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SERVICE DATE – JANUARY 27, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42099[1]

STB Docket No. 42100

STB Docket No. 42101

E.I. DUPONT DE NEMOURS AND COMPANY
v.
CSX TRANSPORTATION, INC.

Decided: January 23, 2009

This decision establishes a schedule for briefs in these proceedings.

BACKGROUND

In these three proceedings, E.I. du Pont de Nemours and Company (DuPont) challenged the reasonableness of certain rates charged by CSX Transportation, Inc. (CSXT) for the movement of certain commodities, including hazardous materials. DuPont elected to pursue rate relief under the Three-Benchmark methodology as clarified and modified in Simplified Standards for Rail Rate Cases, STB Ex Parte No. 646 (Sub-No. 1) (STB served Sept. 5, 2007) (Simplified Standards).

Under the Three-Benchmark methodology, the reasonableness of a challenged rate is determined by examining that challenged rate in relation to three benchmark figures. Each benchmark is expressed as a ratio of revenue to variable costs of providing rail service (R/VC ratio). The first benchmark, the Revenue Shortfall Allocation Methodology (RSAM) is intended to measure the average markup that the railroad would need to collect from all of its "potentially captive traffic" (traffic with an R/VC ratio above 180%) to earn adequate revenues as measured by the Board under 49 U.S.C. 10704(a)(2) (i.e., earn a return on investment equal to the railroad industry cost of capital). The second benchmark, the $R/VC_{>180}$ benchmark, measures the average markup over variable cost currently earned by the defendant railroad on its potentially captive traffic. The third benchmark, the R/VC_{COMP} benchmark, is used to compare the markup being paid by the challenged traffic to the average markup assessed on other comparable potentially captive traffic.

[1] These proceedings are not consolidated. A single decision is being issued for administrative convenience.

In decisions served on June 3, 2008, the Board found: (1) in STB Docket No. 42099 that CSXT had market dominance over the transportation at issue and that the challenged rates were unreasonably high; (2) in STB Docket No. 42100 that CSXT had market dominance over two of the three transportation movements at issue and that the challenged rates for those two movements were unreasonably high; and (3) in STB Docket No. 42101 that CSXT had market dominance over the transportation movement at issue and that the challenged rate was unreasonably high.

In each case, however, CSXT argued that there was a flaw with the RSAM formula. CSXT contended that the RSAM formula failed to account for the effect of taxes on the amount of money a carrier would need to earn to be revenue adequate and argued that the Board needed to adjust the RSAM figure in each case. DuPont opposed this adjustment claiming that it was not necessary to correct RSAM, that it would be inappropriate to change the RSAM formula in the context of a simplified case, and that CSXT's proposed correction was itself flawed.

The Board declined to rule on CSXT's proposed adjustment to RSAM in the context of these cases because the expedited nature of the procedures under Simplified Standards could not accommodate collateral challenges to the methodologies used. Instead, the Board instituted a separate rulemaking proceeding in Simplified Standards for Rail Rate Cases—Taxes in Revenue Shortfall Allocation Method, STB Ex Parte No. 646 (Sub-No. 2), to consider the issue and obtain broad public input.

In that rulemaking, the Board concluded that the RSAM formula did contain a material error because it mixed pre-tax and after-tax revenue.[2] The Board, therefore, changed the formula to calculate the revenue shortfall (or overage) to pre-tax dollars consistent with the other elements of the formula. Simplified Standards for Rail Rate Cases—Taxes in Revenue Shortfall Allocation Method, STB Ex Parte No. 646 (Sub-No.2) (STB served November 21, 2008). We stated that we will collect further evidence necessary to calculate carrier-specific tax rates and then publish new RSAM figures. Because of the material error in the RSAM formula, we also reopened these proceedings on our own motion in a decision served on November 21, 2008.

DISCUSSION AND CONCLUSIONS

In the decision reopening these proceedings, we stated that we would set a schedule for DuPont and CSXT to fully brief us regarding how to best apply the correct RSAM numbers in these proceedings after we published new RSAM figures. Upon reconsideration, we believe that it is not necessary to delay the submission of legal briefs on the propriety of applying revised RSAM figures to these proceedings until after the new figures are published, because the legal arguments pertaining to this issue do not depend on the final numbers established by the RSAM formula.

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[2] The revenue shortfall ($REV_{short/overage}$) – i.e., the difference between the return on net investment that a carrier needs to earn in order to achieve revenue adequacy and the amount that the carrier actually earns – is calculated after all taxes have been paid, and thus is stated on an "after-tax" basis. However, the revenues to which the revenue adequacy shortfall is added ($REV_{>180}$) are calculated before any allowance for taxes, and are thus stated on a "pre-tax" basis.

Therefore, the parties should file simultaneous briefs on whether and how the Board should apply revised RSAM figures to these proceedings. These briefs should not exceed 20 pages and should be filed by February 17, 2009. Simultaneous reply briefs, not to exceed 20 pages, are due March 9, 2009.

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

It is ordered:

1. Briefs are due on February 17, 2009.

2. Reply briefs are due on March 9, 2009.

3. This decision is effective on the date of service.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary