

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42125

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

Decided: September 11, 2012

This decision grants a request by Norfolk Southern Railway Company (NSR) to modify the procedural schedule.

By decision served on February 24, 2011, the Board established a procedural schedule for the challenge by E.I. du Pont de Nemours and Company (DuPont) to the reasonableness of rates established by NSR. In multiple decisions, the most recent served on June 12, 2012, the Board has granted requests to modify the procedural schedule.

On August 17, 2012, NSR filed a motion to modify the procedural schedule, requesting an extension of 60 days for submission of each of the remaining pleadings.<sup>1</sup> NSR argues that the extension is warranted by the complexity of the case and deficiencies in DuPont's opening evidence. On August 31, 2012, NSR submitted a letter to the Board noting that DuPont had recently produced to NSR for the first time two additional workpapers that DuPont omitted from its opening evidence.

In its reply filed August 27, 2012, DuPont acknowledges the large scope and complexity of this rate complaint proceeding, but opposes NSR's motion on the grounds that NSR has previously stated it will seek dismissal of DuPont's complaint if this proceeding is not resolved by October 7, 2013. This date is three years after DuPont's filing of the complaint, and NSR has maintained that 49 U.S.C. § 11701(c) requires that this proceeding be resolved within three years.<sup>2</sup> DuPont argues that granting the requested extension would put the case in jeopardy of exceeding this alleged deadline. DuPont further argues that much of the delay in this proceeding

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<sup>1</sup> On August 6, 2012, NSR filed a motion to hold this proceeding in abeyance. DuPont filed a reply to that motion on August 27, 2012. That motion is currently pending before the Board.

<sup>2</sup> NSR's Reply to DuPont's Second Motion to Modify Procedural Schedule 23-25, Dec. 20, 2011.

has been the result of NSR's actions – an objection to production of traffic data on grounds that it was Sensitive Security Information (SSI),<sup>3</sup> and omissions in NSR's initial traffic data production.

NSR's motion to modify the procedural schedule will be granted, and the procedural schedule in this proceeding will be revised as described below. The delayed workpaper production by DuPont combined with the complexity of this case is sufficient to justify the extension that NSR seeks. While DuPont has expressed concerns regarding the three-year dismissal provision of § 11701(c), the Board has previously held that the deadline does not apply to rate cases initiated by complaint. W. Fuels Ass'n & Basin Elec. Power Coop. v. BNSF Ry., NOR 42088, slip op. at 9 (STB served Feb. 18, 2009), appeal denied in part, BNSF Ry. v. STB, 604 F.3d 602, 608-11 (D.C. Cir. 2010) (declining to decide the § 11701(c) issue because the carrier failed to raise the argument to the Board in a timely manner); AEP Tex. N. Co. v. BNSF Ry., NOR 41191 (Sub-No. 1) (STB served Nov. 13, 2006); Complaints Filed Pursuant to the Savings Provisions of the Staggers Rail Act of 1980, 367 I.C.C. 406 (1983). Furthermore, while no determination is being made here on the issue of waiver, the Board has held that a defendant can waive the issue through its course of conduct in a case. See AEP Tex. N. Co. v. BNSF Ry., slip op. at 6 (holding that where a defendant agrees to an extended schedule, fairness precludes that defendant from claiming the complaint must be terminated after the three-year period).

NSR's request for an extension of time will be granted, and the Board will adopt the following modified procedural schedule:

Defendant's Reply	November 30, 2012
Complainant's Rebuttal	March 28, 2013
Closing Briefs	May 8, 2013

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

It is ordered:

1. The procedural schedule in this proceeding is revised as described above.
2. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

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<sup>3</sup> NSR had taken the position that it could not provide the discovery requested because the relevant traffic event files contained SSI, pursuant to 49 C.F.R. §§ 15.5(a) and 1520.5, that could not be produced without authorization from the Secretaries of Transportation and Homeland Security. See NSR's Reply to DuPont's Motion to Modify Procedural Schedule, July 11, 2011.