

Expedited Consideration Requested

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E.I. DUPONT DE NEMOURS & COMPANY)	
)	
Complainant)	
v.)	Docket No. NOR 42125
)	
NORFOLK SOUTHERN RAILWAY COMPANY)	
)	
Defendant)	
)	

MOTION TO MODIFY PROCEDURAL SCHEDULE

E.I. du Pont de Nemours and Company (“DuPont”), hereby submits this “Motion To Modify Procedural Schedule” in the above-captioned proceeding. Under the current procedural schedule, DuPont’s opening evidence is due on January 31, 2011. DuPont requests a 90 day extension due to its inability to utilize the traffic data¹ produced by Norfolk Southern Railway Company (“NS”) until November 2011. DuPont has requested the consent of defendant, Norfolk Southern Railway Company (“NS”), to this Motion, which NS has refused to grant. **DuPont requests expedited consideration of this Motion because there are only 50 days before DuPont’s Opening Evidence is due. In order to expedite a decision, DuPont proposes that NS respond to this Motion by Friday, December 16, 2011.**

In a decision served on August 25, 2011 the Surface Transportation Board (“Board” or “STB”) adopted the current procedural schedule. This was a modification of the original procedural schedule adopted in a decision served on February 24, 2011. The original schedule established June 30, 2011 as the “Close of Discovery” for this proceeding and October 31, 2011

¹ In this Motion, DuPont uses the term “traffic data” to encompass waybill data, car movement data, intermodal unit movement data, train movement data, mileage data, haulage data, handling line data, switching data, TCS/TDIS movement and revenue data, density data, and all information and decoders needed to link, understand, and utilize the data. This is the quintessential data needed to design, build, and evaluate the SARR.

Expedited Consideration Requested

as the due date for DuPont's Opening Evidence. However, there was a substantial delay in the production of traffic data by NS, without which DuPont could do almost nothing to develop its Stand-Alone Railroad ("SARR"). The delay was caused by NS assertions that its traffic data contained Sensitive Security Information ("SSI") that it could not produce to DuPont without authorization from the Federal Railroad Administration ("FRA"). Therefore, DuPont and NS agreed to approach FRA jointly with the Board to obtain a determination of the SSI status of the NS traffic data; and, if such data was SSI, to determine under what circumstances that data could be produced by NS to DuPont. The FRA took three months, until August 1, 2011, to issue its determination that the NS traffic data was SSI that could be produced to DuPont only under specified conditions. By that time, the original discovery window had closed and the due date for DuPont to submit its opening evidence had become completely unrealistic.

Therefore, on August 9, 2011, DuPont filed an unopposed motion to adopt the current procedural schedule. In that Motion, DuPont noted that the SSI issue had caused a three month delay in the original procedural schedule and requested that all dates in the procedural schedule be extended accordingly. DuPont also noted that NS had only recently produced its traffic data and that DuPont needed sufficient time to review and understand the data, and to develop its stand-alone cost ("SAC") evidence from that data. In other words, DuPont asked the Board merely to preserve the *status quo* that would have existed in the original procedural schedule but for the SSI issue raised by NS. In its August 25 decision, the Board granted DuPont's motion and established September 30, 2011 for the Close of Discovery and January 31, 2012 for the submission of Opening Evidence.

However, the process of producing, reviewing, and understanding the NS traffic data has been much more complicated than anticipated. While NS first produced traffic data on August 3,

Expedited Consideration Requested

2011,² promptly after the FRA determination, it did not produce mileage information associated with the traffic data until August 31, 2011,³ which immediately caused a one-month delay in DuPont's ability to analyze the data, since without that mileage information, the data was unusable. On September 9, 2011, DuPont sent a letter covering a broad range of discovery topics, including multiple requests for decoders in order to understand various traffic data files and information on how to link various data files.⁴

Shortly thereafter, DuPont identified two other major deficiencies in the traffic data, which rendered the data still unusable by DuPont. As noted in a September 21, 2011 letter, DuPont determined that NS had provided incomplete car event data set for both its 2009 and 2010 data. Specifically NS did not include car movement data for its unit train movements and NS had failed to provide any intermodal unit movement data, without which it was impossible to effectively begin the process of selecting the traffic group for the SARR.⁵ Only through its own laborious efforts was DuPont able to ascertain the cause of the problem and that DuPont could not fix the problem on its own. Therefore, DuPont asked NS to revisit its data production process to identify the causes for and full scope of this and any other deficiencies and to replace its original production with a complete data set.

While waiting for NS to respond to the September 21 letter, DuPont diligently continued to review the NS traffic data for any additional issues. On September 26, 2011, DuPont sent a letter that identified various decoders that it needed to understand the data.⁶

On September 29, 2011, NS responded to DuPont's September 21 letter by producing replacement car event files to correct one of the two deficiencies that DuPont had identified.⁷

² Exhibit "A," Aug. 3, 2011 letter from Matthew J. Warren to Sandra L. Brown.

