actually result in any such transportation; and that complainants briefly describe the services considered and the reasons why any such companies did not secure the business. The regulation that provides that production of a document is a sufficient answer to an interrogatory where the answer to the interrogatory may be derived or ascertained from the document, see 49 CFR 1114.26(b) (cited in Decision No. 19, slip op. at 4), is not applicable in this context; the failure to produce any, or more than a very few, documents does not provide an adequate answer to Supplemental Interrogatory No. 4.

We will deny the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 5. The fact that defendants did not address this interrogatory in their two most recent pleadings (their 9/26/97 reply and their 11/5/97 reply) represents, in the context of this proceeding, an indication that complainants have indeed provided, through the medium of document production, satisfactory answers to this interrogatory.

Supplemental Interrogatory No. 8. Defendants' Supplemental Interrogatory No. 8 asks complainants to state whether they have made or have had made any studies of rail rates or services, other than certain "benchmarking" studies and Commonwealth Rail Costing System studies referred to in Supplemental Interrogatories Nos. 6 and 7. If in fact there have been such studies, Supplemental Interrogatory No. 8 further asks complainants to identify each such study and its participants, and to identify and summarize the contents of any documents relating to each such study.

Complainants responded to defendants' Supplemental Interrogatory No. 8 by stating that "[i]nsofar as there are any, documents responsive to this interrogatory have been produced in response to, among others, Interrogatories Nos. 9, 11, 12, 13, 25, 28 and 37 of Defendants' First Set of Interrogatories to Complainants. See, for example, Shell's Bates Stamped document nos. 07757-07793." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 7.

Defendants, in their 8/27/97 motion to compel, argue: that the purpose of Supplemental Interrogatory No. 8 is to elicit information concerning other rail options available to complainants (e.g., barge/rail or truck/rail); that this information is germane to the question of intermodal competition; that the documents cited by complainants consist of lists of their movements by various modes, including hopper cars, but certainly do not constitute "a study of rail rates or services" as requested; and that complainants should be compelled to state affirmatively whether or not any other studies were made and, if so, to identify and summarize them.

Complainants, in their 9/16/97 reply, contend that Supplemental Interrogatory No. 8 asks a question that has already been asked and answered, in that Interrogatories Nos. 9, 11, 12, 13, 25, 28 and 37 of Defendants' First Set of Interrogatories covered the same ground as does Interrogatory No. 8 of Defendant's Supplemental Set of Interrogatories. Complainants maintain that the documents they produced in response to the earlier interrogatories, as, for example, the documents with Bates stamp nos. 07757-07793, gave defendants the very information they now seek again. Complainants add that the intermodal option information referenced in defendants' 8/27/97 motion was not in fact asked for in Supplemental Interrogatory No. 8.

Defendants, in their 9/26/97 reply, state that they have been unable to locate, in the documents produced by complainants, any studies of rail rates or services other than those referenced in Supplemental Interrogatory No. 8. Defendants add that they seek affirmation that there are no other such studies.

Complainants, in their 10/16/97 motion, state: that the only railroad transporting PET shipments from and to complainants' Apple Grove plant is CSXT; that the entire contents of the files of complainants' land transportation department pertaining to CSXT have been produced (complainants cite, in this respect, the documents with Bates stamp nos. 07757-08703); and that "[w]hatever documents were included in those files comprise the only analyses of railroad rates and services pertaining to Shell's PET shipment[s] that there are, and Shell cannot conceive why Defendants seem to believe that there are others." See complainants' 10/16/97 motion at 2-3.

Defendants, in their 11/5/97 reply, state that, because complainants, in their 10/16/97 motion, have identified the Bates range and source of the files which comprise the only analyses of railroad rates and services pertaining to complainants' PET shipments, complainants "have now satisfactorily responded" to Supplemental Interrogatory No. 8. See defendants' 11/5/97 reply at 3.

In light of defendants' statement that complainants have provided a satisfactory response to Supplemental Interrogatory No. 8, we will deny the 8/27/97 motion to compel insofar as it respects this interrogatory.

Supplemental Interrogatory No. 11. Defendants' Supplemental Interrogatory No. 11 asks complainants to state whether they have any written or unwritten policies (including guidelines, directives, manuals, memoranda, or practices, and specifically including both general policies that would encompass PET and any specific policies addressed to PET) providing instructions, strategies, or goals for securing transportation rates. If complainants do indeed have such policies, Supplemental Interrogatory No. 11 further asks that they identify and summarize the contents of any such written documents and identify and describe briefly any such non-written policies, practices, directives, or guidelines. Supplemental Interrogatory No. 11 adds that, if complainants contend that documents responsive to this interrogatory have already been produced, complainants should identify such documents by Bates numbers.

Complainants responded to defendants' Supplemental Interrogatory No. 11 by stating that "[i]nsofar as there are any, documents responsive to this interrogatory have been produced in response to, among others, Interrogatories Nos. 9, 10, 11, 25, 28 and 29 of Defendants' First Set of Interrogatories to Complainants. See, for example, Shell's Bates stamped document nos. 07825, 07826, 07851, 07853 and 07854. To the extent that the request seeks to have Complainants review all produced documents and identify [by] Bates number each and every document produced in response to Interrogatories Nos. 9, 10, 11, 25, 28 and 29 of Defendants' First Set of Interrogatories to Complainants, Complainants object to such a request as unduly burdensome, noting that Defendants can as readily review the documents, in their possession for no less than ten months' time, to make such identification." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 8.

Defendants, in their 8/27/97 motion to compel, state: that the five documents cited by complainants as examples of responsive documents are Commonwealth Rail Costing System Reports, apparently prepared by a consultant, which analyze rail costs and provide an estimate of the revenue to variable cost of the rail transportation for a movement; that these documents are simply not responsive to a request asking whether complainants have any written or unwritten policies; and that complainants should be compelled to affirmatively state whether they have any written or unwritten policies, and if they do, to state the policy or more definitely identify a document that does so.

Complainants, in their 9/16/97 reply, contend that Supplemental Interrogatory No. 11 asks a question that has already been asked and answered, in that Interrogatories Nos. 9, 10, 11, 25, 28 and 29 of Defendants' First Set of Interrogatories covered the same ground as does Interrogatory No. 11 of Defendant's Supplemental Set of Interrogatories. Complainants maintain that the documents they produced in response to the earlier interrogatories gave defendants the very information they now seek again. Complainants indicate that among the documents they had previously produced were documents that disclosed that complainants hoped to obtain rates that would yield defendants 180% of their variable costs. Complainants add, in essence, that our action with respect to this aspect of defendants' 8/27/97 motion to compel should be governed by the action we took with respect to the "document index" aspect of complainants' own 4/3/97 motion to compel.

Defendants, in their 9/26/97 reply, note: that Supplemental Interrogatory No. 11 asks whether complainants have any written or unwritten policies or goals for securing transportation rates; that the documents cited by complainants were prepared by consultants and provide an estimate of the carriers' variable costs and a projected rate based on 180% of those costs; and that if it is complainants' policy to obtain a rate at 180% of a carrier's variable costs, complainants should so state affirmatively and should also indicate whether that is their sole policy.

