

REQUEST FOR PRODUCTION NO. 168

Please produce all documents, from 2005 to the present, that (a) address the willingness and desire of NS to transport hazardous materials, other than TIH commodities; (b) constitute, refer or relate to internal policies or decisions to discourage transportation of hazardous materials, other than TIH commodities, on NS; and (c) refer or relate to decisions by NS whether or not to compete with other modes or rail carriers to transport hazardous materials, other than TIH commodities.

NS refused to produce these records, claiming that “[t]he requested documents have no relevance to any issue in this case.”¹ In support, NS stated that it has a common carrier obligation to transport TIH commodities and hazardous materials, and its willingness and desire to do so are irrelevant and have nothing whatsoever to do with a Stand Alone Cost (“SAC”) case.²

DuPont, however, is not requesting the documents for its SAC case. SAC is one of two principal components of a rate reasonableness case. To get to SAC, a complainant must first prove that the rail carrier is market dominant.³ DuPont’s requests are directed towards, and are relevant to, its market dominance case.

II. ARGUMENT

A. The Legal Standard for Motions to Compel.

The Board will grant motions to compel discovery that are reasonably drawn.⁴ The Board’s discovery rules permit “discovery regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding”⁵ or “‘reasonably calculated to lead to the discovery’ of relevant evidence.”⁶ Relevancy means that “the information might be able to

¹ NS’s Resps. to DuPont’s RFPs # 167, 168.

² Id.

³ 49 U.S.C. §§ 10701(d)(1), 10707(b), (c).

⁴ Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 548 (1985).

⁵ 49 C.F.R. § 1114.21(a)(1).

⁶ Waterloo Ry. — Adverse Abandonment — Lines of Bangor & Aroostook R.R. & Van Buren Bridge co. in Aroostook County, Me., STB Docket No. AB-124 (Sub-No. 2), slip op. at 2 (served Nov. 14, 2003).

affect the outcome of a proceeding.”⁷ Accordingly, these rules grant DuPont broad discovery rights, which follow the policies reflected in the Federal Rules of Civil Procedure.⁸

A motion to compel discovery must state, with particularity, the nature and substance of the charges that the petitioner seeks to prove, as well as the basis for the petitioner’s belief in those charges.⁹ In addition, “the discovery requested must be reasonably tailored to the particular charges to be proved and reflect the least intrusive means of obtaining the information.”¹⁰ The motion should set forth adequate procedures to protect the confidentiality of the information sought.¹¹ This motion meets these requirements.

B. A Railroad’s Disposition To Provide Transportation Indicates The Effectiveness Of Competition.

For the Board to consider the reasonableness of the challenged rates, DuPont must prove that NS possesses market dominance over the traffic to which the rates apply.¹² Market dominance is “an absence of effective competition from other rail carriers or modes of transportation to which a rate applies.”¹³ Competition is effective where it pressures the rail carrier “to perform up to standards and at reasonable prices, or lose desirable business.”¹⁴ Accordingly, the carrier must fear losing business to its competitors in order for competition to be effective. NS’s disposition to transport TIH commodities and hazardous materials will indicate whether it fears losing that business to its competitors, i.e., whether competition is effective.

⁷ Id.

⁸ E.g., Simplified Standards for Rail Rate Cases, STB Ex Parte No. 646 (Sub No. 1), slip op. at 68-69 (“Our discovery rules follow generally those in the Federal Rules of Civil Procedure”) (served Sept. 5, 2007).

⁹ Guidelines, 1 I.C.C.2d at 548.

¹⁰ Id.

¹¹ Id.

¹² 49 U.S.C. § 10707(b).

¹³ 49 U.S.C. § 10707(a).

¹⁴ Market Dominance Determination & Consideration of Product Competition, 365 I.C.C. 118, 129 (1981).

In its objections, NS asserts that, because it has a common carrier obligation to transport TIH commodities and hazardous materials, RFPs 167 and 168 are irrelevant. But NS's common carrier obligation actually reinforces the relevance of those RFPs. Because NS cannot refuse to transport these commodities, it may instead choose to discourage the demand for its services. If NS is averse toward transporting this traffic, NS surely must not fear losing the traffic to other transportation providers. Thus, any evidence of an aversion toward transporting TIH commodities and hazardous materials is relevant to the existence, or non-existence, of effective competition.

C. The Records That DuPont Requested Indicate NS's Disposition To Transport TIH Commodities And Hazardous Materials.

RFPs 167 and 168 request the production of records that indicate NS's disposition to transport TIH commodities and hazardous materials. Specifically, the RFPs request production of documents that

- address the willingness and desire of NS to transport TIH commodities and hazardous materials;
- constitute, refer, or relate to internal policies or decisions to discourage transportation of TIH commodities and hazardous materials; and
- refer or relate to decisions by NS to compete or not compete with other transportation providers to transport TIH commodities or hazardous materials.

Each of these categories of documents will indicate whether and to what extent NS is concerned about losing TIH and hazardous material traffic to its competitors and NS's willingness to compete for such business. Thus, RFPs 167 and 168 are narrowly tailored to lead to the discovery of relevant evidence.

Moreover, DuPont has reason to believe that the requested materials exist. NS has publicly proclaimed its aversion towards transporting TIH commodities and hazardous materials. In fact, its chief executive officer, Charles W. Moorman, stated to the House Subcommittee on Railroads that, "[a]bsent [the common carrier] obligation, Norfolk Southern would not transport

[highly hazardous] materials.”¹⁵ This is just one of many similar public statements by NS.

Therefore, it stands to reason that NS would act upon its publicly expressed desires by adopting internal policies to minimize or discourage the transportation of TIH, or other hazardous, commodities on the NS rail system. Such policies would indicate whether, when, and where NS competes to obtain this traffic, including the issue traffic in this proceeding.

D. NS’s Overbroad, Undue Burden, and Not Reasonably Calculated to Lead to the Discovery of Admissible Evidence Objections are Improper.

Unsupported objections are improper. A party that objects to a request for production must “state an objection to the request, *including the reasons.*”¹⁶

NS offered no support for its overbroad and unduly burdensome objections. The “familiar litany that interrogatories are burdensome, oppressive, or overly broad” is insufficient.¹⁷ Instead, an overbroad or undue burden objection must reveal the nature of the burden.¹⁸ NS’s failure to do so precludes DuPont’s ability to address those objections in this motion. Accordingly, NS’s objections are improper and should be deemed waived.

NS’s objection that the RFPs are not reasonably calculated to lead to the discovery of admissible evidence is not only unsupported, but also misplaced. This objection tracks Federal Rule of Civil Procedure 26, which allows the discovery of relevant information that may “not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Accordingly, this objection requires some assertion that the requested items will not lead to documents that are admissible. NS has not made such an assertion.

¹⁵ Current Issues in Rail Transportation of Hazardous Materials: Hearing Before the Subcomm. on R.Rs. of the H. Comm. on Transp. & Infrastructure, 109th Cong. 127 (2006) (written statement of Charles W. Moorman, Chairman, President & Chief Executive Officer, Norfolk Southern Corp.).

¹⁶ Fed. R. Civ. P. 34(b)(2)(B) (emphasis added).

¹⁷ Essex Ins. Co. v. Interstate Fire & Safety Cleaning Co., 263 F.R.D. 72, 73 (D. Conn. 2009).

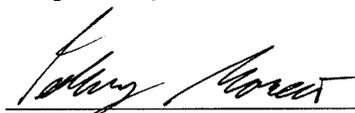
¹⁸ Chubb Integrated Sys. Ltd v. Nat’l Bank of Wash., 103 F.R.D. 52, 59-60 (D.D.C. 1984) (“An objection must show specifically how an interrogatory is overly broad, burdensome or oppressive, by submitting affidavits or offering evidence which reveals the nature of the burden.”); Ariz. Elec. Power Coop., Inc. v. Burlington N. & Santa Fe Ry., STB Docket No. 42058, slip op. at 4 (served Sept. 11, 2002) (rejecting conclusory objections).

Moreover, since the RFPs target business records, which are admissible, it is impossible to make such an assertion. Thus, NS's objection that the RFPs are not reasonably calculated to lead to discoverable information is improper.

III. CONCLUSION

For the foregoing reasons, DuPont respectfully requests that the Board order NS to respond to DuPont's RFPs 167 and 168.

Respectfully submitted,



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April 14, 2011

CERTIFICATE OF SERVICE

I hereby certify that this 14th day of April 2011, I served a copy of the foregoing via e-mail and first class mail upon:

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Jeffrey O. Moreno

Exhibit A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

<p>E.I. DUPONT DE NEMOURS AND COMPANY</p> <p style="text-align:center">Complainant</p> <p style="text-align:center">v.</p> <p>NORFOLK SOUTHERN RAILWAY COMPANY</p> <p style="text-align:center">Defendant</p>	<p style="text-align:center">Docket No. NOR 42125</p>
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**DEFENDANT'S RESPONSES AND OBJECTIONS TO
COMPLAINANT'S SECOND SET OF DISCOVERY REQUESTS**

Pursuant to 49 C.F.R. Part 1114 and other applicable rules and authority, Norfolk Southern Railway Company ("NS"), through undersigned counsel, responds as follows to Complainant E.I. DuPont de Nemours and Company's ("DuPont's") Second Set of Discovery Requests (the "Second Discovery Requests").

GENERAL OBJECTIONS

NS incorporates and adopts the General Objections set forth in NS's Responses and Objections to Complainant's First Requests for Admission, Interrogatories, and Requests for Production of Documents (Jan. 19, 2011). NS's incorporation and adoption of those General Objections includes, but is not limited to, NS's objections to the Definitions and Instructions that were set forth in DuPont's First Discovery Requests and that DuPont incorporates in its Second Discovery Requests. NS's objections shall not waive or prejudice any objections that it may later assert.

SPECIFIC OBJECTIONS AND RESPONSES

In addition to its General Objections (which apply in full to each and every Discovery Request, without further enumeration), below NS sets forth Specific Objections and

REQUEST FOR PRODUCTION NO. 166

Please produce the following documents regarding NS' use of other carrier's locomotives (or foreign locomotives) from 2008 to the present:

- a. All agreements (or any arrangements other than agreements) applicable to use of the locomotive(s) including but not limited to run-through or horsepower equalization agreements or arrangements;
- b. The itemized amount of compensation or equalization for use of the locomotive, by each category of compensation or equalization, including but not limited to fuel, servicing and maintenance;
- c. The methodology used for computing the compensation or equalization;
- d. The service units covered by the compensation or equalization listed by locomotive initial, locomotive number and locomotive model or type; and,
- e. The diesel unit-miles traveled by each foreign locomotive covered by each agreement each year from 2008 to the present.

Response:

NS objects to this Request as overbroad and unduly burdensome to the extent that it calls for production of information that is not relevant to developing Stand Alone Cost evidence. NS further objects to the extent that the Request calls for information on foreign locomotives that is not in NS's possession, custody, or control. Subject to and without waiving these objections and the General Objections, NS responds that it will produce or make available for inspection responsive documents in its possession, to the extent that they exist and can be located in a reasonable search.

REQUEST FOR PRODUCTION NO. 167

Please produce all documents, from 2005 to the present, that (a) address the willingness and desire of NS to transport TIH commodities and/or any Issue Commodity that is a TIH; (b) constitute, refer or relate to internal policies or decisions to discourage transportation of TIH commodities on NS; and (c) refer or relate to decisions by NS whether or not to compete to with other modes or rail carriers to transport TIH commodities.

Response:

NS objects to this Request as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The requested documents have no relevance to any issue in this case. NS has a common carrier obligation to transport TIH commodities, and its “willingness and desire” to do so are irrelevant and have nothing whatsoever to do with a Stand Alone Cost case.

REQUEST FOR PRODUCTION NO. 168

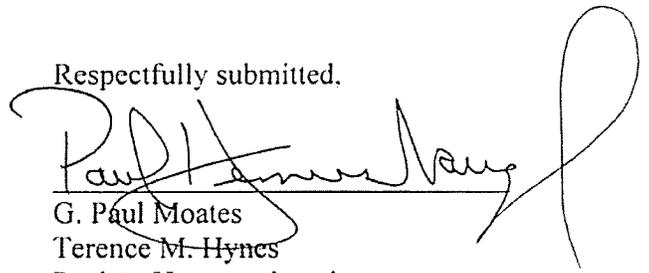
Please produce all documents, from 2005 to the present, that (a) address the willingness and desire of NS to transport hazardous materials, other than TIH commodities; (b) constitute, refer or relate to internal policies or decisions to discourage transportation of hazardous materials, other than TIH commodities, on NS; and (c) refer or relate to decisions by NS whether or not to compete with other modes or rail carriers to transport hazardous materials, other than TIH commodities.

Response:

NS objects to this Request as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The requested documents have no relevance to any issue in this case. NS has a common carrier obligation to transport hazardous materials, and its “willingness and desire” to do so are irrelevant and have nothing whatsoever to do with a Stand Alone Cost case.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul A. Hemmersbaugh". The signature is written in a cursive style with a large, looping flourish at the end.

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Dated: April 4, 2011