³ Exhibit "B," Aug. 31, 2011 letter from Matthew J. Warren to Jeffrey O. Moreno.

⁴ Exhibit "C," Sept. 9, 2011 letter from Jason D. Tutrone to Hanna Chouest.

⁵ Exhibit "D," Sept. 21, 2011 letter from Jeffrey O. Moreno to Paul A. Hemmersbaugh.

⁶ Exhibit "E," Sept. 26, 2011 letter from Jason D. Tutrone to Hanna Chouest.

Expedited Consideration Requested

However, NS noted that it was still investigating the existence of intermodal event records and would respond to that second deficiency at a later date. The following day, NS also responded to portions of DuPont's September 9 letter requesting decoders.⁸ On October 5, 2011, more than two months after its initial production of unusable traffic data, NS produced the intermodal event records.⁹ Thus, the one-month delay in DuPont's ability to analyze the NS data due to NS's failure to produce mileage information, discussed above, had now turned into a two-month delay.

On October 13, 2011, DuPont informed NS of yet a third major deficiency in the replacement traffic data, which was an incomplete mileage data table.¹⁰ DuPont noted that "[t]he data verification process that is required to identify these problems is time consuming and interferes with [DuPont's] ability to utilize the data that has been provided." NS responded on October 21, 2011 that mileage data for intermodal shipments did not exist, but stated that miles for most intermodal movements could be determined by linking the container movement to the corresponding flat car movement.¹¹ Although NS provided a partial solution to the problem, that solution still required over a month of additional labor by DuPont before the data could be usable, thereby injecting a third month of delay since the first attempt by NS to produce traffic data on August 3rd. In this same letter, NS also provided additional decoders in response to DuPont's Sept. 26 letter.

NS provided another set of decoders on October 27, 2011.¹² However, on November 1, 2011, DuPont noted that, thus far, NS still had not provided decoders for 29% of the TRN

⁷ Exhibit "F," Sept. 29, 2011 letter from Hanna Chouest to Jason D. Tutrone.

⁸ Exhibit "G," Sept. 30, 2011 letter from Matthew J. Warren to Jason D. Tutrone.

⁹ Exhibit "H," Oct. 5, 2011 letter from Hanna Chouest to Jason D. Tutrone.

¹⁰ Exhibit "I," Oct. 13, 2011 letter from Jeffrey O. Moreno to Paul A. Hemmersbaugh.

¹¹ Exhibit "J," Oct. 21, 2011 letter from Matthew J. Warren to Jeffrey O. Moreno. Although NS claimed that this was not a "major deficiency," that assertion is belied by the fact that DuPont had to expend over a month of additional labor to implement the NS solution.

¹² Exhibit "K," Oct. 27, 2011 letter from Hanna Chouest to Jason D. Tutrone.

Expedited Consideration Requested

symbols in its Trainsheet data.¹³ DuPont provided NS with a list of TRN symbols for the requested Train Type and Train Type Descriptions. On November 21, 2011, NS responded by providing 229 additional decoders and stating that it cannot identify the train type for the remaining TRN values.¹⁴ As part of this same November 21, 2011 production, NS provided another critical data set that DuPont had first requested more than two months earlier, in its September 9 letter.¹⁵ This data set finally enabled DuPont to link car and intermodal movement data (which contain station information) and train and density data (which contain milepost data), which was the final piece of the puzzle required by DuPont to complete and fully utilize the NS traffic data.

Thus, it was not until the November 21, 2011 NS responses, which was more than three months after the first attempt by NS to produce traffic data on August 3rd, that DuPont possessed sufficient information to understand and use the NS traffic data to begin the selection of the SARR traffic group. Because the SARR is the foundation of SAC evidence, almost every aspect of DuPont's evidence depends upon the SARR design and traffic selection. As the Board well knows, the design of the SARR is the foundation upon which all other SAC evidence is constructed, and traffic data – which is necessary for the selection of the traffic group – is the very first element needed to be able to design the SARR. Because DuPont could not identify that traffic until it received complete and usable traffic data from NS, that very first step could not be completed. Again as the Board well knows, all subsequent steps to develop the SARR and Stand-Alone Costs cannot be taken until the traffic group is selected. Thus, only when the traffic group is selected can the peak period be determined, the SARR designed, and the operating plan developed. Only upon completion of those tasks can DuPont create the RTC Model and

¹³ Exhibit "L," Nov. 1, 2011 letter from Jeffrey O. Moreno to Matthew J. Warren.

¹⁴ Exhibit "M," Nov. 21, 2011 letter from Matthew J. Warren to Jeffrey O. Moreno.

¹⁵ Exhibit "C," Items 14-17.

Expedited Consideration Requested

determine road property investment and operating expenses. Only at that point can DuPont run the Discounted Cash Flow model, make the Maximum Mark-up Methodology calculations, and perform the cross-subsidy tests. Because DuPont has only just recently obtained the traffic data necessary to perform this first step, DuPont has less than 50 days (including the Christmas and New Years holidays) to complete all of the rest.¹⁶ This would not be possible in a typical coal rate case, much less the unprecedented scope and complexity of this proceeding.

