

BEFORE THE
SURFACE TRANSPORTATION BOARD

233849

233850

ENTERED

Office of Proceedings

February 27, 2013

Part of

Public Record

Docket No. NOR 42125

E.I. DUPONT DE NEMOURS & COMPANY)

Complainant,)

v.)

NORFOLK SOUTHERN RAILWAY COMPANY)

Defendant.)

SUNBELT CHLOR ALKALI PARTNERSHIP)

Complainant,)

v.)

NORFOLK SOUTHERN RAILWAY COMPANY)

Defendant.)

Docket No. NOR 42130

**COMPLAINANTS' JOINT RESPONSE TO
DEFENDANT'S MOTION FOR LEAVE TO FILE A REPLY TO COMPLAINANTS'
JOINT REPLY TO DEFENDANT'S PETITION FOR CLARIFICATION**

E.I. du Pont de Nemours and Company ("DuPont") and SunBelt Chlor Alkali Partnership ("SunBelt") (collectively, "Complainants") hereby submit their joint response to the Motion for Leave to File a Reply that Norfolk Southern Railway Company ("NS") submitted in the above-captioned proceedings on February 22, 2013.

Complainants agree with NS that the only question before the Board is whether NS is required to bear the cost of obtaining MultiRail licenses, training, or services for Complainant. And Complainants have squarely addressed this question in their Reply, asserting that: (1) NS is

required to provide, at its own expense, whatever NS provides to the Board for the purpose of examining its evidence; and (2) NS must reimburse Complainants for any expenses they have incurred to obtain what NS claimed that it was providing for the purpose of examining its evidence. Yet NS glosses over Complainants' responses to its question and devotes nearly its entire Response to engaging Complainants in a debate over other issues. Complainants refuse this invitation and call on the Board to limit its decision to the narrow issue that NS purportedly presents—the extent to which NS must provide MultiRail to Complainants, along with training and setup services, at NS's cost.

I. BACKGROUND

To develop its operating plans in the above-captioned proceedings, NS chose to use the MultiRail program rather than have its operating experts develop an operating plan on their own. (NS Surreply 13.) NS did not submit MultiRail with its Reply Evidence. Instead, it represented in a footnote on pages III-C-158 of its DuPont Reply and III-C-122 of its SunBelt Reply that it had arranged “for both the [Complainants] and the Board to be permitted limited access to MultiRail for purposes of this case.” NS provided no instructions on how to obtain this access.

Weeks after NS filed its Reply Evidence in the DuPont case, Complainants' experts finally discovered the general scope of the limited access to MultiRail that NS would be providing and that this access would require Complainants to pay for training, setup, and support concerning the program. (Joint Reply 7-10.) Given that it was evident that NS was providing MultiRail to enable the review of its evidence,¹ Complainants reserved their right to seek reimbursement of the costs they incurred in obtaining MultiRail access (NS Pet., Ex. 3, at 2).

¹ NS confirmed this on pages 3-4 of the January 17, 2013 letter from G. Paul Moates to Jeffrey Moreno. (NS Pet., Ex. 2, at 3-4.)

To resolve the issue of who is responsible for paying for MultiRail access, NS filed a Petition for Clarification on January 25, 2013. By its Petition, NS asked the Board whether it must bear the cost of providing MultiRail to Complainants. On the same day, NS also sent a letter to the Board stating that it would bear the cost of providing the Board with a different level of access to MultiRail than the access it would provide Complainants. (Joint Reply, Ex. D.) On February 11, 2013, the Board responded to NS, declining NS's offer to provide the fully functional read-write version of the MultiRail program. But this response did not address whether NS is required to provide MultiRail to Complainants if NS later provides the software to the Board in an acceptable form.

Complainants filed a Joint Reply to NS's Petition on February 14, 2013. In its Joint Reply, Complainants asserted that they are entitled to the same level of MultiRail access that NS provides the Board and that the Board should reject any attempt for NS to file MultiRail so late after the deadline for filing its evidence.

II. NS ALL BUT IGNORES COMPLAINANTS' CORE ARGUMENT THAT THEY ARE ENTITLED TO THE SAME MULTIRAIL ACCESS PROVIDED TO THE BOARD.

Although NS seeks the opportunity to respond to arguments that it could not have anticipated in the Complainants' Reply (NS Mot. for Leave 5), NS all but ignores the most prominent and dispositive argument that the Complainants presented. The Complainants argue that NS must provide to Complainants a MultiRail package that is equivalent to the one it provides the Board. That is, NS cannot provide the Board with a fully functional read-write version of MultiRail while providing the Complainants with the limited read-only version. If NS were to do so, that would be an impermissible *ex parte* communication. (See Joint Reply 11-15.)

NS buries its response to that argument near the very end of its Surreply under the category of "Other Arguments." (NS Surreply 25-27.) Furthermore, NS doesn't even attempt to

refute the Complainants' argument. Rather, NS feigns indignation on behalf of both itself and the Board for having been accused of unethical behavior. NS then proceeds to explain why none of its MultiRail communications to date have been *ex parte* communications. But the Complainants have never accused NS or the Board of having engaged in an *ex parte* communication. They argued only that, if NS were to provide and the Board were to accept a different version of MultiRail than that provided to the Complainants, that would be an impermissible *ex parte* communication. The NS Surreply does not challenge that argument.

