

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

---

E.I. DUPONT DE NEMOURS & COMPANY )

Complainant )

v. )

NORFOLK SOUTHERN RAILWAY COMPANY )

Defendant )

---

Docket No. NOR 42125

232870

ENTERED  
Office of Proceedings  
August 27, 2012  
Part of  
Public Record

**REPLY TO NORFOLK SOUTHERN RAILWAY COMPANY'S  
MOTION FOR MODIFICATION OF PROCEDURAL SCHEDULE**

Jeffrey O. Moreno  
Sandra A. Brown  
Jason D. Tutrone  
Thompson Hine LLP  
1919 M Street, N.W., Suite 700  
Washington, D.C. 20036  
(202) 331-8800

*Counsel for E.I. du Pont de Nemours and  
Company*

August 27, 2012



DuPont notes NS's concerns about inconsistency "with bedrock principles of fair play and due process."<sup>3</sup> But nothing is more plainly at odds with traditional notions of fair play and due process than the dismissal of a complainant's claims *merely* because the *defendant* needed more time to respond. When NS requests an extension, it does not merely seek more time to prepare its reply—NS seeks to put DuPont's claims at risk of dismissal and increase its chances of prevailing on a procedural technicality wholly unrelated to the merits of the case.<sup>4</sup>

The NS Motion requests an extension on top of two prior extensions that were not of DuPont's making. The first extension was required because NS objected to producing traffic data on grounds that it was Sensitive Security Information. This foreclosed discovery of the most critical information needed for a SAC case, until the Federal Railroad Administration issued a decision permitting disclosure to DuPont. The second extension was required by a combination of key omissions from NS's initial traffic data production and NS's belated production of additional key data needed to link much of the traffic data produced to DuPont in order to make such data useful. The cumulative effect of another extension, on top of these prior extensions, virtually ensures that this case will not be decided within three years.

Although DuPont acknowledges the complexity and scope of this proceeding, it takes issue with NS's attempt to use this Motion to attack DuPont's opening evidence in a volley of serious and unsubstantiated assertions. Those arguments should be reserved for NS's reply evidence and backed up by supporting analyses. DuPont then should be given a full opportunity to rebut them, pursuant to the procedural rules governing this proceeding. Here, however, because NS's substantive claims are not the issue, NS does not have to worry about supporting

---

<sup>3</sup> (Motion 10.)

<sup>4</sup> It is worth noting that NS separately has filed a "Motion to Hold Case in Abeyance Pending Completion of Rulemaking," filed Aug. 6, 2012, to which DuPont is separately responding. In that Motion, NS has requested an open-ended extension of the procedural schedule until the Board completes the recently-announced rulemaking in Ex Parte No. 715, *Rate Regulatory Reforms* (served July 25, 2012).

its claims or even whether its claims are based on fact. Nor does the expedited nature of this Motion permit DuPont adequate time to fully rebut NS's unsubstantiated claims.<sup>5</sup> Accordingly, NS can and does use this motion to frame its argument and attack DuPont's evidence with impunity. Not only is this practice an end run around the Board's procedural rules, but also it serves to taint this proceeding by placing bald assertions before the Board in a manner that does not allow DuPont a fair opportunity for rebuttal.

Along the same lines, the Board should ignore NS's attempt to argue its motion to hold this case in abeyance pending completion of the Board's Ex Parte 715 proceeding. NS's claim that "[i]t would be neither fair nor efficient to apply existing flawed-and-distorting rules regarding the use of cross-over traffic to this case while the Board is in the process of developing rules to fix those flaws"<sup>6</sup> is wholly irrelevant to NS's request for an extension of the procedural

---

<sup>5</sup> Below is DuPont's partial rebuttal to some of the unsubstantiated NS assertions in the short time provided to prepare this Reply:

- NS alleges that Dow's SAC analysis is deficient based upon the number of pages in its Opening Evidence Narrative. (Motion 6 n.8.) But NS totally ignores the 567 electronic files containing more than 17 gigabytes of data, including the file "DuPont\_April 30 2012\_Opening Electronic Workpaper Index.xls," which identifies all the electronic files and how they are linked.
- In response to NS's claims that DuPont has failed to account for a substantial number of local trains, (Motion 6) DuPont notes that it included all NS local trains appearing in the train event files that moved in the 2010 Base Year on the lines of the stand-alone railroad ("SARR") and included traffic in the SARR traffic group. If in fact any trains are missing, it would be due to the many flaws in the NS train event data that are discussed in Exhibit III-C-1 of DuPont's Opening Evidence.
- NS incorrectly accuses DuPont of "failing to give effect to train delay data" in the RTC Model. (Motion 9.) DuPont in fact has identified all 2009 delays experienced by NS that also would be experienced by the SARR in opening electronic workpaper "Delay\_2009(on-sarr).xlsx" and included those delays in the RTC model at the same locations for the same length of time experienced by NS.
- NS incorrectly asserts that DuPont's road property investment ignored the construction of turnouts necessary to serve customers. (Motion 6.) Electronic workpaper "DRR\_2010\_TRAFFIC\_ATC\_OT\_v2.xlsx," Tab "Summary," lists 702 unique origins and destinations, which includes customers. The allegedly missing turnouts are included in the construction costs in electronic work paper "Track Construction Costs errata.xls," Tab "User Input," cell J53.
- DuPont has identified two summary workpapers that are missing from its Opening Evidence that address NS's claim that DuPont has not indicated the number of cars that the SARR would be required to handle at its yard facilities. (Motion 6.) Those workpapers contain the number of carloads originated, received, terminated and delivered by yard in the 2010 Base Year, and the crew assignments by yard. Those workpapers are being provided to NS and the Board under separate cover. Although DuPont inadvertently omitted those "summary" workpapers, the source data from which NS could derive this information, was included in DuPont's Opening Evidence (*see* Access database titled "ATC\_REV\_WB\_Summary\_04032012," and query titled "DRR\_TRAFFIC\_2010\_VARIABLE\_COST\_INPUTS"). It is notable that NS never asked DuPont for these inadvertently omitted workpapers even though it made similar requests for missing information shortly after DuPont filed its Opening Evidence.

<sup>6</sup> (Motion 4.)

schedule to “develop and file complete evidence” under the existing rules and is emblematic of NS’s gamesmanship. DuPont has separately responded to NS’s motion to hold this case in abeyance pending completion of the Board’s Ex Parte 715 proceeding and that motion should remain separate from this motion.

This sort of gamesmanship and unfair practice is characteristic of NS. For example, by way of its motion to hold this case in abeyance pending completion of the Board’s Ex Parte 715 proceeding, NS is essentially seeking to change the “rules of the game” after DuPont has already submitted its opening evidence and developed its argument in reliance upon current SAC principals. Not only would the requested stay also put this case in grave danger of exceeding the alleged three-year statutory deadline and unfairly subject DuPont to new, unforeseen rules, but also it flies in the face of the Board’s decision that applying any resultant rule from the Ex Parte 715 proceeding retroactively and to current rate cases would be unfair to complainants like DuPont.<sup>7</sup>

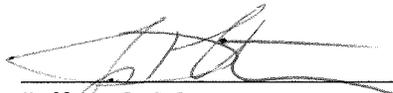
Accordingly, the Board should ignore the bulk of NS’s argument in support of its Motion and focus on the key issue: whether NS should be granted an extension in light of its claim that it will seek dismissal of this proceeding if the Board does not resolve it before the alleged statutory deadline. As mentioned above, DuPont’s concern is not that any extension of time would provide NS more time to prepare— but that it would prejudice DuPont by placing its claims in further jeopardy of dismissal. The Board should not permit such an inequitable result so long as NS threatens to use that extension to undermine DuPont’s claims and rob DuPont of its day in court. Such procedural “gimmickry” should not be sanctioned.

---

<sup>7</sup> *Rate Regulation Reforms*, STB Docket No. EP 715, slip op. at 17 n.11 (July 25, 2012).

For the foregoing reasons, DuPont respectfully requests that the Board deny NS's motion for modification of the procedural schedule.

Respectfully submitted,



Jeffrey O. Moreno  
Sandra A. Brown  
Jason D. Tutrone  
Thompson Hine LLP  
1919 M Street, N.W., Suite 700  
Washington, D.C. 20036  
(202) 331-8800

*Counsel for E.I. du Pont de Nemours and  
Company*

August 27, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that this 27th day of August 2012, I served a copy of the foregoing via e-mail and messenger upon:

G. Paul Moates  
Paul Hemmersbaugh  
Sidley Austin LLP  
1501 K Street, NW  
Washington, DC 20005  
pmoates@sidley.com  
phemmersbaugh@sidley.com

*Counsel for Norfolk Southern Railway Company*

  
\_\_\_\_\_  
Jason D. Tutrone