

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
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July 30, 2015
Part of
Public Record

E.I. DUPONT DE NEMOURS & COMPANY

Complainant,

v.

**NORFOLK SOUTHERN RAILWAY
COMPANY**

Defendant.

Docket No. NOR 42125

**NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO E.I. DU PONT DE
NEMOURS AND COMPANY'S MOTION TO SUBSTITUTE PARTIES**

Norfolk Southern Railway Company ("NS") respectfully submits this Reply to E.I. du Pont de Nemours and Company's ("DuPont's") Motion to Substitute Parties ("Motion"). While NS does not oppose DuPont's request to substitute The Chemours Company FC, LLC and the Chemours Company TT, LLC (collectively "Chemours") as complainants for the case lanes for which Chemours is now the responsible shipper, NS does oppose DuPont's suggestion that Chemours replace it as complainant for fourteen case lanes for which DuPont continues to be the responsible shipper. DuPont should either remain as a complainant for those lanes or those lanes should be dismissed with prejudice.

The Board issued a final Decision on DuPont's Complaint on March 21, 2014, and a corrected Decision on October 3, 2014. Petitions for reconsideration are pending.

DuPont's Motion proposes to substitute Chemours for DuPont as Complainant because

“most of the issue traffic in this proceeding is associated” with Chemours’ business that was recently spun off from DuPont. Motion at 1 (emphasis added). Therefore, DuPont says that it “no longer has an interest in this proceeding.” *Id.* But the key word in DuPont’s Motion is “most.” “Most” of the case lanes are to or from facilities that DuPont has spun off to the Chemours companies. But not all of them. In the wake of DuPont’s Motion NS asked DuPont to clarify which case lanes are not associated with Chemours. DuPont counsel responded that fourteen out of the 138 case lanes contain traffic for which the “residual DuPont” is the “shipper responsible for the movements.” Exhibit 1.

DuPont’s Motion therefore presents two distinct sets of issues: one for the lanes for which Chemours will be the responsible shipper paying the challenged rates (the “Chemours Lanes”), and another for the lanes for which the residual DuPont remains the responsible shipper paying the challenged rates (the “Residual DuPont Lanes”).

Chemours Lanes. For the 124 Chemours lanes, NS has no objection to substituting Chemours as the complainant. But this substitution cannot be a means for the residual DuPont to avoid the preclusive effect of the Board’s final decision on the reasonableness of the rates on these lanes. Both Chemours and DuPont should be equally bound by the outcome of the case in the same way as a litigant that did not undertake a transaction in the midst of litigation.¹ Put differently, if some future corporate restructuring by

¹ The Board applies the concepts of collateral estoppel (or issue preclusion) and *res judicata* (or claim preclusion). Once a matter has been litigated and decided or a party has had a chance to litigate a claim before an appropriate tribunal, relitigation is foreclosed. *See, e.g., California High-Speed Rail Authority – Petition for Declaratory Order,*

DuPont and Chemours were to result in DuPont's regaining an interest in any of the Chemours issue lanes or if DuPont or Chemours were to sell or spin-off any of their respective case lanes to other entities, the preclusive effect of the Board's final decision in Docket No. NOR 42125 on DuPont should not be limited by its substitution of Chemours as the complainant now, or of any other entities which might acquire such interests subsequently.

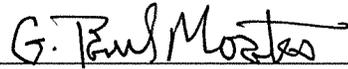
Residual DuPont Lanes. DuPont's proposal to substitute Chemours as the complainant for the fourteen lanes on which residual DuPont remains the responsible shipper raises serious questions, however. Under DuPont's proposal, Chemours would become a complainant for fourteen lanes as to which it has no interest. DuPont has cited no precedent for the proposition that a private company can pursue a rate reasonableness complaint as to a rate that that company has never paid and will never pay. And NS is not aware of any cases that would justify such a transfer of rate challenges to a private party that is not actually paying the rates for the challenged movements and that has no apparent nexus to those movements. Moreover, DuPont's proposal raises significant questions about who would receive any reparations on the Residual DuPont Lanes and who would benefit from any hypothetical rate prescriptions on those lanes.

