

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E.I. DUPONT DE NEMOURS AND COMPANY)

Complainant,)

v.)

NORFOLK SOUTHERN RAILWAY)
COMPANY)

Defendant.)
_____)

232370

Docket No. NOR 42125 ENTERED

Office of Proceedings

May 29, 2012

Part of

Public Record

**REPLY OF E.I. DU PONT DE NEMOURS AND COMPANY TO
NORFOLK SOUTHERN RAILWAY COMPANY'S
MOTION FOR MODIFICATION OF PROCEDURAL SCHEDULE**

E.I. du Pont de Nemours and Company ("DuPont"), hereby submits this Reply to the "Motion for Modification of Procedural Schedule" filed by defendant, Norfolk Southern Railway Company ("NS"), in the above-captioned proceeding on May 24, 2012. NS has requested a 30 day extension of all dates in the procedural schedule established by the Board's January 13, 2012 Decision in this proceeding in order to review and evaluate the Errata to DuPont's Opening Evidence, which DuPont filed on May 17, 2012, just 17 days after DuPont filed its Opening Evidence. Although DuPont does not oppose an extension of 17 days, the 30 day extension requested by NS is excessive and unwarranted.

The DuPont Errata contained very minor corrections that have a *de minimis* impact upon the stand-alone railroad ("SARR") and the stand-alone cost ("SAC") analysis. Specifically, the Errata corrected for an inadvertent mismatch between the cost evidence submitted by DuPont and the Rail Traffic Controller ("RTC") simulation submitted to verify the feasibility of the

SARR's operating plan, because the RTC simulation was based upon a slightly different SARR configuration. The Errata aligns the RTC simulation with the SARR route mile and infrastructure requirements developed by DuPont's expert witnesses. As summarized on page 2 of its Errata, that realignment required just the following two minor modifications to the SARR configuration in the RTC simulation:

1. Added 4 route miles; and
2. Removed 27.24 yard miles.

The other Errata modifications merely flow from those two changes by reflecting their impact upon the SARR's investment and operating costs, and ultimately the SAC rate.¹ DuPont did not change any other SAC analysis inputs, such as the traffic group, forecasts, the operating plan, unit costs, indices, or cost of capital.

The NS claim, at page 3 of its Motion, that it must engage in a "time-intensive process of comparing DuPont's Opening Evidence with its 'Errata' and workpapers to determine for each section and sub-section of the evidence how and to what extent the 'Errata' changed DuPont's case-in-chief" is a red-herring. There is no need to compare the Errata with the Opening Evidence at all; how they differ has no bearing on this case going forward. Rather, the Errata is a replacement for parts of the Opening Evidence. At most, NS has lost the 17 day period between the filing of DuPont's Opening Evidence and its Errata to evaluate the replacement files. Truly, not even that much time has been lost because DuPont only changed 35 electronic files out of approximately 3900 such files.² Nevertheless, DuPont is willing to agree to a 17 day

¹ For example, these two small changes produced similarly small changes in the RTC Model outputs for transit times and train miles, which required equally small changes to various operating and investments costs that rely upon these outputs to determine unit quantities.

² Furthermore, NS disingenuously claims that all the work it has done on the Opening Evidence RTC simulation prior to the Errata filing has been for naught. NS Motion at 4. This is a gross exaggeration because only 35 out of

extension as more than ample time to make NS whole for the time lost between the Opening Evidence and Errata filings.

NS, however, attempts to portray the DuPont Errata as something much bigger in order to justify a longer extension. First, NS mischaracterizes the Errata as 170 pages long, “containing “entirely new RTC simulation analyses,” and “changing numerous elements of [DuPont’s] case-in-chief.” NS Motion at 3. The Errata itself is less than 8 pages long. All of the other pages are replacement pages for the Opening Evidence text and exhibits to reflect the changes already referenced in the 8-page Errata text. The Errata contains only a single RTC analysis, not multiple analyses, and the Errata RTC simulation is not new, but merely changes a very small portion of the infrastructure in the Opening Evidence RTC simulation. As noted above and summarized on page 2 of the Errata, DuPont has changed only slightly just two elements of its RTC simulation, which in turn have only very slight impacts upon the principal components, and ultimate results, of the SAC analysis. This hardly constitutes a significant change to DuPont’s case-in-chief.

Second, NS misrepresents the Errata as a black box that “provide[s] only the most cursory ‘summary’ of the changes [DuPont] made” and that generically references “other errors” “without meaningful identification or explanation of those purported errors.” NS Motion at 3, n. 2. What NS describes as “cursory” is merely evidence that DuPont did not make very significant changes. DuPont has identified the two changes that it made to the RTC simulation and identified all the changed values that flow through the SAC analysis as a result of those two changes. Each modified electronic workpaper contains the word “errata” in the new file name for easy identification. Furthermore, the “other errors” are non-substantive typos that are

3900 electronic files in DuPont’s Opening Evidence, which is less than 1%, have been modified. All of the other files are unaffected by the Errata.

explicitly identified in the 8-page Errata. NS does not describe what more information DuPont could or should have provided.

Finally, NS attempts to justify a 30-day extension as reasonable in light of prior extensions to the procedural schedule that preceded DuPont's filing of Opening Evidence. Extensions should be granted based upon a demonstrated need rather than this type of "me too" argument.³ Here, NS has not demonstrated why it needs more than the 17 days it lost between the filing of DuPont's Opening Evidence and its Errata.

NS concedes that, even if the Board grants its motion for a full 30-day extension, it expects to return to the Board for additional extensions of time due to the complexity of this case.⁴ NS Motion at 4-5. But NS also acknowledges that it currently "is not in a position to determine whether it will require additional time...." *Id.* at 4. Therefore, the Board should only grant an extension based upon the currently known facts, which warrant no more than 17 days, and wait for NS to make the case for additional time if and when it is able to do so.

³ NS disingenuously portrays the prior extensions as granting DuPont "one-and-a-half years...to develop, revise, check, and submit its case-in-chief." NS Motion at 3 and 5, n. 3. NS self-servingly ignores the fact that the first extension was sought because NS would not produce its traffic data without a determination from the Federal Railroad Administration regarding the status of that data as Sensitive Security Information, and that the second extension was sought because NS had not provided adequate information to link the various traffic data files until very late in the procedural schedule. Because useable traffic data is essential to the SAC analysis from the very earliest phases of a case, DuPont had far less than one-and-a-half years to prepare its case-in-chief.

⁴ As an example of this complexity, NS asserts that "it is not clear that the RTC model, run properly with all appropriate inputs and factors included, has sufficient computing power and data capacity to model the huge and complex SARR network and traffic group DuPont has selected in this case." NS Motion at 5, n. 4. This is not a valid concern because Berkeley Simulation's expansion of the RTC software to a 64 bit system gives the model virtually unlimited capacity that is constrained only by the size of the computer NS uses.

Based upon the justifications presented by NS, DuPont proposes that the Board modify the procedural schedule as follows:

NS Reply Evidence	Sept. 17, 2012 ⁵
DuPont Rebuttal Evidence	Jan. 16, 2013 ⁶
Closing Briefs	March 1, 2013

WHEREFORE, for the foregoing reasons, the Complainants respectfully request that the Board adopt the procedural schedule proposed for this case (Docket No. 42125) in Exhibit A to this Motion.

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

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⁵ This is actually an 18 day extension because the 17th day falls on a Sunday.

⁶ DuPont has extended the filing date for its rebuttal evidence by more than the 18 days proposed for NS reply evidence because rebuttal evidence will now be due after the Christmas and New Year's holidays as a result of the extension to the reply evidence filing date. Even if the Board were to grant the full 30 day extension that NS has requested, it should add an extra week to the rebuttal evidence filing date proposed by NS for the same reason.

CERTIFICATE OF SERVICE

I hereby certify that this 29th day of May 2012, I served a copy of the foregoing via e-mail and first class mail 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



Jeffrey O. Moreno