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January 3, 2013

Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 204231

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January 3, 2013
Part of
Public Record

RE: STB Docket No. 42125; *E.I. du Pont de Nemours & Co. v. Norfolk Southern Railway Co.*

Dear Ms. Brown:

On behalf of Complainant, E.I. du Pont de Nemours and Company (“DuPont”), I am writing in response to the letter filed by the Defendant, Norfolk Southern Railway Company (“NS”), on January 2, 2013. Although NS purports to “clarify a point of procedure,” it is in fact a direct challenge to Board precedent on a subject that NS neglected to address in its Reply Evidence, filed on November 30, 2012. Therefore, the Board should not grant any consideration to the NS letter.

The NS letter pertains to the so-called “PPL” and “Otter Tail” cross-subsidy tests that are part of a Stand-Alone Cost (“SAC”) presentation.¹ NS did not offer any evidence or argument as to these tests in its Reply Evidence. Through its January 2nd letter, NS belatedly asserts that, because its Reply Evidence shows that the DuPont Railroad’s (“DRR”) costs exceed its revenue, it was not possible for NS to conduct a cross-subsidy analysis because “no meaningful, rational, or accurate internal cross-subsidy analysis can be conducted on the DRR unless and until the Board were to issue an initial decision detailing its findings regarding all relevant costs and revenues, and finding—contrary to NS’ Reply Evidence—that the present value of SAC revenues would exceed SAC costs.” NS Letter, p. 1. Therefore, NS claims an unprecedented “right to conduct and submit an internal cross-subsidy analysis based on the DRR revenues and costs as determined by the Board,” if the Board finds that the DRR’s revenues in fact do exceed its costs. *Id.*, p. 2. NS has no such right under Board procedures.

As an initial matter, NS has not presented a valid reason for not performing a cross-subsidy analysis in its Reply Evidence. NS is not the first defendant to submit reply evidence showing that the stand-alone railroad costs exceed its revenues. Indeed, every defendant’s reply evidence attempts to make that showing. Many of those defendants nevertheless have performed a cross-subsidy analysis in accordance with the Board’s procedures and there is no reason why NS should be treated differently.

¹ Both analyses take their name from the decisions in which they were adopted. See *PPL Mont., LLC v. Burlington N. & Santa Fe Ry.*, 6 S.T.B. 286 (2002), *reconsideration denied*, *PPL Mont., LLC v. Burlington N. & Santa Fe Ry.*, NOR 42054 (served Mar. 24, 2003, *aff’d sub nom. PPL Mont. v. STB*, 437 F.3d 1240 (D.C. Cir. 2006)); *Otter Tail Power Co. v. BNSF Railway*, NOR 42071 (served Jan. 27, 2006), *aff’d sub nom. Otter Tail Power Co. v. STB*, 484 F.3d 959 (8th Cir. 2007).

The proper time for NS to have submitted cross-subsidy evidence was in its Reply Evidence. As the Board noted in *Western Fuels Ass'n, Inc. v. BNSF Ry. Co.*, NOR 42088, slip op. at 10 (served Sept. 10, 2007), a defendant which does not demonstrate an internal cross-subsidy based upon the PPL or Otter Tail tests in its reply evidence "has not met its burden to demonstrate that the SAC presentation rests upon an improper internal cross-subsidy." Therefore, having failed to perform a cross-subsidy test in its reply evidence, NS has no basis to insist upon a right to submit such evidence in a subsequent round of pleadings after the Board determines the final DRR costs and revenues.

Any doubt as to this fact in the mind of NS should have been erased by the Board's decision in *Ariz. Elec. Power Coop., Inc. v. BNSF Ry. Co. and Union Pac. R.R. Co.*, NOR 42113, slip op. at 15-16 (served Nov. 22, 2011). In that case, the defendants did perform a cross-subsidy analysis on their own version of the stand-alone railroad ("SARR"), but not on the complainant's SARR. Because the Board adopted the complainant's SARR configuration, it held that the defendants had not met their burden to demonstrate an internal cross-subsidy:

Defendants do state that the Board should conduct a PPL Montana cross-subsidy analysis on the ANR to determine whether the revenues generated by traffic using the Vaugh-El Paso segment cover the costs of that segment, and also an analysis of the prescribed rate to ensure that the rate reduction does not itself result in an impermissible cross subsidy, in accordance with guidance in Otter Tail Power Co. However, defendants make no effort to perform these analyses themselves. Defendants have performed a cross-subsidy analysis on the ANR-NM SARR, and give no reason why they have not repeated their efforts on the ANR submitted by AEPCO. Defendants could have also easily performed the Otter Tail Power Co. analysis by using the revenues associated with AEPCO's opening evidence, but have not provided the Board with evidence that the prescribed rate would necessarily have to rise to avoid creating a cross subsidy.

As the Board accepts the ANR SARR configuration, defendants have failed to challenge the relevant SARR utilizing the Board's internal cross-subsidy test. As the Board found in Western Fuels Ass'n v. BNSF Railway (western Fuels Ass'n 2007), NOR 42088, slip op. at 10 (STB served Sept. 10, 2007), when a defendant fails to identify a section of the SARR that is not self-supporting, it has not met its burden to demonstrate an internal cross subsidy, and the disputed traffic shall be included in the SAC analysis.

Id. [footnotes omitted] Thus, NS was clearly on notice that it must perform a cross-subsidy analysis in its Reply Evidence in order to meet its burden. In this case, NS did not perform a

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cross-subsidy analysis on either its version of the DRR or the DuPont version. NS's January 2nd letter, filed more than a month after its Reply Evidence, is a *post hac* rationalization of its failure.

While NS is entitled to submit its January 2nd letter claiming to reserve a right to submit supplemental cross-subsidy evidence at a later date, such letter does not in fact vest NS with any such right. DuPont submits this reply to establish for the record that no such right exists and that DuPont opposes any such attempt by NS to supplement the record with a cross-subsidy analysis now or at a future date.

Sincerely,



Jeffrey O. Moreno