While questions of reparations and prescriptions are largely academic in this case because the Board has found the challenged NS rates to be reasonable by a large

STB Docket No. 35861 at 7, n.15 (S.T.B. served Dec. 12, 2014); *Brotherhood of Locomotive Engineers v. CSX Transp., Inc.*, 9 I.C.C.2d 713, 723 (1993).

margin, the Board should not set a precedent for allowing rate complainants to transfer individual claims to parties that have no interest in the challenged rate or other nexus to the challenged movement. The Board should therefore deny DuPont's request to substitute Chemours as complainant on the Residual DuPont Lanes. Instead, the Residual DuPont Lanes should be addressed in one of two ways. The Board should dismiss the fourteen lanes from the case with prejudice and allow Chemours to proceed as the Complainant for the 124 lanes in which it has an interest. Alternatively, DuPont should remain as a Complainant for the fourteen lanes for which DuPont is the responsible shipper.

Respectfully submitted,



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Counsel to Norfolk Southern Railway Company

Dated: July 30, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July 2015, I caused a copy of the foregoing Norfolk Southern Railway Company's Reply to DuPont's Motion to Substitute Parties to be served by email and hand delivery upon:

Jeffrey O. Moreno
Jason D. Tutrone
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036



Marc A. Korman

EXHIBIT 1

to

**NS Reply to Complainant's
Motion to Substitute Parties**

STB Docket No. NOR 42125

From: [REDACTED]
To: [REDACTED]
Cc: [REDACTED]
Subject: [REDACTED]
Date: [REDACTED]
Attachments: [REDACTED]

[REDACTED]

[REDACTED]

From: Moreno, Jeff
Sent: Friday, July 24, 2015 03:21:41 PM
To: Moates, G. Paul
Cc: Warren, Matthew J.
Subject: RE: DuPont Motion

Paul,
Here are the rate case lanes that are still part of the residual DuPont. All of the other lanes are now Chemours traffic. The route description below is just the NS segment:

1. A16; Flammable Liquid Waste; Lemoyne, AL to Giant, SC.
2. A17; Biopropanediol; Loudon, TN to Braithwaite, LA
3. A22; Sodium Caustic; McIntosh, AL to Lemoyne AL
4. B44; Polyethylene; New Orleans, LA to Greenville, SC
5. B45; Polyethylene; E. St. Louis to Washington, NJ
6. B76; Flammable Liquid Waste; Lemoyne, AL to Meridian, MS
7. B80; Sodium Caustic; McIntosh, AL to New Orleans
8. B82; Polyethylene; New Orleans to Greenville, SC
9. B83; Polyethylene; E. St. Louis to Washington, NJ
10. B86; Sodium Methylate; New Orleans to Lemoyne, AL
11. B96; Lime; Danville, VA to Petersburg, VA
12. B99; Biopropanediol; Loudon, TN to Chattanooga, TN
13. B100; Biopropanediol; Loudon, TN to Chattanooga, TN
14. B108; Sodium Caustic; Lynchburg, VA to Danville, VA

As I previously responded last week, DuPont is the shipper responsible for the foregoing 14 movements and Chemours is the shipper responsible for all of the remaining movements.

Best Regards,

Jeffrey O. Moreno | Partner | **Thompson Hine LLP**
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From: Moates, G. Paul [mailto:pmoates@sidley.com]
Sent: Tuesday, July 14, 2015 11:09 AM
To: Moreno, Jeff
Cc: Warren, Matthew J.
Subject: RE: DuPont Motion

Jeff, the Motion states that "DuPont has assigned this proceeding to Chemours as part of the spin-off because most of the issue traffic in this proceeding is associated with the performance chemicals business." Please specify which of the issue movements are not "associated with the performance chemicals business"; and please clarify whether the phrase "associated with the performance chemicals business" means that Chemours is paying the freight charges for those issue movements. Paul

G. PAUL MOATES
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From: Moreno, Jeff [mailto:Jeff.Moreno@thompsonhine.com]
Sent: Tuesday, July 14, 2015 10:24 AM
To: Moates, G. Paul
Cc: Warren, Matthew J.
Subject: DuPont Motion

Paul,

DuPont has filed the attached motion this morning at the STB. As you may have heard in the media, DuPont has spun-off its performance chemicals business into a new company called Chemours. The rate case against NS is part of the new company. This motion seeks to substitute Chemours as the complainant.

Best Regards,

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