

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

E.I. DUPONT DE NEMOURS & COMPANY

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

Docket No. NOR 42125

**Expedited Consideration Requested**

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**NORFOLK SOUTHERN RAILWAY COMPANY'S  
MOTION FOR MODIFICATION OF PROCEDURAL SCHEDULE**

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Dated: August 16, 2012

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**EXPEDITED CONSIDERATION REQUESTED**

**NORFOLK SOUTHERN RAILWAY COMPANY'S  
MOTION FOR MODIFICATION OF PROCEDURAL SCHEDULE**

Defendant Norfolk Southern Railway Company ("NS") hereby moves the Board to adjust the procedural schedule in the above-captioned case to provide an additional 60 days for NS to file its Reply Evidence. NS also proposes parallel 60-day extensions to the deadlines for Complainant E.I. du Pont de Nemours and Company ("DuPont") to file Rebuttal Evidence and for the parties to submit closing briefs, to preserve the time intervals in the Board's existing procedural schedule.

Because of the relatively short time remaining until the deadline for filing Reply evidence under the current procedural schedule, NS requests expedited briefing, consideration, and determination of this Motion. NS hereby requests that the Board promptly issue an order directing DuPont to file any reply to this Motion no later than 10 calendar days after this Motion is filed. NS further urges the Board to issue a decision on this Motion as soon as possible following the completion of expedited briefing.

## ARGUMENT

NS seeks a modest 60-day extension in order to ensure that it “has enough time . . . to develop its evidence . . .” in a case of “unusual scope and complexity.” *E.I. du Pont de Nemours & Co. v. Norfolk Southern Ry. Co.*, STB Docket No. 42125, at 2 (Jan. 13, 2012) (granting DuPont a second 90-day extension of time to prepare Opening Evidence).<sup>1</sup> When the Board granted DuPont a *second* 90-day extension, it declined to provide the same schedule extension for NS at that time, advising that NS would have an opportunity to seek additional time to develop its Reply evidence, if necessary, after it had reviewed DuPont’s opening evidence. *See id.* When DuPont filed an extensive “Errata,” significantly revising its opening evidence, NS asked the Board for an extension of 29 days, the minimum time it believed necessary to re-start its review and analysis process and make up time lost due to the changes made by that 170-page “Errata.” *See* NS Motion for Modification of Procedural Schedule at 3-5, *DuPont v. NS*, STB Docket No. 42125 (May 24, 2012). When it filed its motion for a 29-day extension, NS alerted the Board that once it had an opportunity to evaluate DuPont’s revised opening evidence in more detail, it might determine it would need more time to develop its Reply evidence in this case of unprecedented size and complexity, stating in part:

[T]his Motion requests only the minimum amount of time NS believes is necessary to account for the disruption of its efforts caused by DuPont’s “Errata.” At this juncture, Norfolk Southern is not in a position to determine whether it will require additional time in order to: (i) fully understand and evaluate DuPont’s modified Opening Evidence in this large, complex case; and then (ii) develop and submit Reply Evidence addressing DuPont’s revised evidence. Due to the complexity of this case, Norfolk

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<sup>1</sup> As discussed below, NS’s review of DuPont’s opening evidence shows that DuPont’s case-in-chief employed a variety of “shortcuts,” purported simplifications, and significant errors and omissions that resulted in a distorted and wholly unreliable SAC analysis. A large part of NS’s task in developing Reply Evidence is to correct these fundamental flaws and eliminate the myriad gaps and shortcuts in DuPont’s case-in-chief.

Southern believes it is entirely possible that, once it has an opportunity to fully evaluate DuPont's revised evidence, NS may need to seek more time to prepare its Reply Evidence . . . . Norfolk Southern requests that the Board promptly grant a 30-day extension of time to permit [it] a reasonable opportunity to analyze DuPont's revised evidence, with the understanding that Norfolk Southern may determine it is necessary to seek a further extension of time within which to file its Reply Evidence. NS fully reserves its rights to seek further extension of time or other modification of the procedural schedule should it be necessary.