Not only does NS's Surreply gloss over Complainant's core argument that it is entitled to a MultiRail package that is identical to the one NS presents to the Board, but also NS presents arguments that mischaracterize Complainants as seeking more than just the same MultiRail package that NS provides the Board. Accordingly, most of Part II of NS's Surreply is simply non-responsive.

First, NS misplaces emphasis on the commercial availability² of the MultiRail program, as if commercial availability eliminates NS's obligation to provide MultiRail. But commercial availability is not the touchstone of the analysis. Rather, the analysis turns on whether NS presents MultiRail to the Board for use as a prism to view NS's evidence. Commercial availability is only relevant to the extent NS provides MultiRail to the Board because MultiRail is so unavailable that NS does not believe the Board will acquire a copy for its own use in reviewing NS's evidence. Indeed, Complainants and NS have not provided the RTC Model or Microsoft Word, Excel, or Access to the Board because the Board already possesses these products and uses them to review evidence, not because they are commercially available. But, if the Board did not possess these products, a prudent party would not risk its evidence by failing to

² Indeed, in multiple parts of its Surreply, NS has framed the question at issue as "whether NS is required to purchase additional commercially available computer tools and services for Complainants' use in these cases." (NS Surreply 1, 11.)

provide these products to the Board because they are commercially available. Accordingly, NS's obligation to provide MultiRail to Complainants does not turn on commercial availability. Rather, NS's obligation arises where it offers MultiRail as a prism for viewing its evidence. NS must provide Complainants with the same prism that it provides to the Board.

Second, NS misapprehends Complainants to be seeking a specific level of MultiRail functionality. (NS Surreply 14 (claiming that a read-write version is not necessary for evaluating its operating plan).) But Complainants do not seek specific functionality; they only seek the same functionality as NS provides the Board.³ In their Reply, Complainants noted the functional differences between the read-only and read-write versions of MultiRail only for the purpose of illustrating that the Board would receive something different, which prejudices Complainants. Once again, Complainants merely seek the same MultiRail package that NS provides the Board.

Third, NS continues to make the baseless assertion that the real reason Complainants seek the read-write version of MultiRail is that they want to use it to develop their Rebuttal Evidence.⁴ (NS Surreply 17.) This flies in the face of Complainants argument, both here and in their Joint Reply, that they are only entitled to the same MultiRail package as NS gives the Board. Indeed, where Complainants asserted in their Joint Reply that they are entitled to the read-write version of MultiRail, they also referenced the read-write version that NS claimed it was providing the Board. Given the Board's refusal to accept NS's MultiRail package, Complainants agree with NS's assertion that this point is moot. (Id. at 17)

³ In correspondence with NS prior to the filing of the NS Petition, the Complainants raised the issue of whether read-only access was adequate for the Board to properly evaluate NS's MultiRail evidence, because NS had stated in its Reply Evidence that it was provided "limited access" to both the Complainants and the Board. (NS Pet., Ex. 1, at 2.) But NS rendered that issue moot when it announced its intent only to limit the Complainants' to read-only access while providing the Board with fully functional read-write access (Joint Reply, Ex. C).

⁴ NS even claims that it is the Complainants' fault that NS had to use MultiRail, which somehow should absolve NS of its duty to provide MultiRail to the Complainants. (NS Surreply. 3) This *ad hominem* charge should be viewed for what it is and disregarded by the Board.

III. NS MAKES MULTIPLE ARGUMENTS ABOUT ITS EVIDENCE THAT ARE MOOT.

Attempting both to paint Complainants as seeking relief in their Reply and to bolster its evidence in light of the Board's rejection of the MultiRail program, NS uses its Surreply to address non-existent claims concerning the sufficiency of its evidence. Specifically, it asserts that Claimants have made a *de facto* motion to strike MultiRail from evidence (NS Surreply 12-13) and claimed that the validity of NS's operating evidence submitted in these cases depends on the use of the MultiRail tool (NS Surreply 15).

First, the Complainants have not asked the Board to strike any of the NS Reply Evidence. Indeed, because NS has not submitted MultiRail into evidence, there is nothing for the Board to strike. Rather, Complainants asked the Board to deny any attempt by NS to supplement the record by submitting the MultiRail software into evidence at this late date in order to cure its failure to properly do so with its Reply Evidence. (Joint Reply 31-35.) Since NS has indicated that it cannot do so under its license agreement with Oliver Wyman, this issue is moot. (NS Surreply 10, n.5.)

Second, the Complainants have not challenged the validity of NS's Reply Evidence. Complainants are still reviewing NS's Reply Evidence and believe that any ruling on NS's Reply Evidence is premature until Complainants have an opportunity to complete their review and file their Rebuttal. Accordingly, NS's argument about the validity of its Reply Evidence is non-responsive to Complainants' Joint Reply and premature.