Complainants, in their 10/16/97 motion, state that they desire to obtain the lowest possible transportation rates and the best possible transportation services, consistent with, and responsive to, the demands and desires of their customers.

Defendants, in their 11/5/97 reply, claim that Supplemental Interrogatory No. 11 remains unanswered. Complainants, defendants note, have discussed their transportation policies only in the most general terms, but have not discussed whether complainants actually have information concerning any particular policy or goal put forth or adopted by complainants for securing transportation rates. Complainants, defendants add, should be compelled either to provide affirmative narrative responses to Supplemental Interrogatory No. 11 or to state affirmatively that complainants have no such information.

We will grant the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 11. That interrogatory asks, in essence, that complainants: state whether they have any policies, written or unwritten, that provide instructions, strategies, or goals for securing transportation rates; identify and describe any such policies; and identify, by Bates numbers, any previously produced responsive documents. Complainants have already described what might be called their primary policy in this field (the policy of obtaining the best possible services at the lowest possible rates), and they should complete their response to Supplemental Interrogatory No. 11 by identifying and describing any other policies they may have, if indeed they have any other policies at all, that provide instructions, strategies, or goals for securing transportation rates. The regulation that provides that production of a document is a sufficient answer to an interrogatory where the answer to the interrogatory may be derived or ascertained from the document, see 49 CFR 1114.26(b), is not applicable in this context; the failure to produce any, or more than a very few, documents does not provide an adequate answer to Supplemental Interrogatory No. 11.

Our action with respect to this aspect of defendants' 8/27/97 motion to compel is not governed by the action we took with respect to the "document index" aspect of complainants' 4/3/97 motion to compel. The subject matter of Supplemental Interrogatory No. 11 is such that there are likely to be few, if any, documents that are responsive to this interrogatory. Accordingly, complainants, in providing a further answer to Supplemental Interrogatory No. 11, should identify any previously produced documents by Bates numbers.

Supplemental Interrogatory No. 12. Defendants' Supplemental Interrogatory No. 12 asks complainants to state whether they have any written or unwritten policies (including guidelines, directives, manuals, memoranda or practices, and specifically including both general policies that would encompass PET and any specific policies addressed to PET) providing instructions, strategies, or goals for reducing costs, including but not limited to transportation costs. If complainants indeed have such policies, Supplemental Interrogatory No. 12 further asks that they identify and summarize the contents of any such written documents and identify and describe briefly any such non-written policies, practices, directives, or guidelines. Supplemental Interrogatory No. 12 adds that, if complainants contend that documents responsive to this interrogatory have already been produced, complainants should identify such documents by Bates numbers.

Complainants responded to defendants' Supplemental Interrogatory No. 12 by stating that they objected on the ground that, "pursuant to the stipulation of the parties [hereinafter referred to as

the 6/5/96 stipulation], as set forth in a letter agreement, dated June 5, 1996, Defendants agreed that during the market dominance phase of this proceeding they would pose no interrogatory or [and] seek the production of no document pertaining to the costs of Shell's production of PET or the profitability of its sales." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 8-9.

Defendants, in their 8/27/97 motion to compel, argue that Supplemental Interrogatory No. 12 does not ask for information concerning complainants' costs or profitability but merely asks whether complainants have any policies, etc., for reducing their costs. This interrogatory, defendants claim, is intended to elicit generic information concerning the way in which complainants seek to reduce their costs and the extent to which transportation is a factor in their cost reduction program.

Complainants, in their 9/16/97 reply, insist that the 6/5/96 stipulation covers any question and any document relating to any study, report, or analysis, whether prepared by complainants, outside consultants, or any other person, which refers to or relates to complainants' PET production and marketing costs.

Defendants, in their 9/26/97 reply, insist that Supplemental Interrogatory No. 12 does not ask for information respecting complainants' costs of marketing or producing PET, but asks only for information respecting the cost-containment policies, practices, and procedures followed and advocated by complainants' purchasing department, their transportation services purchasing department or group, and any other department which purchases goods and services and has strategies for reducing such costs.

Complainants, in their 10/16/97 motion, insist that the information sought in Supplemental Interrogatory No. 12 falls squarely within the scope of the 6/5/96 stipulation.

Defendants, in their 11/5/97 reply, insist that complainants should be compelled to respond to Supplemental Interrogatory No. 12.

The 6/5/96 stipulation is apparently set out at p. 2, in the first two sentences of the second full paragraph, of the letter signed by Samuel M. Sipe, Jr., and addressed to Fritz R. Kahn, and dated June 5, 1996, which appears in the record as Attachment 2 to the pleading, also dated June 5, 1996, that is titled "Joint Status Report on Resolution of Discovery Disputes and Motion to Adopt Stipulated Protective Order." The stipulation provides, in essence, that, during the "market dominance phase" of this proceeding, defendants will not seek information respecting the component costs of complainants' production of PET and the profitability of complainants' sales of PET. Relying upon this stipulation, we will deny the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 12, but only insofar as that interrogatory seeks (as indeed it does seek) information respecting the costs of complainants' production of PET or the profitability of complainants' sales of PET.

The fact remains, however, that Supplemental Interrogatory No. 12 also seeks cost information that has nothing to do with the matters covered by the 6/5/96 stipulation. We will therefore grant the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 12, but only insofar as that interrogatory seeks (as indeed it does seek) information not covered by the 6/5/96 stipulation. As defendants note, "the disclosure of generic company policies or strategies concerning cost reductions would not reveal any specific Shell costs. Any specific cost information on a responsive document could be redacted." See defendants' 8/27/97 motion at 5 (emphasis added).

Supplemental Interrogatory No. 13. Defendants' Supplemental Interrogatory No. 13 has reference to certain meetings or discussions held by complainants' personnel and CSXT personnel on certain dates in 1994, 1995, and 1996. With respect to each such meeting or discussion, this interrogatory asks that complainants: identify the complainants' personnel involved; state whether complainants made any presentations or handed out any materials at such meetings or during such discussions; identify and summarize the contents of any such presentations or handouts; identify and summarize the contents of all documents, notes, calendar entries, journal entries, or other memorializations of such meetings or discussions; and identify by Bates numbers any previously produced responsive documents.

Complainants responded to defendants' Supplemental Interrogatory No. 13: by identifying the complainants' personnel who had attended these meetings or discussions; by indicating that there had been no handouts; and by stating that "[i]nsofar as there are any documents, notes, calendar entries, journal entries or other memorializations of such meetings [or] discussions, they have been produced in response to, among others, Interrogatories Nos. 10, 11, 26, 28, 29, 33 and 37 of Defendants' First Set of Interrogatories to Complainants. See, for example, Bates stamp nos. 07895-07897. To the extent that the request seeks to have Complainants review all produced documents and identify by Bates stamp number each and every document produced in response to Interrogatories Nos. 10, 11, 26, 28, 29, 33 and 37 of Defendants' First Set of Interrogatories to Complainants, Complainants object to such a request as unduly burdensome, noting that Defendants can as readily review the documents, in their possession for no less than ten months' time, to make such identification." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 9-10.

