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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 14, 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). 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.[2] Consistent with Simplified Standards, DuPont has obtained access to data from the unmasked Carload Waybill Sample for the years 2001-2005.

On December 20, 2007, DuPont filed a motion to compel responses to interrogatories and discovery requests, specifically, Interrogatory 1, and Document Request Nos. 2 and 3. Additionally, DuPont takes issue with CSXT's General Objection Nos. 7 and 11, asserting that they are overbroad. CSXT replied on December 28, 2007.

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[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 revenue to variable costs of providing rail service.

On January 2, 2008, DuPont filed a motion for leave to file a reply to CSXT's reply and that reply. CSXT filed a response on January 4, 2008, and does not object to the acceptance of DuPont's pleading.[3] As CSXT has no objection, we will accept these filings.

DISCUSSION AND CONCLUSIONS

Ordinarily, motions to compel are to be addressed in the first instance by Board staff. See Simplified Standards at 26; 49 CFR 1114.31(a)(4). Parties would then have 3 business days to appeal the decision to the Board under a stringent standard of review, 49 CFR 1115.9(b), and the Board "would attempt to rule on such appeals within 20 days after the filing of the reply to the appeal," 49 CFR 1114.31(a)(4). In this case, however, to avoid any further delay of these proceedings associated with a potential appeal of a staff decision, we have decided to address these discovery disputes in the first instance. See 49 CFR 1011.2(b) (the Board may bring before it any matter assigned to a Board employee).

1. Interrogatory No. 1

DuPont asks CSXT to identify all movements in the Confidential Waybill Sample for the years 2002 through 2005 that (A) CSXT contends that it does not have market dominance over because there is effective rail competition at both the origin and destination and (B): (1) have a revenue/variable cost (R/VC) ratio greater than or equal to 180%; (2) move in single-line CSXT service; and (3) move in tank cars. DuPont argues that this information is relevant to determining which movements from the Waybill Sample CSXT contends should be excluded from the comparable traffic group due to intramodal competition.

CSXT objects to production of such information for the years 2002-2004. CSXT maintains that the comparison group should be drawn only from the most recent year for which there are available data.

In Simplified Standards at 83, we stated we will select the comparison group based on the information contained in the Waybill Sample released to the parties at the outset of the case and other publicly available information. Because our procedures provide for 4 years of waybill data to be supplied, all of that data are available to a party in developing its comparison group.[4]

However, we will deny the motion to compel because the information sought is inadmissible in the selection group process. When formulating the Three-Benchmark approach, we were concerned that extensive discovery by the complainant to plumb the depths of the carrier's files for information potentially relevant to the selection of the comparison group would undermine our objective of a streamlined process. See Simplified Standards at 83-84. We were also aware that it would not be fair to permit a carrier to introduce evidence in its files to advocate for a particular comparison group if the shipper were not permitted broad discovery of all information that the carrier might have that would bear on the proper comparison group. We

[3] On January 8, 2008, DuPont filed a letter responding to CSXT's filing.

[4] CSXT is free to limit its own proposed comparison group to the most recent movements available and to argue that is a more appropriate group for the Board to select.

therefore provided, over the objection of several carriers, that the selection of the comparison group is to be based only on information set forth in the confidential Waybill released to parties and on any other publicly available information. Neither the carrier nor the shipper is permitted to use information from the carrier's files to advocate for a particular comparison group. This limitation places the shipper on an even playing field with the carrier, contains the costs of litigation, and expedites the discovery process. While we acknowledged that there would almost certainly be some otherwise relevant information (of the sort requested by DuPont here), no party had offered any means of controlling the litigation cost such discovery would obviously entail. See Simplified Standards at 84. Indeed, given the limited amount that is at stake in a Three-Benchmark case, discovery should not be burdensome for either side.

The information DuPont seeks falls squarely in the category of information contained in the carrier's files that, while it would otherwise bear on the proper comparison group, has been deemed inadmissible by rule in Simplified Standards. Therefore, this portion of DuPont's motion to compel will be denied.

2. Document Request No. 2

DuPont has asked CSXT to produce all "Private Price Quotations" (PPQs) for movements in the Confidential Costed Waybill Sample for the years 2002 through 2005 that: (1) have an R/VC ratio greater than or equal to 180%; (2) move in single-line CSXT service; and (3) move in tank cars. DuPont asserts that it needs this information to demonstrate to the Board that the movements are comparable to the issue movements.

CSXT argues that the production of this information would be burdensome, especially in light of the marginal relevance that the historical information would provide. CSXT has produced the requested information only for the 2004 Waybill Sample and states that to identify documents responsive to DuPont's request in that year entailed a time- and labor-intensive special study.

As discussed above, selection of the comparison group will be based only on information contained in the waybill data released to the parties and any publicly available information. Because neither the carrier nor the shipper is permitted to use information from the carrier's files to advocate for a particular comparison group, there is no need for a shipper to obtain discovery of information of the sort contemplated in Document Request No. 2. Therefore, this portion of DuPont's motion to compel will also be denied for that reason.

3. Document Request No. 3

DuPont has asked CSXT to produce annual density charts and/or tables showing density by line segment by direction for the entire CSXT system for 2001 through 2006 and explain how the density is measured and what is included in the calculations. CSXT states that it produced the requested documents on December 19, 2007. Therefore, this portion of the motion to compel is now moot.

4. General Objections Nos. 7 and 11

DuPont takes issue with CSXT's General Objections Nos. 7 and 11. In General Objection No. 7, CSXT objected to the production of classified documents and documents prohibited from disclosure. DuPont asserts that this objection to production is overbroad. According to CSXT, however, the carrier did not ultimately withhold responsive information on this ground. Therefore, issues regarding Objection No. 7 are moot.

In General Objection 11, CSXT objected to the answering of interrogatories and production of documents prior to January 1, 2005. DuPont asserts that this objection to production is also overbroad. We agree that CSXT cannot exclude the production of information based on a cut-off date of its choosing that would have the effect of limiting the information produced to a subset of the actual universe of discoverable information. Therefore, DuPont's motion to compel CSXT to produce documents prior to January 1, 2005, is granted to the extent such documents are discoverable. As discussed previously, however, information contained in the carrier's files that would bear on the proper comparison group is not discoverable in a Three-Benchmark proceeding because neither the carrier nor the shipper can rely on that information. The only information the parties can rely on for creating and advocating their comparison groups is the 4 years of waybill data released to the parties and any publicly available information.

It is ordered:

1. DuPont's motion to compel responses to interrogatories and document requests is granted in part and denied in part, as set forth in this decision.

2. The parties' motions to file additional pleadings are granted.

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