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SERVICE DATE – MARCH 27, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42125

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

Docket No. NOR 42130¹

SUNBELT CHLOR ALKALI PARTNERSHIP
v.
NORFOLK SOUTHERN RAILWAY COMPANY

Digest:² This decision denies as moot a request to clarify which party is responsible for the cost of a license to certain modeling software for complainants' use in these proceedings.

Decided: March 25, 2013

BACKGROUND

E.I. du Pont de Nemours and Company (DuPont) challenges the reasonableness of rates established by Norfolk Southern Railway Company (NSR) for the transportation of 27 different commodities between 139 origin and destination pairs.³ Sunbelt Chlor Alkali Partnership (Sunbelt) challenges the reasonableness of rates established by NSR for the transportation of chlorine from McIntosh, Ala., to New Orleans, La.

¹ These proceedings are not consolidated; they are being considered together for administrative purposes.

² The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

³ The original, October 7, 2010 complaint challenges the reasonableness of rates for 146 origin and destination pairs. DuPont has since filed three amended complaints. The last of these, filed December 5, 2011, is controlling, and challenges 139 origin and destination pairs.

On January 25, 2013, NSR filed a petition asking the Board to clarify that NSR is not obligated to bear the cost of providing DuPont and Sunbelt (collectively, Complainants) with certain licenses or training for the MultiRail software that NSR used in developing its reply evidence.⁴ NSR states that it used MultiRail to develop carload blocking and train service plans for the stand-alone railroads in these two proceedings.⁵ According to NSR, it has arranged for Complainants to have cost-free access to a read-only version of MultiRail, but NSR is unwilling to underwrite the cost of a full read-write version of MultiRail for Complainants' use.⁶

Also, on January 25, 2013, NSR submitted a letter to the Board offering an arrangement under which the Board could receive access to the full read-write version of MultiRail, loaded onto a laptop computer, at no cost to the Board. On February 11, 2013, the Director of the Board's Office of Proceedings (Director) sent a letter in reply, declining NSR's offer due to concerns related to the Antideficiency Act, as well as record-keeping issues.⁷ On February 13, 2013, NSR submitted a letter replying to the Director's letter.

Complainants filed a reply in opposition to NSR's petition on February 14, 2013. NSR submitted a surreply on February 22, 2013, together with a motion for leave to file a surreply. On February 27, 2013, Complainants submitted a surreply. In the interest of compiling a more complete record, we will accept the surreplies.

DISCUSSION AND CONCLUSIONS

NSR has already arranged for Complainants to receive a read-only version of MultiRail.⁸ The only question presented to the Board is whether NSR would be required to bear the cost of providing Complainants with licensing and training for a full read-write version of MultiRail. However, we need not reach that question here, because Complainants, in their February 27 surreply, refer to the two versions of MultiRail and state that they "do not seek specific functionality; they only seek the same functionality as [NSR] provides the Board."⁹ Complainants emphasize that their argument, both in their surreply and their February 14 reply, is not that they seek the full read-write version of MultiRail to prepare their rebuttal evidence, but only that they are "entitled to the same MultiRail package as [NSR] gives the Board."¹⁰

⁴ See Pet. 2.

⁵ *Id.* at 3.

⁶ *Id.* at 13.

⁷ See 2 Principles of Federal Appropriations Law, GAO-06-382SP, at 6-222, 223 (3d ed. 2006); 31 U.S.C. §§ 1341-42.

⁸ See Pet. 13.

⁹ Complainants Surreply 5.

¹⁰ See *id.*

Complainants add that, “[g]iven the Board’s refusal to accept [NSR’s] MultiRail package, Complainants agree with [NSR’s] assertion that this point is moot.”¹¹

The Board agrees. As the Director stated in her February 11 letter, the Board will not accept any MultiRail software or training at NSR’s expense.¹² Complainants’ position—that they should receive the same package provided to the Board—therefore must mean that they are not requesting any MultiRail package from NSR at this point beyond the read-only version they have already been given.¹³ Accordingly, the question presented in NSR’s petition requires no clarification, and the petition will be denied as moot.

The parties are reminded that rate proceedings before the Board involve an adjudicatory process in which the Board relies on each party to make its own case and critique the other party’s case. Should the Board decide to rely on a certain type of evidence—an issue we are not deciding at this time—the fact that the Board does not have a particular software program does not mean we would be unable to evaluate that evidence.¹⁴

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

It is ordered:

1. NSR’s petition for clarification is denied as moot.
2. NSR’s February 22 surreply and Complainants’ February 27 surreply are accepted into the record.

¹¹ Id.

¹² As the Director’s February 11 letter also indicated, sequestration and other budgetary constraints prevent the Board, at this time, from purchasing a MultiRail license for itself. See Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240; Am. Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313.

¹³ The Board is aware of Complainants’ argument that, if the Board were to accept any MultiRail package from NSR later on, Complainants would be entitled to the same arrangement. See Complainants Surreply 3. However, as noted, the Board does not intend to accept a MultiRail package at NSR’s expense in these proceedings, and thus it need not reach that issue here.

¹⁴ For example, the Board could decide to further evaluate MultiRail blocking and train service evidence by convening a technical conference with Board staff and all parties present.

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

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.