Defendants, in their 8/27/97 motion to compel, maintain that complainants should be compelled to provide the Bates ranges of the department or files from which the documents called for by Supplemental Interrogatory No. 13 can be found.

Complainants, in their 9/16/97 reply, contend, in essence, that our action with respect to this aspect of defendants' 8/27/97 motion to compel should be governed by the action we took with respect to the "document index" aspect of complainants' 4/3/97 motion to compel.

Defendants, in their 9/26/97 reply, state that they have been unable to locate, from among the documents previously produced by complainants, any documents concerning the Supplemental Interrogatory No. 13 meetings or discussions. Defendants maintain that complainants should be compelled either to affirmatively state that there are no responsive documents or to indicate the Bates range within the documents previously produced where such documents would most likely be found.

Complainants, in their 10/16/97 motion, state that they "certainly have no way of disputing Defendants' assertion [that defendants have located no documents responsive to Supplemental Interrogatory No. 13] and can only conclude that, since the entire contents of the files of Shell's land transportation department pertaining to CSX Transportation were produced, see documents Bates stamped nos. 07757-08703, [] there must not be any." See complainants' 10/16/97 motion at 4.

Defendants, in their 11/5/97 reply, state that complainants "have now satisfactorily responded" to Supplemental Interrogatory No. 13, because complainants, in their 10/16/97 motion, (a) have indicated that any documents responsive to Supplemental Interrogatory No. 13 would be kept in the department files identified in response to Supplemental Interrogatory No. 8, and (b) have concluded that there must not be any such documents. See defendants' 11/5/97 reply at 3.

In light of defendants' statement that complainants have provided a satisfactory response to Supplemental Interrogatory No. 13, we will deny the 8/27/97 motion to compel insofar as it respects this interrogatory.

Supplemental Interrogatory No. 15. Defendants' Supplemental Interrogatory No. 15 asks complainants to state whether they have undertaken any of the proposed expansion plans that were discussed with defendant CSXT in April 1996. Supplemental Interrogatory No. 15 further asks that complainants: (a) for each expansion facility under construction or in existence, identify its location, the date it became or is expected to become operable, its capacity, the product(s) produced, and the anticipated geographic areas or customers to be served; (b) with respect to any facility in Mexico, state the percentage of its output that will be exported and the countries to which it will be exported; and (c) identify and summarize the contents of any documents relating to the impact of such facilities on defendants' rail services.

Complainants responded to defendants' Supplemental Interrogatory No. 15 by stating that, "[i]nsofar as there are any, documents responsive to this interrogatory have been produced in response to Interrogatories Nos. 6 and 7 of Defendants' First Set of Interrogatories to Complainants. See, for example, Shell's Bates stamped documents nos. 01433-01482 and 02342-02358." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 11.

Defendants, in their 8/27/97 motion to compel, argue that the documents referenced by complainants do not answer Supplemental Interrogatory No. 15 insofar as it seeks information on whether any of the planned plant expansions have in fact been constructed and/or are operational.

Complainants, in their 9/16/97 reply, have supplemented their response to Supplemental Interrogatory No. 15 to state: that it is anticipated that their PET plant at Altamira, Mexico, will not come on line until some time in the fourth quarter of 1997; that the plant is expected to have a capacity of approximately 190,000,000 pounds of PET annually; that the output of the plant is targeted for sales in Mexico City, Monterey, and Guadalajara; that approximately 30% of the production of the plant is expected to be exported; and that it is anticipated that orders for PET from several South American countries will be filled from the Altamira PET plant, rather than from the Apple Grove PET plant.

Defendants, in their 9/26/97 reply, note that complainants, in their 9/16/97 reply, "responded for the first time" to Supplemental Interrogatory No. 15. See defendants' 9/26/97 reply at 1.

We will deny the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 15. Although defendants have not formally withdrawn their motion to compel a response to Supplemental Interrogatory No. 15, the context suggests, and we therefore conclude, that complainants have fully answered this interrogatory.

Conclusion. This decision should resolve all outstanding discovery disputes. We urge the parties to complete discovery expeditiously so that this proceeding can finally move toward resolution.

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

It is ordered:

1. Complainants' 10/16/97 motion is denied insofar as it seeks to strike defendants' 9/26/97 reply, and defendants' 9/26/97 reply is accepted for filing and made part of the record in this proceeding.
2. Complainants' 10/16/97 motion is granted insofar as it seeks acceptance of complainants' surrebuttal material, and that material is accepted for filing and made part of the record in this proceeding.
3. Defendants' 8/27/97 motion to compel is granted as to Supplemental Interrogatories Nos. 4 and 11, and is granted in part, as explained in the text, as to Supplemental Interrogatory No. 12. Complainants should furnish their responses to defendants by December 29, 1997.
4. Except as indicated in ordering paragraph no. 3, defendants' 8/27/97 motion to compel is denied.

No. 41670

5. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

28602
EB

SERVICE DATE - DECEMBER 15, 1997

SURFACE TRANSPORTATION BOARD

No. 41670

SHELL CHEMICAL COMPANY and SHELL OIL COMPANY
v.
BOSTON & MAINE CORPORATION, ET AL.

Decision No. 23

Decided: December 8, 1997

On July 31, 1997, defendants submitted their "supplemental set of interrogatories" to complainants, and asked complainants to respond by August 15, 1997. On August 15, 1997, complainants responded in part but, on account of certain difficulties arising from the United Parcel Service (UPS) strike, were unable, at that time, to make a complete response. On August 20, 1997, the difficulties caused by the UPS strike apparently having been resolved, complainants submitted their "revised objections and responses" to defendants.¹

This decision addresses: defendants' motion (filed August 27, 1997) to compel answers to their Supplemental Interrogatories Nos. 2, 3, 4, 5, 8, 11, 12, 13, and 15;² complainants' reply (filed

¹ Defendants' "supplemental set of interrogatories" will hereinafter be referred to as defendants' 7/31/97 supplemental interrogatories. Complainants' "revised objections and responses" will hereinafter be referred to as complainants' 8/20/97 responses.

² As of August 15, 1997, there are 16 remaining defendants: Boston & Maine Corporation (B&M); Buffalo & Pittsburgh Railroad, Inc. (B&P); Consolidated Rail Corporation (Conrail); CSX Transportation, Inc. (CSXT); Gateway Western Railway Company (GWWR); Great Walton Railroad Company, Inc. (GWRC); Illinois Central Railroad Company (IC); Indiana Harbor Belt Railroad Company (IHB); Louisville & Indiana Railroad Company (L&I); Modesto and Empire Traction Company (M&E); Providence and Worcester Railroad Company (P&W); Salt Lake, Garfield and Western Railway Company (SLG&W); South Carolina Central Railroad Company, Inc. (SCC); ST Rail System (ST); The Columbus & Ohio River Rail Road Company (C&OR); and Washington Central Railroad Company, Inc. (WCRC). See Decision No. 19, slip op. at 1-2; Decision No. 20; Decision No. 22. The motion filed by defendants on August 27, 1997, and also defendants' two subsequent pleadings noted in the text, were apparently filed on behalf of all of the 16 remaining defendants except GWWR (the "non-litigating" defendant) and IHB, L&I, and WCRC (the "held in abeyance" defendants). See Decision No. 19, slip op. at 2 n.7 (status of GWWR) and 3 (continued...)

September 16, 1997);³ defendants' "reply" (filed September 26, 1997) in support of their motion to compel; complainants' motion (filed October 16, 1997) to strike or, in the alternative, to accept their surrebuttal statement; and defendants' reply (filed November 5, 1997).⁴

DISCUSSION AND CONCLUSIONS

The 8/27/97 Motion to Compel. Complainants have suggested, see complainants' 9/16/97 reply at 2 (second full paragraph), that defendants' 8/27/97 motion to compel was filed "belatedly." We disagree, (i) because it was not until August 20, 1997, that complainants submitted their complete responses (i.e., their so-called "revised objections and responses") to defendants' 7/31/97 supplemental interrogatories, and (ii) because defendants' 8/27/97 motion is timely as respects complainants' 8/20/97 responses.

The 9/26/97 Reply. The 9/26/97 reply is, in essence, an impermissible "reply to a reply." However, because the 9/26/97 reply narrows, to a certain extent, the issues in dispute, we shall accept it as part of the record and deny complainants' 10/16/97 motion insofar as that motion seeks to strike the 9/26/97 reply.

The 10/16/97 Motion. Because the information presented in the "surrebuttal" portion of the 10/16/97 motion narrows, to a certain extent, the issues in dispute, we shall grant the 10/16/97 motion insofar as that motion seeks acceptance of complainants' surrebuttal material.

Supplemental Interrogatory No. 2. At the core of the complaint filed by complainants on December 24, 1995, is the allegation that the defendant railroads are charging unreasonable rates on complainants' shipments of polyethylene terephthalate (PET) from and to certain points. The most important point named in the complaint is complainants' facility at Apple Grove, WV. Complainants named six individuals in response to defendants' Supplemental Interrogatory No. 1, which asked complainants to identify, for the period 1992 to the present, all personnel whose positions included any day-to-day or supervisory responsibilities related to the transportation of PET. Defendants' Supplemental Interrogatory No. 2 asks complainants: to state, for each of these individuals, whether that individual's files or documents in his or her possession were searched in response to defendants'

²(...continued)
n.14 (status of IHB, L&I, and WCRC).

³ The two complainants are Shell Chemical Company and Shell Oil Company (referred to collectively as complainants or Shell). See Decision No. 19, slip op. at 1 & n.3.

⁴ The five pleadings addressed in this decision will hereinafter be referred to as: the 8/27/97 motion; the 9/16/97 reply; the 9/26/97 reply; the 10/16/97 motion; and the 11/5/97 reply.

first set of interrogatories⁵ and August 21, 1996 follow-up questions; to identify, by Bates numbers, which documents, if any, came from each individual's files; and, if an individual's files were not previously searched, to identify and summarize the contents of all documents in the individual's files that are responsive to defendants' first set of interrogatories and August 21, 1996 follow-up questions.

Complainants responded to defendants' Supplemental Interrogatory No. 2 by stating, in essence: that the files of each of the six named individuals had been searched in response to defendants' first set of interrogatories and August 21, 1996 follow-up questions; that any responsive documents disclosed by that search had previously been furnished to defendants; and that, to the extent that defendants seek to have complainants "review all produced documents and [] identify by Bates stamp number each and every document authored or received by said individuals, Complainants object to such a request as being unduly burdensome, noting that Defendants can as readily as Complainants review the documents, in the possession [of defendants] for no less than ten months' time, to make such identification." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 3-4.

Defendants, in their 8/27/97 motion to compel, argue that Supplemental Interrogatory No. 2 asks only that complainants identify by Bates range either the individual files (if these individuals maintain their own files) or the department files wherein documents authored or received by these individuals are maintained. This, defendants maintain, is "similar to the request that Complainants made of Defendants, and for those individuals who maintained separate files, Defendants identified the bates ranges." See defendants' 8/27/97 motion at 10-11 (emphasis added).

Complainants, in their 9/16/97 reply, argue, in essence, that our action with respect to this aspect of defendants' 8/27/97 motion to compel should be governed by the action we took with respect to the "document index" aspect of complainants' own "second motion to compel." See Decision No. 19, slip op. at 5-6 (in that decision, complainants' second motion to compel was referred to as the 4/3/97 motion).

In Decision No. 19, we considered, among other things, complainants' request that defendants be ordered to produce an index which would identify, by interrogatory, the produced documents said to be responsive thereto. We noted defendants' contentions: that the transmittal letters for the documents provided by defendant CSXT (the key defendant as respects document production) clearly indicated the interrogatories to which those documents were primarily intended to respond; that most if not all of the CSXT documents included both "file covers" indicating the files from which such documents were produced and also "sheets" indicating the person or persons responsible for those files; that the time-consuming task of reviewing and preparing a written index

⁵ These were the interrogatories defendants submitted to complainants on March 18, 1996. See Decision No. 19, slip op. at 3.

for the "thousands of documents" produced by defendants generally, and indicating, for each document, each interrogatory to which it was responsive, would be far more onerous and burdensome for the defendants than it would be for complainants simply to review the documents to identify the specific information that they wanted; and that defendants had in fact provided a "list" of the documents produced by all defendants through July 1996, indicating, for each document or related group of documents, the primary interrogatories to which those documents were responsive.

We noted, in Decision No. 19, that, given the substantial number of documents produced by defendants in general and defendant CSXT in particular, it would have been better had complainants requested and defendants provided a more formal "index" or "list." We added, however, that, at the then present stage of this proceeding, the crucial question was not what would have been better at an earlier stage but, rather, what should be done at the then present stage. We pointed out that complainants had not explained why they simply could not do as defendants had suggested, i.e., review the documents theretofore produced to ascertain the relevant information contained therein. We concluded, accordingly, that, under the circumstances, complainants' 4/3/97 motion to compel should be denied insofar as complainants sought to compel defendants to provide a formal index, because it appeared to us that a review of the documents by complainants would be no more difficult or burdensome than a review of the documents by defendants. See Decision No. 19, slip op. at 6.

We will deny the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 2, because we agree with complainants that our action with respect to this aspect of the 8/27/97 motion to compel should be governed by the action we took with respect to the "document index" aspect of complainants' 4/3/97 motion to compel. Given the substantial number of documents produced both by defendants and by complainants, it would have been better had production been accompanied by formal "indices" or "lists," and, if the parties had not been able to reach agreement respecting such matters, it would have been better had they formally requested, at a much earlier stage of this proceeding, that such indices or lists be required. At the present stage of this proceeding, however, the crucial question is not what would have been better at an earlier stage but, rather, what should be done now. Defendants have not explained why they simply cannot do what they themselves once suggested that complainants should do, i.e., review the documents heretofore produced to ascertain the relevant information contained therein.

The burdens imposed by the necessity of categorizing documents produced in discovery are meant to be reciprocal, not unilateral. In Decision No. 19, we allowed defendants to impose, upon complainants, the burdens of categorizing the documents produced by defendants. In this decision, therefore, we simply cannot allow defendants to impose, upon complainants, the burdens of categorizing the documents produced by complainants.⁶

⁶ We are not persuaded otherwise by defendants' assertion that, as respects documents produced by defendants, "for those individuals who maintained separate files, Defendants identified (continued...)"

Supplemental Interrogatory No. 3. Defendants' Supplemental Interrogatory No. 3 asks complainants to state whether they have ever used consultants to assist in the procurement, solicitation of bids, negotiations of rates and terms, or costing of transportation of PET. If complainants indeed have thus used consultants, Supplemental Interrogatory No. 3 further asks that they identify each such consultant, state the dates on which such services were provided, briefly describe the nature of the consultant's services, and identify and summarize all studies, reports, analyses, or recommendations made by such consultants, whether orally or in writing.

Complainants responded to defendants' Supplemental Interrogatory No. 3 by stating that they "will be pleased to respond to interrogatories relating to the rates, terms and costing of PET transportation during the rate phase of this proceeding.¹⁷¹ In the meantime, however, Complainants object to this interrogatory on the ground that it is irrelevant to the question whether Defendants were constrained in [] establishing their rates applicable on Complainants' PET shipments to or from Apple Grove, WV, by intramodal, intermodal, product or geographic competition or other factors negating market dominance in the transportation to which the assailed rates applied; nor is the interrogatory reasonably calculated to lead to the discovery of admissible evidence." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 4-5.

Defendants, in their 8/27/97 motion to compel, argue that Supplemental Interrogatory No. 3 is not directed toward the level of defendant railroads' rates, but is intended to elicit information concerning options that are available to complainants for the transportation of PET, the terms at which such options are available to complainants, and the extent to which complainants could use such options as leverage in their dealings with the defendant railroads. The options defendants have

⁶(...continued)

the bates ranges." See defendants' 8/27/97 motion at 10. As noted in Decision No. 21, most of the documents produced by defendant CSXT (the key defendant as respects document production) apparently came from "office" files, not from "personal" files. See Decision No. 21, slip op. at 3.

⁷ By motion filed February 20, 1996, defendants requested: that this proceeding be bifurcated into separate market dominance and rate reasonableness phases; and that a procedural schedule be established to govern the market dominance phase. By reply filed March 1, 1996, complainants indicated that they agreed that the proceeding should be bifurcated. See Decision No. 19, slip op. at 2 & n.11. By decision served April 15, 1996: a procedural schedule was established for the submission of evidence and argument on the issue of market dominance; but the motion to bifurcate was ordered held in abeyance, pending receipt of the submissions on the market dominance issue. See Decision No. 19, slip op. at 3. Although the parties have since worked out a *de facto* suspension of the procedural schedule, see Decision No. 19, slip op. at 4 n.17, it has been understood by all concerned that the discovery now under way is limited to the market dominance issue.

in mind include the availability of other transportation modes, the threat of a build-out to another carrier, or the threat of serving certain customers from another plant (other than Apple Grove).

Complainants, in their 9/16/97 reply, have supplemented their response to Supplemental Interrogatory No. 3 to state "that no transportation consultant has been used by Complainants to aid them in identifying transportation options, the availability of other transportation modes, the threat of a build-out to another carrier or the threat of serving certain customers from another plant as a means of constraining Defendants' rates." See complainants' 9/16/97 reply at 3.

Defendants, in their 9/26/97 reply, note that complainants, in their 9/16/97 reply, "responded for the first time" to Supplemental Interrogatory No. 3. See defendants' 9/26/97 reply at 1.

We will deny the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 3. Although defendants have not formally withdrawn their motion to compel a response to Supplemental Interrogatory No. 3, the context suggests, and we therefore conclude, that complainants have fully answered this interrogatory.

Supplemental Interrogatories Nos. 4 & 5. Defendants' Supplemental Interrogatory No. 4 asks complainants to state whether they have ever solicited bids from, or engaged in negotiations with, non-rail transportation companies (including trucking and barge companies) for the transportation of PET where those companies were unsuccessful in obtaining complainants' business. If indeed complainants have solicited such bids or engaged in such negotiations, Supplemental Interrogatory No. 4 further asks complainants to identify each such company and briefly describe the services considered and the reason the company did not secure the business. Defendants' Supplemental Interrogatory No. 5 asks complainants to identify and summarize, for each company identified in response to Supplemental Interrogatory No. 4, the contents of all such bids and documents relating to such bids.

Complainants responded to defendants' Supplemental Interrogatories Nos. 4 & 5 by stating that "[i]nsofar as there are any, documents responsive to these interrogatories have been produced in response to, among others, Interrogatories Nos. 3, 4, 5, 13, 14, 25, 37 and 38 of Defendants' First Set of Interrogatories to Complainants. See, for example, Shell's Bates stamped document nos. 07426, 07427 and 02748." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 5.⁸

Defendants, in their 8/27/97 motion to compel, argue that complainants' response is inadequate in that it addresses only the request for identification of documents in Supplemental Interrogatory No. 5 but completely ignores the information requirements of Supplemental

⁸ The last Bates number reference is apparently incorrect. The correct reference appears to be 07428. See complainants' 9/16/97 reply at 4 (line 6).

Interrogatory No. 4. Defendants maintain that they cannot ascertain from the documents that have been produced, including the documents cited by complainants as responsive, whether there were any carriers that were unsuccessful in obtaining complainants' business and if so, the reason(s) for their lack of success.

Complainants, in their 9/16/97 reply, assert that Supplemental Interrogatories Nos. 4 and 5 ask questions that have already been asked and answered, in that Interrogatories Nos. 3, 4, 5, 13, 14, 25, 37 and 38 of Defendants' First Set of Interrogatories covered the same ground as do Interrogatories Nos. 4 and 5 of Defendants' Supplemental Set of Interrogatories. Complainants maintain that the documents they produced in response to the earlier interrogatories, as, for example, the documents Bates stamped nos. 07426, 07427 and 07428, gave the defendants the very information they now seek again (i.e., the identities of the carriers that were unsuccessful in bidding for complainants' traffic). One such carrier, complainants note, was CCC Carriers of Barbourville, WV.

Defendants, in their 9/26/97 reply, insist: that it is not apparent from the face of the documents, including those cited by complainants, whether the carrier whose bid was produced was successful or unsuccessful; that defendants have found no documents that address the reasons for unsuccessful bids; and that complainants' statement that CCC Carriers was unsuccessful does not satisfactorily respond to the interrogatory.