NS Motion for Modification of Procedural Schedule at 4-5 (emphasis added). The Board granted NS's motion for a 29-day extension, and acknowledged NS's reservation of the right to seek an additional modification of the procedural schedule should it prove necessary. *See* Decision at 1, n.1, *DuPont v. NS*, STB Dkt. No. 42125 (served June 12, 2012) (further stating that it is "important to ensure that the defendant in a case of this size has enough time, after assembling a full set of information, to develop its evidence.")<sup>2</sup> Now that NS has had an opportunity to more fully review and analyze DuPont's opening evidence, it has determined that it will need at least an additional 60-day extension of the procedural schedule to allow it to develop and file complete evidence. The additional time NS seeks is essential for it to prepare detailed, complete, and robust Stand Alone Cost ("SAC") evidence in this extraordinarily complex case – particularly in light of the "shortcuts" and fundamental errors in DuPont's evidence, errors so significant that they may constitute a failure to present a viable *prima facie* case.<sup>3</sup> If the Board grants this request for an additional 60-day extension, the combined length of the schedule extensions granted to NS would be 89 days, a day shorter than DuPont's *second* schedule extension *alone*.

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<sup>2</sup> In the same order, the Board granted DuPont's request for an additional extension of the procedural schedule, extending DuPont's time to file rebuttal evidence by 37 days. *See id.* at 2.

<sup>3</sup> Counsel for NS conferred with counsel for DuPont and sought DuPont's consent to the extension of time requested herein. DuPont declined to consent.

NS separately has moved the Board to hold this proceeding in abeyance until the conclusion of the Board's rulemaking in Ex Parte 715, *Rate Regulation Reforms*. See NS's Motion to Hold Case in Abeyance Pending Completion of Rulemaking (filed August 6, 2012) ("Abeyance Motion"). For the reasons expressed in that pending Motion, NS believes that all evidentiary filings in this case should be held in abeyance until the Board revises its rules and limits governing "cross-over" traffic and allocation of cross-over traffic revenue between the SARR and the residual incumbent. See *id.* DuPont's Opening Evidence in this case exemplifies the problems and distortions caused by cross-over traffic that caused the Board to convene the *Rate Regulation Reforms* rulemaking. It would be neither fair nor efficient to apply existing flawed-and-distorting rules regarding the use of cross-over traffic to this case while the Board is in the process of developing rules to fix those flaws. But if the Board chooses to go forward in this case at the same time it conducts the Ex Parte 715 rulemaking, NS would require an extension of 60 days to address the issues in this case.

As the Board has recognized, this is a case of "extraordinary size." *E.I. du Pont de Nemours & Co. v. Norfolk Southern Ry. Co.*, STB Docket No. 42125, at 2 (Jan. 13, 2012). While most stand alone railroads ("SARRs") have replicated a limited portion of the defendant railroad's network, DuPont has posited an 8,096 mile SARR that purports to replicate most of NS's core network. And while most prior SAC cases have involved SARR traffic groups consisting exclusively or predominantly of unit train movements, the majority of DuPont's traffic in this case is carload traffic, which requires a SARR designed to move each of millions of individual cars and containers from its origin to its destination. In addition, the traffic group DuPont has selected for its SARR is broad and diverse, including substantial volumes of

intermodal, general freight, automotive, carload, and multi-car traffic. *See* Abeyance Motion at 5-6.

Previously, DuPont itself relied upon the unusual size and complexity of this rate case as grounds to secure an extraordinarily lengthy procedural schedule. DuPont's final Opening Evidence (as modified by its substantial "Errata" filing) was not submitted until May 17, 2012 – *nineteen months* after DuPont filed its initial Complaint, sixteen months after NS began producing documents in discovery,<sup>4</sup> ten months after NS completed production of discovery data that was not Sensitive Security Information ("SSI"),<sup>5</sup> more than seven months (225 days) after NS produced complete traffic files,<sup>6</sup> and nearly six months (178 days) after the date on which NS responded to DuPont's last remaining follow-up requests.<sup>7</sup> In contrast, under the current schedule, NS will have only 134 days to prepare its Reply to DuPont's final Opening Evidence Errata. Although the parties have disagreed about the need for DuPont to have so much time to prepare its evidence, it is indisputable that the current procedural schedule affords DuPont far more time to prepare evidence than NS has been given.

