

EXPEDITED CONSIDERATION REQUESTED

236022

BEFORE THE  
SURFACE TRANSPORTATION BOARD

ENTERED  
Office of Proceedings  
May 9, 2014  
Part of  
Public Record

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

COMPLAINANT’S MOTION FOR  
EXTENSION OF PAGE LIMIT

Complainant, E.I. du Pont de Nemours and Company (“DuPont”), hereby requests an extension of the page limit for a petition for reconsideration to 50 pages. The final decision of the Surface Transportation Board in this proceeding<sup>1</sup> (the “Decision”) is unprecedented in length, number of issues, and complexity, which are facts that mirror the evidence submitted in this proceeding. The Decision also involves multiple novel issues of law and incorporates intervening regulatory changes that strike at the foundation of DuPont’s evidence. An extension of the page-limit requirement is necessary for DuPont to adequately present and address in a petition for reconsideration the many legal, factual, procedural, and methodological errors presented by this Decision. **DuPont requests expedited consideration of this motion.**<sup>2</sup>

The Board’s rules limit a petition for reconsideration, and a reply, to 20 pages. 49 C.F.R. § 1115.2(d). When the Interstate Commerce Commission adopted this limit, it expressed

<sup>1</sup> E.I. du Pont de Nemours & Co. v. Norfolk S. Ry., STB Docket No. NOR 42125, slip op. (served March 24, 2014).

<sup>2</sup> At present, there is no specific due date for Petitions for Reconsideration. Rather, the Board has stated that such Petitions will be due within 20 days after the Board issues a Corrected Decision in response to the “Joint Technical Corrections Petition,” STB Docket No. 42125 (submitted April 14, 2014). See Decision (served April 30, 2014). However, since DuPont does not know when the Board will issue the Corrected Decision, which could occur before the standard pleading cycle for motions is completed, DuPont is seeking expedited consideration so that the Board can decide this motion within a time frame that is reasonably contemporaneous with the Corrected Decision.

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concern that the page limit be sufficient for cases that are especially novel, lengthy, and complex.<sup>3</sup> Although the Commission did not believe that greater length was required at that time, it noted that it would “continue to entertain requests for waiver of the page limitation based upon an adequate showing.”<sup>4</sup> The Board has waived this limitation on multiple occasions.<sup>5</sup>

The Decision presents the unusual novelty, length, and complexity that justifies a waiver of the 20-page limit. Moreover, because the Commission established the page limit in 1979, before the advent of stand-alone-cost (“SAC”) rate cases, the page limit does not account for the length and complexity of modern rate cases.

The Decision and this proceeding are exceptionally large, even for a SAC case. Before this proceeding, the Board had decided rate cases involving primarily coal shipments in unit trains between few origin and destination pairs. In contrast, this proceeding involved 26 distinct commodities shipped in carloads over 138 lanes of movement under 100 separate rates.<sup>6</sup> DuPont constructed a stand-alone railroad (“SARR”) that would operate in 20 states with over 7,300 constructed route miles,<sup>7</sup> which is more than 2,800 route miles longer than the next largest SARR ever presented.<sup>8</sup> Moreover, the Decision is the longest rate case decision, by 136 pages.<sup>9</sup>

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<sup>3</sup> Rail Appellate Procedures, 361 I.C.C. 591, 598 (1979).

<sup>4</sup> Id.

<sup>5</sup> Burlington N., STB Docket No. 32549, slip op. (served Feb. 11, 2000) (waiving limitation where petitioner alleged “waiver is necessary to allow it to present and summarize witness testimony, explain a need to submit additional evidence, and to conduct discovery.”); W. Fuels Serv. Crop. v. Burlington N. & Santa Fe Ry., STB Docket No. 41987, slip op. at 2 n.6 (served July 28, 1997) (waiving page limit for a 42-page reply with an addendum containing more than 150 pages, noting that the waiver would not unreasonably burden either the petitioner or Board). See also Pa. Power & Light Co. v. Consol. Rail Corp., ICC Docket No. 38186S, 1984 ICC LEXIS 327 at \*2-3 (ICC Aug. 31, 1984) (granting waiver of the 30-page limit for appeals due to the “size and complexity of the record”); Chesapeake & Ohio Ry., 360 I.C.C. 245, 247 (1979) (waiving 30-page limit for a 57-page reply to exceptions in an abandonment proceeding, noting that the proceeding was unusually lengthy and complexity of the application for abandonment).

<sup>6</sup> E.I. du Pont de Nemours & Co. v. Norfolk S. Ry., STB Docket No. NOR 42125, slip op. at 14 (served March 24, 2014).

<sup>7</sup> Id. at 14, 46.

<sup>8</sup> McCarty Farms, Inc. v. Burlington Northern, Inc., 2 S.T.B. 460, 490 (1997), has the next largest SARR, at 4,469.3 route miles.

<sup>9</sup> Compare DuPont, STB Docket No. NOR 42125, slip op. (served March 24, 2014) (comprising 335 pages) with FMC Wyo. Corp. v. Union Pac. R.R., STB Docket No. 42022, slip op. (served May 12, 2000) (comprising 199 pages).

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This proceeding also has been exceptionally complex. To see this complexity, the Board need not look beyond the unprecedented size and quantity of the technical errors in the Decision.<sup>10</sup> The potential number and magnitude of other errors is similar. Even setting the technical errors aside, the complexity is evident in the size of the proposed SARR, the nearly 6.2 million carloads that the proposed SARR would handle,<sup>11</sup> and the enormous amount of data that the parties had to review, process, analyze and present, and that the Board had to review and evaluate.

Although the Board has decided many SAC cases, this case was highly novel. It presented the first primarily carload SARR and was the first case where a party relied on a computer program, MultiRail, to develop its operating plan. It also was the first case to which the Board applied its Alternative Average Total Cost (“ATC”) methodology, which it proposed and developed after DuPont submitted its opening evidence.<sup>12</sup> Not only is this the third attempt by the Board to get ATC right, but also it shifted the goalposts on DuPont just as it was kicking the ball, which is a fact that Chairman Elliott signaled in his concurring opinion may warrant reconsideration or reopening of this proceeding.<sup>13</sup>

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<sup>10</sup> “Joint Technical Corrections Petition,” STB Docket No. 42125 (submitted April 14, 2014). The parties identified 31 technical corrections that have a multi-billion-dollar net impact on the Board’s Discounted Cash Flow analysis.

<sup>11</sup> DuPont, STB Docket No. NOR 42125, slip op. at 14 (served March 24, 2014).

<sup>12</sup> Id., at 51.

<sup>13</sup> DuPont, STB Docket No. NOR 42125, slip op. at 55 (served March 24, 2014) (Elliott, Chairman, concurring).

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For the foregoing reasons, DuPont respectfully requests a waiver of the page limit for petitions for reconsideration.

Respectfully submitted,



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May 9, 2014

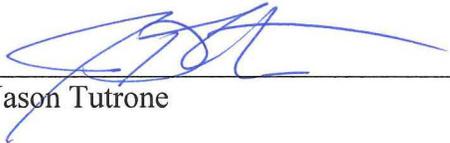
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**CERTIFICATE OF SERVICE**

I hereby certify that this 9th day of May 2014, I served a copy of the foregoing via e-mail and first class mail upon:

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