

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42099¹

STB Docket No. 42100

STB Docket No. 42101

E.I. DUPONT DE NEMOURS AND COMPANY

v.

CSX TRANSPORTATION, INC.

Decided: January 22, 2008

On August 21, 2007, E.I. du Pont de Nemours and Company (DuPont) filed three separate complaints challenging the reasonableness of rates charged by CSX Transportation, Inc. (CSXT) for the movement of non-exempt commodities, including hazardous materials. In its complaints DuPont stated that it intended to pursue relief under the simplified procedures in Rate Guidelines—Non-Coal Proceedings, 1 S.T.B. 1004 (1996).

In September 2007, the Board clarified and modified its simplified procedures for rate reasonableness complaints, in Simplified Standards for Rail Rate Cases, STB Ex Parte No. 646 (Sub-No. 1) (STB served Sept. 5, 2007) (Simplified Standards), *pet. for review docketed*, No. 07-1369, *et al.* (D.C. Cir. Sept. 18, 2007). That decision established a simplified Stand-Alone Cost (Simplified-SAC) methodology for medium-size rate disputes and modified the Three-Benchmark method for the smallest cases.² Simplified Standards also established limits on the relief available under the Three-Benchmark method (\$1 million in relief over 5 years) and under the Simplified-SAC method (\$5 million over 5 years).

At the Board's direction, DuPont supplemented its complaints to conform to the Board's decision in Simplified Standards, on October 30, 2007. DuPont elected to pursue relief under the Three-Benchmark methodology for all three complaints. Consistent with Simplified Standards, DuPont requested access to data from the unmasked Carload Waybill Sample for the 4 years

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

² Under the Three-Benchmark method, the reasonableness of a challenged rate is to be determined by examining that challenged rate in relation to three benchmark figures. Each benchmark is expressed as a ratio of revenues to variable costs of providing rail service.

corresponding to the most recent Revenue Shortfall Allocation Method (RSAM) calculation.³ As the 2005 RSAM figure had not yet been released, the Board released data from 2001-2004 to the parties.

On December 7, 2007, CSXT filed a petition to hold these proceedings in abeyance until the Board made the 2006 Waybill Sample available to the parties. CSXT also filed a motion to clarify that \$1 million is the maximum available relief in each case. DuPont filed a response on December 19, 2007, opposing the request to hold these proceedings in abeyance and arguing that the \$1 million relief limit should not be applied on a per-case basis but rather on an origin/destination rate-by-rate basis.

As discussed below, we will deny CSXT's petition to hold these proceedings in abeyance and will clarify the amount of relief available in a case involving the Three-Benchmark approach.

DISCUSSION AND CONCLUSIONS

Request to Hold the Proceedings in Abeyance

CSXT asks to hold these proceedings in abeyance until the Board issues the 2006 Waybill Sample and corresponding 2006 RSAM figures, arguing that movements from 2001-2004 cannot provide a meaningful comparison group for rates established in June 2007. CSXT maintains that the regulatory lag due to the lack of more recent data would undermine the accuracy of any comparison between rates, due to substantial changes in market conditions, rates and costs over the last several years. CSXT asserts that the lag in this case is more serious than the Board had contemplated in Simplified Standards and would create an inappropriate rate reasonableness determination in light of substantial industry-wide changes in rail rates during this period, and in chemical rates in particular.

We conclude that holding these cases in abeyance is not warranted. The 2005 RSAM figures are now available to the parties and the parties have now also received data from the 2005 Waybill Sample.⁴ To delay these proceedings until 2006 data are available would not be appropriate. There is no clear timeframe for when the 2006 data would become available, as 2006 RSAM calculations must be preceded by a 2006 cost-of-capital determination and 2006 revenue-adequacy determinations. Even in the best of circumstances, it will take us considerable time before the 2006 information would be available for these cases.