While DuPont had ample time to prepare its evidence, it did not use this time to develop a SAC presentation that is feasible and supported or otherwise meets the standards established by Board precedent. *See Duke Energy Corp. v. Norfolk Southern Ry*, STB Docket No. 42069

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<sup>4</sup> NS began producing documents and data to DuPont on January 14, 2011.

<sup>5</sup> NS produced nearly all responsive non-SSI data to DuPont before the close of discovery on June 30, 2011. Production of SSI data was delayed pending consideration by the Federal Railroad Administration and Transportation Security Administration of the appropriate ground rules for SSI production.

<sup>6</sup> As detailed in NS's Reply to DuPont's Second Motion to Amend Procedural Schedule, NS produced complete and corrected traffic files to DuPont on October 5, 2011. *See* NS's Reply to DuPont's Second Motion to Amend Procedural Schedule at 7-9 (filed Dec. 20, 2011).

<sup>7</sup> As DuPont acknowledged in its Second Motion to Amend Procedural Schedule, NS's production to DuPont was complete on November 21, 2011. *See id.* at 14.

(served Nov. 6, 2003) (“*Duke/NS*”) Decision at 13-15 (complainant’s case-in-chief fails if its opening evidence is either infeasible or unsupported). To take only a few examples, DuPont selected a traffic group that requires significant local train service to pick up and deliver freight to customers, but failed to present a feasible local operating plan because it failed to account for a substantial number of local trains needed to serve customers. Similarly, it selected vast amounts of general freight traffic that requires substantial classification and switching work to move each individual car from its origin to its destination over the SARR network, but failed to present a yard operating plan for creating blocks or building trains.

Further, neither DuPont’s Opening Evidence narrative nor its work papers provide any indication of the number of cars that the SARR would be required to handle at its yard facilities (thereby making it impossible to determine whether those facilities are adequate). Moreover, neither DuPont’s SARR operating statistics nor its Rail Traffic Controller (“RTC”) simulation accounts for all of the train services required to meet customer requirements. DuPont’s road property investment evidence failed to account for the construction of turnouts or tracks necessary to serve DRR customers.

The foregoing examples barely scratch the surface of the extraordinary and pervasive flaws, errors, and omissions in DuPont’s Opening Evidence. In short, DuPont claimed that its SARR could obtain the lion’s share of NS’s revenues for the DRR traffic group without developing in a feasible or supported manner the complex network operations necessary to serve the customers in that group.<sup>8</sup> *Cf. E.I. du Pont de Nemours & Co. v. Norfolk Southern Ry. Co.*,

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<sup>8</sup> The entirety of DuPont’s SAC narrative consists of just 156 pages – far less than the narrative evidence presented by other SAC complainants with far less extensive SARRs. Indeed, DuPont’s entire opening narrative evidence is 14 pages shorter than the length of its full “Errata.”

STB Docket No. 42125, at 2 (Jan. 13, 2012) (providing DuPont an additional extension of time to allow it to submit complete evidence “without shortcuts”).