Complainants, in their 10/16/97 motion, argue: that it stands to reason that complainants would maintain files relating only to the motor or water carriers they in fact have dealt with and no others; that it would make no sense for complainants to keep records relating to the unsuccessful bidders for their transportation business or the reasons why they were unsuccessful in soliciting that business; and that complainants know of no shipper that, in the normal course of business, would keep such records. These considerations, complainants apparently mean to suggest, explain why defendants have been unable to find, among the documents produced by complainants, more than a few documents (if any at all) that appear to be responsive to Supplemental Interrogatories Nos. 4 & 5.

Defendants, in their 11/5/97 reply, claim that Supplemental Interrogatory No. 4 remains unanswered. Complainants, defendants note, have discussed what would or would not make sense, but have not discussed whether complainants actually have information, not documents, concerning trucking companies that have unsuccessfully bid for complainants' traffic. Complainants, defendants add, should be compelled either to provide affirmative narrative responses to Supplemental Interrogatory No. 4 or to state affirmatively that complainants have no such information.

We will grant the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 4. We agree with complainants' observations that it would make no sense for complainants to keep records relating to the unsuccessful bidders for their transportation business or the reasons why they were unsuccessful in soliciting that business, and we agree that this explains

why complainants have produced few, if any, documents responsive to Supplemental Interrogatory No. 4. In our judgment, however, this does not explain why complainants have not provided answers responsive to Supplemental Interrogatory No. 4, which asks, in essence: that complainants identify any transportation companies from which they solicited bids, or engaged in negotiations, respecting PET transportation, which solicitations or negotiations did not actually result in any such transportation; and that complainants briefly describe the services considered and the reasons why any such companies did not secure the business. The regulation that provides that production of a document is a sufficient answer to an interrogatory where the answer to the interrogatory may be derived or ascertained from the document, see 49 CFR 1114.26(b) (cited in Decision No. 19, slip op. at 4), is not applicable in this context; the failure to produce any, or more than a very few, documents does not provide an adequate answer to Supplemental Interrogatory No. 4.

We will deny the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 5. The fact that defendants did not address this interrogatory in their two most recent pleadings (their 9/26/97 reply and their 11/5/97 reply) represents, in the context of this proceeding, an indication that complainants have indeed provided, through the medium of document production, satisfactory answers to this interrogatory.

Supplemental Interrogatory No. 8. Defendants' Supplemental Interrogatory No. 8 asks complainants to state whether they have made or have had made any studies of rail rates or services, other than certain "benchmarking" studies and Commonwealth Rail Costing System studies referred to in Supplemental Interrogatories Nos. 6 and 7. If in fact there have been such studies, Supplemental Interrogatory No. 8 further asks complainants to identify each such study and its participants, and to identify and summarize the contents of any documents relating to each such study.

Complainants responded to defendants' Supplemental Interrogatory No. 8 by stating that "[i]nsofar as there are any, documents responsive to this interrogatory have been produced in response to, among others, Interrogatories Nos. 9, 11, 12, 13, 25, 28 and 37 of Defendants' First Set of Interrogatories to Complainants. See, for example, Shell's Bates Stamped document nos. 07757-07793." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 7.

Defendants, in their 8/27/97 motion to compel, argue: that the purpose of Supplemental Interrogatory No. 8 is to elicit information concerning other rail options available to complainants (e.g., barge/rail or truck/rail); that this information is germane to the question of intermodal competition; that the documents cited by complainants consist of lists of their movements by various modes, including hopper cars, but certainly do not constitute "a study of rail rates or services" as requested; and that complainants should be compelled to state affirmatively whether or not any other studies were made and, if so, to identify and summarize them.

Complainants, in their 9/16/97 reply, contend that Supplemental Interrogatory No. 8 asks a question that has already been asked and answered, in that Interrogatories Nos. 9, 11, 12, 13, 25, 28 and 37 of Defendants' First Set of Interrogatories covered the same ground as does Interrogatory No. 8 of Defendant's Supplemental Set of Interrogatories. Complainants maintain that the documents they produced in response to the earlier interrogatories, as, for example, the documents with Bates stamp nos. 07757-07793, gave defendants the very information they now seek again. Complainants add that the intermodal option information referenced in defendants' 8/27/97 motion was not in fact asked for in Supplemental Interrogatory No. 8.

Defendants, in their 9/26/97 reply, state that they have been unable to locate, in the documents produced by complainants, any studies of rail rates or services other than those referenced in Supplemental Interrogatory No. 8. Defendants add that they seek affirmation that there are no other such studies.

Complainants, in their 10/16/97 motion, state: that the only railroad transporting PET shipments from and to complainants' Apple Grove plant is CSXT; that the entire contents of the files of complainants' land transportation department pertaining to CSXT have been produced (complainants cite, in this respect, the documents with Bates stamp nos. 07757-08703); and that "[w]hatever documents were included in those files comprise the only analyses of railroad rates and services pertaining to Shell's PET shipment[s] that there are, and Shell cannot conceive why Defendants seem to believe that there are others." See complainants' 10/16/97 motion at 2-3.

Defendants, in their 11/5/97 reply, state that, because complainants, in their 10/16/97 motion, have identified the Bates range and source of the files which comprise the only analyses of railroad rates and services pertaining to complainants' PET shipments, complainants "have now satisfactorily responded" to Supplemental Interrogatory No. 8. See defendants' 11/5/97 reply at 3.

In light of defendants' statement that complainants have provided a satisfactory response to Supplemental Interrogatory No. 8, we will deny the 8/27/97 motion to compel insofar as it respects this interrogatory.

Supplemental Interrogatory No. 11. Defendants' Supplemental Interrogatory No. 11 asks complainants to state whether they have any written or unwritten policies (including guidelines, directives, manuals, memoranda, or practices, and specifically including both general policies that would encompass PET and any specific policies addressed to PET) providing instructions, strategies, or goals for securing transportation rates. If complainants do indeed have such policies, Supplemental Interrogatory No. 11 further asks that they identify and summarize the contents of any such written documents and identify and describe briefly any such non-written policies, practices, directives, or guidelines. Supplemental Interrogatory No. 11 adds that, if complainants contend that documents responsive to this interrogatory have already been produced, complainants should identify such documents by Bates numbers.

Complainants responded to defendants' Supplemental Interrogatory No. 11 by stating that "[i]nsofar as there are any, documents responsive to this interrogatory have been produced in response to, among others, Interrogatories Nos. 9, 10, 11, 25, 28 and 29 of Defendants' First Set of Interrogatories to Complainants. See, for example, Shell's Bates stamped document nos. 07825, 07826, 07851, 07853 and 07854. To the extent that the request seeks to have Complainants review all produced documents and identify [by] Bates number each and every document produced in response to Interrogatories Nos. 9, 10, 11, 25, 28 and 29 of Defendants' First Set of Interrogatories to Complainants, Complainants object to such a request as unduly burdensome, noting that Defendants can as readily review the documents, in their possession for no less than ten months' time, to make such identification." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 8.