Because of the nature of data collection, there will always be some degree of regulatory lag. Simplified Standards therefore allows for parties to "present (as 'other relevant factors') evidence that the presumed maximum lawful rate should be higher, or lower, due to market

³ RSAM is a benchmark that measures the average markup that the railroad would need to charge all of its potentially captive traffic in order for the railroad to earn adequate revenues as measured by the Board under 49 U.S.C. 10704(a)(2).

⁴ The 2005 RSAM calculation was released in Rate Guidelines—Non Coal Proceedings, STB Ex Parte No. 347 (Sub-No. 2) (STB served Dec. 11, 2007).

changes not reflected in the comparison group or the average RSAM and $R/VC_{>180}$ ⁵ benchmarks.” Simplified Standards at 85. Thus, the parties can present evidence, not reflected in the Waybill Sample, that they think is relevant to show changes in market conditions, rates, and costs.

Accordingly, CSXT request to hold these cases in abeyance will be denied.

Request for Clarification

In STB Docket No. 42099, DuPont challenged three separate rates for movements of plastics between various origins and destinations. In STB Docket No. 42100, DuPont challenged three separate rates for movements of chlorine between various origins and destinations. DuPont takes the position that, under Simplified Standards, the limit to relief is on a “per rate” basis, citing the statement in Simplified Standards (at 28) that “the limit on relief will apply to the difference between the challenged rate and the maximum lawful rate, whether in the form of reparations, a rate prescription, or a combination of the two.” Based on this interpretation, DuPont maintains that the \$1 million limit applies separately to each movement challenged in STB Docket Nos. 42099 and 42100, because there is a separate and different rate for each challenged movement.

DuPont’s interpretation is incorrect. Under DuPont’s interpretation, a complainant could receive, for example, \$50 million in relief by bundling as many as 50 origin/destination movements into a single Three-Benchmark complaint. That was not our intent. Indeed, in Simplified Standards, the Board discussed the limit on relief as a per “case” or per “dispute” limit. See Simplified Standards at 29. The Three-Benchmark and Simplified SAC monetary recovery limits are based on the Board’s estimate of litigation costs to pursue relief under the next more complex, and more precise, method. Simplified Standards at 28. The amount of relief available in a complaint invoking the Three-Benchmark method is limited to \$1 million over a 5-year period. It is not \$1 million per published rate movement, as DuPont suggests. Including multiple origin/destination movements into a Three-Benchmark complaint, each with a potential of \$1 million of relief, would easily defeat the purpose of limiting the relief available in a Three-Benchmark case. Specifically, the Board stated that “by placing limits on the relief available, we encourage shippers with larger disputes to pursue relief under the more appropriate methodology.” Simplified Standards at 28.

If DuPont wished to seek relief of up to \$1 million on each individual rate for each origin/destination pair, it needed to file separate complaints for each. DuPont argues that such an approach would elevate form over substance. We disagree. The purpose of the Three-Benchmark approach is to provide access to the regulatory process for the truly small rate dispute, not to be a vehicle for adjudicating multiple parts of a larger dispute. See Simplified Standards at 28. Requiring complainants to file individual complaints corresponding to the limits of rate relief they seek will provide the Board a way to track disputes between shippers and their rail carriers, to gauge the size, scope and costs of litigating rate disputes adjudicated

⁵ R/VC_{180} is a benchmark that measures the average markup applied by the defendant railroad on its potentially captive traffic.

under the Three-Benchmark method, and to protect the integrity of its processes from abuse by preventing any improper attempts to disaggregate a large claim into a number of smaller claims. Simplified Standards at 32-33.

Accordingly, in STB Docket No. 42099, DuPont is limited to \$1 million in total relief over 5 years. In STB Docket No. 42100, DuPont is similarly limited to \$1 million in total relief over the same period.

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

It is ordered:

1. CSXT's petition to hold these proceedings in abeyance is denied.
2. CSXT's petition for clarification is granted as discussed above.
3. This decision is effective on its date of service.

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

Anne K. Quinlan
Acting Secretary