More generally, DuPont’s superficial and incomplete narrative evidence fails to explain adequately its methodology, assumptions, calculations, and various inputs and outputs for many parts of its SAC presentation, forcing NS to attempt to interpret and fill in the gaps in DuPont’s evidence in order to make it understandable. DuPont does not even attempt to explain essential steps, assumptions, and parameters of its analysis, including key portions of many sections of its evidence. In many instances, DuPont’s workpapers shed no more light than its narrative on what DuPont did to develop its evidence and calculations, or why it proceeded as it did. That is, DuPont’s workpapers often include data and calculations but are entirely lacking in explanation of what the workpapers purport to do, what data or assumptions they rely upon, or how the results of such calculations are used to determine SARR requirements or to support SAC analysis and conclusions. Accordingly, NS’s experts have been required to painstakingly attempt to reconstruct what DuPont apparently did in its evidence, what assumptions it made, and how and why it generated its analyses and results, before they can analyze that evidence and develop reply evidence that corrects the mistakes and flaws in DuPont’s case-in-chief. The interpretation and review of DuPont’s cryptic and incomplete evidence has been an extraordinarily time-consuming task for NS’s experts and others working to develop its Reply Evidence.

Once NS has interpreted and developed a working understanding of DuPont’s opening evidence, it must develop Reply Evidence that will correct the myriad deficiencies in DuPont’s evidence, and present stand-alone cost evidence that models the full network operations necessary for a least-cost, most-efficient, feasible stand-alone railroad to serve the traffic group DuPont has selected for its SARR. The process of developing thorough and detailed stand-alone

cost evidence is very time-intensive, and NS in-house personnel and outside consultants are devoting thousands of hours and substantial resources to developing Reply Evidence that is consistent with SAC principles and Board rules and precedents

Even apart from the myriad errors in DuPont's evidence, the sheer complexity of this case requires more time for development of detailed, accurate, and supported analysis and evidence. NS's request for extension of the procedural schedule is also necessitated by the additional time required to develop and produce the thorough and detailed evidence that the Board will need to evaluate this extraordinarily complex case. Virtually every aspect of this case is of unprecedented scope and complexity. NS's motion to hold this case in abeyance pending the *Rate Regulation Reforms* rulemaking provided an overview of DuPont's extensive and novel uses of cross-over traffic. *See Norfolk Southern Railway Company's Motion to Hold Case in Abeyance Pending Completion of Rulemaking at 5-11 (Aug. 6, 2010).*

Further, DuPont's SARR traffic group and network are both larger and more diverse than in any previous SAC case, and the process of evaluating and correcting DuPont's revenue projections and calculations and cross-over traffic revenue allocations is complex and time-consuming. Developing the type of feasible and supported operating plan required by the Board (particularly a plan for carload traffic that actually accounts for the movement of individual cars from origin to destination through a SARR network) is a labor-intensive and complicated process. In this case, that process has required NS's experts to create from scratch essential items such as local train service plans and yard operating plans that were largely ignored in DuPont's opening evidence. Road property investment work for a SARR with over 7,000 constructed route miles also requires substantial time and effort to evaluate and develop real estate costs and engineering costs for this vast network.

Another area of complexity is the simulation analysis DuPont conducted using the RTC model. DuPont asserts in its Opening Evidence that the feasibility of its proposed DRR operations is “confirmed” by its purportedly successful RTC simulation. But like any computer model, DuPont’s RTC simulation is only as reliable as the data and assumptions that are input into its model (“Garbage-in, garbage-out”). Here, NS has discovered substantial errors, omissions and distortions in DuPont’s RTC inputs – including, for example, failing to give effect to train delay data, and failing to include *hundreds* of “peak period” trains that would be needed to serve the DRR’s customers. These and other errors render DuPont’s RTC outputs essentially meaningless. NS’s Reply Evidence will demonstrate that these, and other, fatal flaws render DuPont’s RTC simulation, and the operating expenses derived from the output of that simulation, utterly unreliable.

Correcting the errors in DuPont’s RTC model – and running a proper RTC model that accounts for all necessary SARR trains and all the work that would be required to provide service in the real world – is a significant and very time-consuming computing task. The RTC model was designed to model much smaller network segments than the DuPont’s 8961-mile hypothetical network.

Once NS has corrected the myriad errors and omissions in DuPont’s RTC model and accounted for all the necessary trains and service, the resulting complexity will challenge the decision-making capacity of the RTC software and its ability to simulate the operation of such a large and complex network. NS’s RTC experts are working diligently to design an RTC model that will generate meaningful results, but substantial additional time and effort will be required to complete that process.

In short, the unprecedented complexity and size of this case presents challenges in virtually every area of SAC evidence, and NS needs additional time to prepare thorough and complete Reply Evidence. Because NS's Reply submission represents its sole opportunity to present evidence in this case, NS respectfully submits that a 60-day extension of the procedural schedule is reasonable. The modest extension NS requests is particularly appropriate in light of the multiple, lengthy extensions of time that the Board granted DuPont to prepare its Opening Evidence. Although the burden of proffering a feasible and supported *prima facie* case and the entire burden of proof falls squarely on Complainant DuPont, a defendant carrier such as NS is nevertheless expected to present feasible and supported SAC evidence in its Reply submission.<sup>9</sup> Complainants and railroads are each required to present fully supported and documented evidence. If the Board is to hold each party to a similar evidentiary standard, it cannot approve a procedural schedule giving one party far more time to prepare evidence than the other.

To deny NS's request for a modest extension would be to establish a procedural schedule in which one litigant is given nearly three months more time to prepare evidence than the other litigant.<sup>10</sup> That structure is plainly inconsistent with bedrock principles of fair play and due process, and the Board should reject DuPont's position that NS should be afforded substantially less time to prepare evidence than DuPont itself received.

Accordingly, NS requests an extension of time until November 30, 2012 to file its Reply Evidence. To preserve the time intervals in the Board's existing schedule, NS further requests that the dates for filing of DuPont's Rebuttal Evidence and for filing of final briefs each be

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<sup>9</sup> See, e.g., *Duke/NS* at 13-15.

<sup>10</sup> NS substantially completed discovery production seven months (225 days) before DuPont filed its revised opening evidence. Under the current procedural schedule, NS will have 134 days following DuPont's "Errata" filing to develop and file its Reply evidence. NS's time to prepare its evidence would thus be 91 days – or 68 percent (91/134) – shorter than the time DuPont enjoyed for the preparation of its opening evidence.

extended by a commensurate 60 days. The following table details the schedule changes that NS seeks.

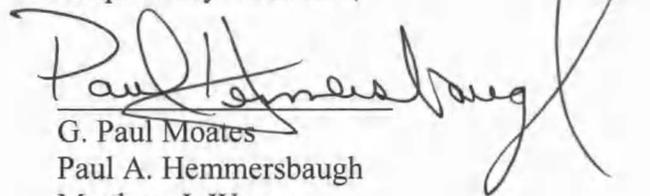
	<b>Due Date Under Current Procedural Schedule</b>	<b>Due Date Under Proposed Amended Procedural Schedule</b>
<b>NS's Reply Evidence</b>	September 28, 2012	November 30, 2012
<b>DuPont Rebuttal Evidence</b>	January 28, 2013	March 28, 2013
<b>Final Briefs</b>	March 8, 2013	May 8, 2013

### **CONCLUSION**

For the foregoing reasons, NS requests that the Board act expeditiously to modify the governing procedural schedule to extend the date for filing of NS's Reply Evidence to November 30, 2012, to extend the date for filing DuPont's Rebuttal Evidence to March 28, 2013, and to extend the deadline for final briefs to May 8, 2013. More immediately, NS requests that the Board issue an order directing DuPont to file any reply to this Motion within 10 calendar days of the filing of this Motion. NS further requests that the Board give this Motion expedited consideration, and rule on it as soon as possible.

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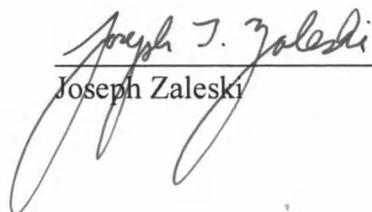
*Counsel to Norfolk Southern Railway Company*

Dated: August 16, 2012

## CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 2012, I caused a copy of the foregoing Norfolk Southern Railway Company's Motion for Modification of Procedural Schedule to be served by email and by first class mail, postage prepaid, or more expeditious method of delivery on:

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