IV. NS'S SURREPLY PROCEEDS FROM A MISCHARACTERIZATION OF RELEVANT FACTS AND COMPLAINANTS' ARGUMENT.

NS's remaining arguments concerning the relevant facts, history of RTC, and Complainants' use of case law are contrived. Regardless, NS's arguments either support Complainants' position or fail to rebut Complainants' position head-on.

First, NS provides the Verified Statement of Kevin Foy, who is Oliver Wyman's Head of Marketing for the Surface Transportation and Corporate Finance Practices, for the purpose of refuting several of Complainants' descriptions of MultiRail. Although Mr. Foy disputes the accuracy of some of Complainants' statements, his testimony actually confirms the Complainants' main point that they could not have installed the software and databases without paying Oliver Wyman for assistance.

Mr. Foy claims that Complainants could create a scenario file with the read-only version of MultiRail. (Foy V.S. ¶ 3.) Complainants of course are in no position to challenge that statement because Mr. Foy clearly has a far greater knowledge of MultiRail. But Complainants stand by their Reply testimony that Oliver Wyman's trainers made statements during the February 4-5 training session of Complainants' expert consultant that were inconsistent with Mr. Foy's testimony. This illustrates the confusion surrounding the process by which NS chose to provide MultiRail and the fact that Complainants really had no choice but to take Oliver Wyman's advice regarding the services that they needed to purchase in order to make use of the MultiRail software.

Indeed, Mr. Foy confirms Complainants' overall point that Oliver Wyman's assistance was a necessity, not an option. (Id. ¶2 ("with telephone guidance from Oliver Wyman, L.E. Peabody could have loaded the application and data to their PCs.")) It is notable that Mr. Foy does not volunteer that Oliver Wyman would have provided that service for free. Neither does Mr. Foy contest Complainants' testimony that he discouraged the Complainants from attempting to load MultiRail themselves; he "strongly recommend[ed]" training just to understand how to operate MultiRail; and only Oliver Wyman could provide that training. (Joint Reply 7-9.)

Second, NS's attempt to distinguish Complainants' history of the RTC Model in the Otter Tail case actually proves the point that Complainants intended to make. (See NS Surreply 23-24.) First, NS faults Complainants for "fail[ing] to note that there was no Board decision . . . requiring a party to pay for the opposing party's acquisition or use of the RTC Model." (*Id.* at 23.) That is the point. The parties understood the basic requirement that, if they used the software in their evidence, they had a duty to provide that software to the other party for the purpose of rebuttal. No Board order was necessary because the parties did what they were supposed to do.

NS also points out that Otter Tail ultimately did purchase its own copy of the RTC Model so that it could submit supplemental evidence. (*Id.*) The salient point is that Otter Tail purchased the RTC Model for the purpose of presenting supplemental evidence for its affirmative case, not for rebuttal evidence. BNSF provided Otter Tail with a laptop containing the RTC Model for the purpose of enabling Otter Tail to develop its rebuttal evidence. The supplemental evidence in Otter Tail entailed two new rounds of evidence: the simultaneous submission of opening and reply evidence by both parties. Otter Tail Power Co. v. Burlington N. & Santa Fe Ry., STB Docket 42071, slip op. at 3 (Dec. 13, 2004). In its request for supplemental evidence, the Board invited Otter Tail to use the RTC Model instead of the string model that it originally had used. *Id.* This distinction between supplemental and rebuttal evidence is key. Although the American Rule required BNSF to serve the RTC Model upon Otter Tail as part of BNSF's Reply Evidence, the same rule required Otter Tail to incur that expense itself if it wanted to use the RTC Model to make its affirmative case.

Third, NS attempts to undermine Complainants' use of case law by cherry-picking cases that can be easily misconstrued and ignoring the context in which Complainants presented the

cases. For example, NS criticizes Complainants' reliance on criminal cases, because they are subject to different legal standards than Board proceedings. (NS Surreply 21.) Yet Complainants quoted only the portions of these cases dealing with the universal benefits of cross-examination in the fact-finding process (Joint Reply 27), and NS disingenuously fails to mention the civil cases that Complainants relied upon, which echo the importance of cross-examination. NS also deceptively claims that Complainants relied on a dissenting opinion to state a rule of law. (NS Surreply 21.) Not so. Complainants cited to the dissenting opinion, which quoted a unanimous opinion of the District of Columbia Circuit Court of Appeals, only for the proposition that courts are simply aware of the "garbage-in garbage-out" problem with computer-generated evidence. (Joint Reply 20.)

V. CONCLUSION

For the foregoing reasons, the Board should deny NS's Motion for Leave to File a Reply. If the Board chooses to grant the Motion, it should consider this Joint Response as a Response to NS's Reply.

Respectfully submitted,



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

*Counsel for E.I. du Pont de Nemours and
Company & SunBelt Chlor Alkali
Partnership*

Dated: February 27, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February 2013, I served a copy of the foregoing Complainants' Joint Response to Defendant's Motion for Leave to File a Reply, by email and U.S. mail, upon:

G. Paul Moates
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005



Jason D. Tutrone