

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 31, 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.

On December 20, 2007, DuPont filed a motion to compel responses to interrogatories and discovery requests. In a decision served on January 15, 2008, the Board granted in part and denied in part DuPont's motion to compel discovery (January 15 decision). The January 15 decision granted DuPont's motion to compel CSXT to produce documents in existence prior to

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.

January 1, 2005, to the extent such documents were otherwise discoverable. The January 15 decision also denied the other requests to compel discovery as moot or because the information sought was inadmissible for the purposes sought.

On January 18, 2008, CSXT filed a motion for clarification of the Board's January 15 decision. Specifically, CSXT asks whether: (1) parties can rely on information not provided in the Waybill Samples released to the parties by the Board and not publicly available in their evidentiary submissions or arguments regarding the comparison groups and comparability of Waybill Sample movements; (2) the prohibition against use of information "from carrier's files" applies equally to use of information from the shipper's files; (3) information produced by CSXT in discovery that falls within categories of information prohibited by the January 15 decision is inadmissible in these proceedings; (4) parties can use information not contained in the Waybill Samples or publicly available for other parts or phases of these Three-Benchmark cases; (5) commodity type, traffic densities of likely routes involved, demand elasticity, captivity of traffic group, and type of movement (contract or common carriage) are relevant factors for determining comparability and how will those factors be evaluated and presented in cases where evidence can only be drawn from the Waybill Samples and publicly available information; and (6) parties should rely on the Waybill Samples "Calculated Rate Flag" field as definitive evidence of whether a particular Waybill Sample record concerns a contract movement or a common carrier movement.

DuPont filed a response on January 22, 2008. DuPont disputes the need for clarification and asks the Board to sanction CSXT for continuously filing what DuPont deems to be frivolous motions designed to postpone these proceedings. CSXT replied to the request for sanctions on January 24, 2008.

DISCUSSION AND CONCLUSIONS

As the first cases brought under Simplified Standards, it is not unreasonable for CSXT to seek guidance and clarification regarding the Three-Benchmark methodology. We will therefore address its request for clarification below and deny DuPont's request for sanctions. We are mindful of the potential for abuse, however, and will continue to expedite these proceedings.

Under the Three-Benchmark methodology, the reasonableness of the challenged rate is to be considered in comparison with the carriers' other rates. Both parties must tender a comparison group of traffic to the Board, which will select one or the other to be used in the proceeding. Both Simplified Standards and the January 15 decision state that the information that can be used to determine the comparison group is limited to information contained in the Waybill Samples released to the parties and other available public information. The Board specifically so limited the sources a party could use in determining a comparable traffic group to place the parties on an even playing field, contain the costs of litigation, and expedite the discovery process. Simplified Standards at 84.

The purpose of such limited discovery in Three-Benchmark cases is to balance the burden of discovery with fairness to all parties. The Board was concerned that extensive discovery by the complainant of the carrier's files for information potentially relevant to the selection of the comparison group would undermine the objective of a streamlined process. It would not be fair to allow a carrier to introduce evidence in its files to advocate for a particular comparison group if the shipper was not permitted broad discovery of all information that the carrier might have that would bear on the selection of the comparison group. Nor would it be fair to allow a shipper to introduce evidence in its files to advocate for a particular comparison group if the carrier was not permitted broad discovery of all information that the shipper might have that would bear on the selection of the comparison group. Thus, we clarify here that the prohibition against use of information "from carrier's files" applies equally to information from shipper's files.

Once the parties have tendered their final comparison group of traffic, the Board will select the traffic group that it concludes is most similar in the aggregate to the issue movement. The Board held that "comparability will be determined by reviewing a variety of factors, such as length of movement, commodity type, traffic densities of the likely routes involved, and demand elasticity." See Simplified Standard at 17. Additionally, the comparison group should be made up of "captive traffic over which the carrier has market power," and holding every thing else constant, a comparison group that consists of just common carrier traffic will be selected over a group that includes contract traffic." Id. This is not an exclusive or exhaustive list and because of the limited source material not every case will have evidence of every possible factor that might be relevant to comparability.