Defendants, in their 8/27/97 motion to compel, state: that the five documents cited by complainants as examples of responsive documents are Commonwealth Rail Costing System Reports, apparently prepared by a consultant, which analyze rail costs and provide an estimate of the revenue to variable cost of the rail transportation for a movement; that these documents are simply not responsive to a request asking whether complainants have any written or unwritten policies; and that complainants should be compelled to affirmatively state whether they have any written or unwritten policies, and if they do, to state the policy or more definitely identify a document that does so.

Complainants, in their 9/16/97 reply, contend that Supplemental Interrogatory No. 11 asks a question that has already been asked and answered, in that Interrogatories Nos. 9, 10, 11, 25, 28 and 29 of Defendants' First Set of Interrogatories covered the same ground as does Interrogatory No. 11 of Defendant's Supplemental Set of Interrogatories. Complainants maintain that the documents they produced in response to the earlier interrogatories gave defendants the very information they now seek again. Complainants indicate that among the documents they had previously produced were documents that disclosed that complainants hoped to obtain rates that would yield defendants 180% of their variable costs. Complainants add, in essence, that our action with respect to this aspect of defendants' 8/27/97 motion to compel should be governed by the action we took with respect to the "document index" aspect of complainants' own 4/3/97 motion to compel.

Defendants, in their 9/26/97 reply, note: that Supplemental Interrogatory No. 11 asks whether complainants have any written or unwritten policies or goals for securing transportation rates; that the documents cited by complainants were prepared by consultants and provide an estimate of the carriers' variable costs and a projected rate based on 180% of those costs; and that if it is complainants' policy to obtain a rate at 180% of a carrier's variable costs, complainants should so state affirmatively and should also indicate whether that is their sole policy.

Complainants, in their 10/16/97 motion, state that they desire to obtain the lowest possible transportation rates and the best possible transportation services, consistent with, and responsive to, the demands and desires of their customers.

Defendants, in their 11/5/97 reply, claim that Supplemental Interrogatory No. 11 remains unanswered. Complainants, defendants note, have discussed their transportation policies only in the most general terms, but have not discussed whether complainants actually have information concerning any particular policy or goal put forth or adopted by complainants for securing transportation rates. Complainants, defendants add, should be compelled either to provide affirmative narrative responses to Supplemental Interrogatory No. 11 or to state affirmatively that complainants have no such information.

We will grant the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 11. That interrogatory asks, in essence, that complainants: state whether they have any policies, written or unwritten, that provide instructions, strategies, or goals for securing transportation rates; identify and describe any such policies; and identify, by Bates numbers, any previously produced responsive documents. Complainants have already described what might be called their primary policy in this field (the policy of obtaining the best possible services at the lowest possible rates), and they should complete their response to Supplemental Interrogatory No. 11 by identifying and describing any other policies they may have, if indeed they have any other policies at all, that provide instructions, strategies, or goals for securing transportation rates. The regulation that provides that production of a document is a sufficient answer to an interrogatory where the answer to the interrogatory may be derived or ascertained from the document, see 49 CFR 1114.26(b), is not applicable in this context; the failure to produce any, or more than a very few, documents does not provide an adequate answer to Supplemental Interrogatory No. 11.

Our action with respect to this aspect of defendants' 8/27/97 motion to compel is not governed by the action we took with respect to the "document index" aspect of complainants' 4/3/97 motion to compel. The subject matter of Supplemental Interrogatory No. 11 is such that there are likely to be few, if any, documents that are responsive to this interrogatory. Accordingly, complainants, in providing a further answer to Supplemental Interrogatory No. 11, should identify any previously produced documents by Bates numbers.

Supplemental Interrogatory No. 12. Defendants' Supplemental Interrogatory No. 12 asks complainants to state whether they have any written or unwritten policies (including guidelines, directives, manuals, memoranda or practices, and specifically including both general policies that would encompass PET and any specific policies addressed to PET) providing instructions, strategies, or goals for reducing costs, including but not limited to transportation costs. If complainants indeed have such policies, Supplemental Interrogatory No. 12 further asks that they identify and summarize the contents of any such written documents and identify and describe briefly any such non-written policies, practices, directives, or guidelines. Supplemental Interrogatory No. 12 adds that, if complainants contend that documents responsive to this interrogatory have already been produced, complainants should identify such documents by Bates numbers.

Complainants responded to defendants' Supplemental Interrogatory No. 12 by stating that they objected on the ground that, "pursuant to the stipulation of the parties [hereinafter referred to as

the 6/5/96 stipulation], as set forth in a letter agreement, dated June 5, 1996, Defendants agreed that during the market dominance phase of this proceeding they would pose no interrogatory or [and] seek the production of no document pertaining to the costs of Shell's production of PET or the profitability of its sales." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 8-9.

Defendants, in their 8/27/97 motion to compel, argue that Supplemental Interrogatory No. 12 does not ask for information concerning complainants' costs or profitability but merely asks whether complainants have any policies, etc., for reducing their costs. This interrogatory, defendants claim, is intended to elicit generic information concerning the way in which complainants seek to reduce their costs and the extent to which transportation is a factor in their cost reduction program.

Complainants, in their 9/16/97 reply, insist that the 6/5/96 stipulation covers any question and any document relating to any study, report, or analysis, whether prepared by complainants, outside consultants, or any other person, which refers to or relates to complainants' PET production and marketing costs.

Defendants, in their 9/26/97 reply, insist that Supplemental Interrogatory No. 12 does not ask for information respecting complainants' costs of marketing or producing PET, but asks only for information respecting the cost-containment policies, practices, and procedures followed and advocated by complainants' purchasing department, their transportation services purchasing department or group, and any other department which purchases goods and services and has strategies for reducing such costs.

Complainants, in their 10/16/97 motion, insist that the information sought in Supplemental Interrogatory No. 12 falls squarely within the scope of the 6/5/96 stipulation.

Defendants, in their 11/5/97 reply, insist that complainants should be compelled to respond to Supplemental Interrogatory No. 12.

The 6/5/96 stipulation is apparently set out at p. 2, in the first two sentences of the second full paragraph, of the letter signed by Samuel M. Sipe, Jr., and addressed to Fritz R. Kahn, and dated June 5, 1996, which appears in the record as Attachment 2 to the pleading, also dated June 5, 1996, that is titled "Joint Status Report on Resolution of Discovery Disputes and Motion to Adopt Stipulated Protective Order." The stipulation provides, in essence, that, during the "market dominance phase" of this proceeding, defendants will not seek information respecting the component costs of complainants' production of PET and the profitability of complainants' sales of PET. Relying upon this stipulation, we will deny the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 12, but only insofar as that interrogatory seeks (as indeed it does seek) information respecting the costs of complainants' production of PET or the profitability of complainants' sales of PET.