In a typical procedural schedule for a non-coal SAC case, including the schedule originally adopted in this proceeding, there are four full months after the close of discovery to develop SAC evidence.¹⁷ A critical assumption built into those schedules is that the railroad will have produced complete and usable traffic data no later than that date. As a practical matter, that means that traffic data would be produced earlier in the discovery window in order to allow sufficient time to address the inevitable follow-up questions prior to the close of discovery.

In this case, that simply did not occur. First, the SSI issue precluded DuPont from receiving any traffic data until August 3, 2011, which necessitated an extension of the discovery period from June 30 until September 30, 2011. Second, that data turned out to be completely unusable and had to be replaced by NS on September 29, 2011, which was the next to last day in the discovery window and nearly two months after production of the data that it replaced.

Additional deficiencies were not remedied, and a series of follow-up questions and responses

¹⁶ Any suggestion that DuPont could have worked with the incomplete, and only partially understood, data first produced by NS on September 29, 2011 is unrealistic. Any analyses that DuPont performed with that data inevitably would be incomplete and would have to be redone when more information was produced. Moreover, subsequent analyses that depend upon these incomplete prior analyses would themselves be incomplete. Attempting to update these analyses incrementally as additional information is produced would be highly inefficient and utterly pointless.

¹⁷ E.g., Sunbelt Chlor Alkali Partnership v. Norfolk Southern Ry. Co. and Union Pac. R.R. Co., Docket No. NOR 42130 (served Nov. 21, 2011); Total Petrochemicals USA, Inc., Docket No. NOR 42121 (served June 23, 2010); M&G Polymers USA, LLC v. CSX Transp. Inc., Docket No. NOR 42123 (served Aug. 4, 2010). Although many coal cases provide only three months, those SARRs are not nearly as complex and market dominance is rarely, if ever, in dispute for what is typically just a single issue movement.

Expedited Consideration Requested

required to understand the traffic data did not conclude, until November 21, 2011. It took DuPont until the first week of December to determine that it now possessed complete and usable traffic data from which it could begin to select its traffic group and design its SARR. Thus, DuPont did not possess complete and usable traffic data until nearly four months after NS first attempted to produce traffic data.

Moreover, the unprecedented scope of the DuPont SARR also means that there is an unprecedented amount of traffic data that DuPont must review and analyze. DuPont's Third Amended Complaint challenges rates for 121 movements of 26 different commodities, necessitating the largest and most complex SARR ever presented to the agency. DuPont currently estimates that its SARR will be over 8000 route miles and include anywhere between 8000 and 9000 trains during the SARR's peak period. Thus, even if DuPont had received a complete and fully usable set of traffic data on September 29, 2011, when NS produced the replacement data, it is likely that DuPont still would have needed a 30-day extension to the procedural schedule due to the complexity of the case. Because of the additional delays in receiving complete and usable traffic data, DuPont requires a three month extension.

This Motion is not intended to cast blame or to otherwise suggest that NS has deliberately engaged in dilatory tactics. In most areas, the parties have worked cooperatively despite their differences. Rather, the purpose of this Motion is to detail the lengthy process that has been required, and the multiple problems encountered, to obtain and understand the enormous amount of data required for this proceeding, which is of unprecedented scope. The Board has granted extensions in prior SAC cases due to discovery delays that have impaired the Complainant's ability to develop its SAC evidence.¹⁸ The number of such issues in this proceeding has been

¹⁸ See Seminole Electric Coop., Inc. v. CSX Transp. Inc., STB Docket No. 42110 (served May 6, 2009) (granting a 60 day extension because "the discovery has proven more complex than the parties anticipated" and the

Expedited Consideration Requested

greater than a typical proceeding, proportionate to the larger scope of this proceeding. Because of all these problems, DuPont requires additional time to develop its SARR and to prepare its SAC evidence.

This Motion requests the bare minimum amount of additional time that DuPont has determined is necessary to develop its SAC evidence. DuPont has no desire or incentive to prolong this case unnecessarily. Indeed, DuPont already has been prejudiced by the delay resulting from the SSI issue. Therefore, DuPont would not request this extension of time if it was not absolutely essential. Anything less than the requested three months will seriously jeopardize DuPont's ability to present its SAC case.

WHEREFORE, for the foregoing reasons, DuPont respectfully requests that the Board adopt the following procedural schedule for the remainder of this proceeding:

DuPont Opening Evidence	April 30, 2012
NS Reply Evidence	August 30, 2012
DuPont Rebuttal Evidence	December 21, 2012
Closing Briefs	January 31, 2013

Respectfully submitted,



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December 12, 2011

necessity of adapting to the new processes in Major Issues); and id. (served July 13, 2009) (granting an additional 30 day extension due in part to delayed discovery responses).

CERTIFICATE OF SERVICE

I hereby certify that this 12th day of December 2011, I served a copy of the foregoing via e-mail and first class mail upon:

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