CSXT, however, asserts that without evidence from outside the Waybill Sample, neither the Board nor the parties could evaluate the above factors. We disagree. The length of movement, commodity type, and contract or common carrier status is readily available in the Waybill Sample. To limit disputes the parties should take the Waybill Sample's "Calculated Rate Flag" field as definitive evidence of whether a particular Waybill Sample record is a contract movement or a common carrier movement. The parties are free to argue, however, that based on publicly available data such a distinction does not render movements less comparable to the traffic at issue.

Demand elasticity and captivity are concepts that are neither directly measurable nor lend themselves to expedited consideration of the reasonableness of rail rates. See Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 527 (1985), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987) (noting the amount of data and degree of analysis required to calculate the marginal cost and elasticity of demand "seemed overwhelming"); Market Dominance Determinations—Product and Geographic Competition, 5 S.T.B. 492 (2001), aff'd sub. nom. AAR v. STB, 306 F.3d 1108 (2002) (observing the complexity of the market dominance inquiry). In Rate Guidelines—Non-Coal Proceedings, 1 S.T.B. 1004, 1025-26 (1996), the Board created a presumption that all movements in the Waybill Sample with an R/VC greater than 180% were captive. Thus, regarding demand elasticity and whether traffic is captive, the parties should look in the first instance to whether the R/VC for each movement is

above 180%. If a party believes that another methodology for measuring demand elasticity from the Waybill Sample is appropriate, it may present it for consideration in the comparison group argument.

The purpose of limited discovery is to balance the costs and burdens of discovery with fairness to all parties. Therefore, the parties are limited to information contained in the Waybill Sample and publicly available data to advocate their comparison group, with one exception. After reconsideration, we believe that additional discovery would be appropriate to address traffic densities in cases under the Three-Benchmark method. Whether traffic moves on a relatively high or low density route should bear on its comparability to the issue movements. The railroads keep traffic density charts or maps in the regular course of business and there should be a minimal burden in requiring that these charts or maps be turned over to a complainant at the start of discovery. While publicly available information exists regarding traffic densities, the railroads' records reflect the most accurate information regarding traffic density. As the traffic density maps have already been turned over in this proceeding, there is no need for additional discovery on traffic density. The parties may each rely on the traffic density maps provided during discovery to support their comparison group. However, all other evidence produced by CSXT in discovery that falls within categories of information prohibited by the January 15 decision will not be considered by the Board when selecting the comparison group.

Such information is not completely inadmissible in these proceedings. After the Board has selected the appropriate comparison group, each movement in the comparison group will be adjusted by the ratio of $RSAM \div R/VC_{>180}$. Using the formula adopted in Simplified Standards the Board will determine the maximum lawful rate to be prescribed. At that point the parties "will be permitted to introduce evidence of 'other relevant factors' to show that the maximum lawful rate should be higher or lower." Simplified Standards at 77. The party introducing the evidence is required to quantify it, so that the Board will have an objective, transparent means of adjusting the maximum lawful rate. Thus, information that cannot be used to justify a comparison group, i.e., information other than from the Waybill Sample or publicly available sources, could be used to argue that "other relevant factors" should affect the maximum lawful rate in a quantifiable way.

Because of concerns about evidentiary disputes over "other relevant factors," the Board set limits on the kind of discovery that would be permitted. Specifically, "[e]ven if the information sought is relevant, we may not permit discovery if the burden is considerable. Parties are strongly encouraged to narrowly tailor any discovery request relating to 'other relevant factors.' Parties seeking such evidence will have to show how the information requested is consistent with the expedited and simplified nature of this process." Simplified Standards at 77-78. In this case, DuPont did not seek to compel discovery of any material for use in the other relevant factors portion of the case; therefore the January 15 decision did not address these standards.

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

It is ordered:

1. CSXT's request for clarification is granted.
2. DuPont's request for sanctions is denied.
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