The fact remains, however, that Supplemental Interrogatory No. 12 also seeks cost information that has nothing to do with the matters covered by the 6/5/96 stipulation. We will therefore grant the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 12, but only insofar as that interrogatory seeks (as indeed it does seek) information not covered by the 6/5/96 stipulation. As defendants note, "the disclosure of generic company policies or strategies concerning cost reductions would not reveal any specific Shell costs. Any specific cost information on a responsive document could be redacted." See defendants' 8/27/97 motion at 5 (emphasis added).

Supplemental Interrogatory No. 13. Defendants' Supplemental Interrogatory No. 13 has reference to certain meetings or discussions held by complainants' personnel and CSXT personnel on certain dates in 1994, 1995, and 1996. With respect to each such meeting or discussion, this interrogatory asks that complainants: identify the complainants' personnel involved; state whether complainants made any presentations or handed out any materials at such meetings or during such discussions; identify and summarize the contents of any such presentations or handouts; identify and summarize the contents of all documents, notes, calendar entries, journal entries, or other memorializations of such meetings or discussions; and identify by Bates numbers any previously produced responsive documents.

Complainants responded to defendants' Supplemental Interrogatory No. 13: by identifying the complainants' personnel who had attended these meetings or discussions; by indicating that there had been no handouts; and by stating that "[i]nsofar as there are any documents, notes, calendar entries, journal entries or other memorializations of such meetings [or] discussions, they have been produced in response to, among others, Interrogatories Nos. 10, 11, 26, 28, 29, 33 and 37 of Defendants' First Set of Interrogatories to Complainants. See, for example, Bates stamp nos. 07895-07897. To the extent that the request seeks to have Complainants review all produced documents and identify by Bates stamp number each and every document produced in response to Interrogatories Nos. 10, 11, 26, 28, 29, 33 and 37 of Defendants' First Set of Interrogatories to Complainants, Complainants object to such a request as unduly burdensome, noting that Defendants can as readily review the documents, in their possession for no less than ten months' time, to make such identification." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 9-10.

Defendants, in their 8/27/97 motion to compel, maintain that complainants should be compelled to provide the Bates ranges of the department or files from which the documents called for by Supplemental Interrogatory No. 13 can be found.

Complainants, in their 9/16/97 reply, contend, in essence, that our action with respect to this aspect of defendants' 8/27/97 motion to compel should be governed by the action we took with respect to the "document index" aspect of complainants' 4/3/97 motion to compel.

Defendants, in their 9/26/97 reply, state that they have been unable to locate, from among the documents previously produced by complainants, any documents concerning the Supplemental Interrogatory No. 13 meetings or discussions. Defendants maintain that complainants should be compelled either to affirmatively state that there are no responsive documents or to indicate the Bates range within the documents previously produced where such documents would most likely be found.

Complainants, in their 10/16/97 motion, state that they "certainly have no way of disputing Defendants' assertion [that defendants have located no documents responsive to Supplemental Interrogatory No. 13] and can only conclude that, since the entire contents of the files of Shell's land transportation department pertaining to CSX Transportation were produced, see documents Bates stamped nos. 07757-08703, [] there must not be any." See complainants' 10/16/97 motion at 4.

Defendants, in their 11/5/97 reply, state that complainants "have now satisfactorily responded" to Supplemental Interrogatory No. 13, because complainants, in their 10/16/97 motion, (a) have indicated that any documents responsive to Supplemental Interrogatory No. 13 would be kept in the department files identified in response to Supplemental Interrogatory No. 8, and (b) have concluded that there must not be any such documents. See defendants' 11/5/97 reply at 3.

In light of defendants' statement that complainants have provided a satisfactory response to Supplemental Interrogatory No. 13, we will deny the 8/27/97 motion to compel insofar as it respects this interrogatory.

Supplemental Interrogatory No. 15. Defendants' Supplemental Interrogatory No. 15 asks complainants to state whether they have undertaken any of the proposed expansion plans that were discussed with defendant CSXT in April 1996. Supplemental Interrogatory No. 15 further asks that complainants: (a) for each expansion facility under construction or in existence, identify its location, the date it became or is expected to become operable, its capacity, the product(s) produced, and the anticipated geographic areas or customers to be served; (b) with respect to any facility in Mexico, state the percentage of its output that will be exported and the countries to which it will be exported; and (c) identify and summarize the contents of any documents relating to the impact of such facilities on defendants' rail services.

Complainants responded to defendants' Supplemental Interrogatory No. 15 by stating that, "[i]nsofar as there are any, documents responsive to this interrogatory have been produced in response to Interrogatories Nos. 6 and 7 of Defendants' First Set of Interrogatories to Complainants. See, for example, Shell's Bates stamped documents nos. 01433-01482 and 02342-02358." See complainants' 8/20/97 responses (Attachment A to defendants' 8/27/97 motion to compel) at 11.

Defendants, in their 8/27/97 motion to compel, argue that the documents referenced by complainants do not answer Supplemental Interrogatory No. 15 insofar as it seeks information on whether any of the planned plant expansions have in fact been constructed and/or are operational.

Complainants, in their 9/16/97 reply, have supplemented their response to Supplemental Interrogatory No. 15 to state: that it is anticipated that their PET plant at Altamira, Mexico, will not come on line until some time in the fourth quarter of 1997; that the plant is expected to have a capacity of approximately 190,000,000 pounds of PET annually; that the output of the plant is targeted for sales in Mexico City, Monterey, and Guadalajara; that approximately 30% of the production of the plant is expected to be exported; and that it is anticipated that orders for PET from several South American countries will be filled from the Altamira PET plant, rather than from the Apple Grove PET plant.

Defendants, in their 9/26/97 reply, note that complainants, in their 9/16/97 reply, "responded for the first time" to Supplemental Interrogatory No. 15. See defendants' 9/26/97 reply at 1.

We will deny the 8/27/97 motion to compel insofar as it respects Supplemental Interrogatory No. 15. Although defendants have not formally withdrawn their motion to compel a response to Supplemental Interrogatory No. 15, the context suggests, and we therefore conclude, that complainants have fully answered this interrogatory.

Conclusion. This decision should resolve all outstanding discovery disputes. We urge the parties to complete discovery expeditiously so that this proceeding can finally move toward resolution.

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

It is ordered:

1. Complainants' 10/16/97 motion is denied insofar as it seeks to strike defendants' 9/26/97 reply, and defendants' 9/26/97 reply is accepted for filing and made part of the record in this proceeding.
2. Complainants' 10/16/97 motion is granted insofar as it seeks acceptance of complainants' surrebuttal material, and that material is accepted for filing and made part of the record in this proceeding.
3. Defendants' 8/27/97 motion to compel is granted as to Supplemental Interrogatories Nos. 4 and 11, and is granted in part, as explained in the text, as to Supplemental Interrogatory No. 12. Complainants should furnish their responses to defendants by December 29, 1997.
4. Except as indicated in ordering paragraph no. 3, defendants' 8/27/97 motion to compel is denied.

No. 41670

5. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary