

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

234574

ENTERED

Office of Proceedings

July 25, 2013

Part of

Public Record

Docket No. NOR 42125

E.I. DUPONT DE NEMOURS & COMPANY

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

MOTION TO STRIKE

Pursuant to 49 C.F.R. §§ 1104.8 and 1117.1 and other applicable authority, Defendant Norfolk Southern Railway Company (“NS”) respectfully submits this Motion to Strike the unauthorized and highly prejudicial Errata to Rebuttal Evidence (“Errata”) submitted by E.I. du Pont de Nemours & Company (“DuPont”) on July 18, 2013. DuPont’s so-called “Errata” is actually a substantial new evidentiary filing submitted in complete contravention of the Board’s rules and the evidentiary schedule in this case, and without authorization of the Board. Moreover, the purported “Errata” was not accompanied by any motion for leave to file, nor any explanation to justify its out-of-time and prejudicial submission. The “Errata” is an egregious attempt to pass off major evidentiary changes affecting essential components of DuPont’s SAC evidence as mere technical alterations and minor corrections, a brazen violation of the Board’s rules and procedures that it cannot allow to stand.

INTRODUCTION

DuPont’s “Errata” is a completely unauthorized additional evidentiary submission that attempts to evade the Board’s rules, would prevent testing of DuPont’s new evidence, and would unfairly prejudice NS. The practice of filing errata, which is not provided for in the Board’s

rules, is appropriately directed towards making minor technical corrections. DuPont has gone far beyond that by making significant, substantive changes to its SAC evidence through its “Errata.” It has done so *more than three months* after filing the Rebuttal Evidence the “Errata” purports to correct and over one month after the parties filed their *Final Briefs* in this case. By DuPont’s express admission, it is not correcting errors but responding to points summarized in NS’s brief concerning the many deficiencies and failures of proof in DuPont’s evidence. “Errata” at 4. Moreover, DuPont’s unprecedented gambit after the final buzzer has sounded confirms NS’s position in this case that much of DuPont’s SAC evidence is fatally flawed. DuPont’s “Errata” should be stricken because it is completely improper and highly prejudicial to NS.

I. DUPONT’S “ERRATA” IS UNAUTHORIZED, INAPPROPRIATE, AND INCONSISTENT WITH THE GOVERNING SCHEDULE, THE BOARD’S RULES, AND ACCEPTED CUSTOM AND PRACTICE.

DuPont’s “Errata” substantially deviates from the substance of a typical errata filing. The practice of submitting errata to make minor corrections to filings is an accepted one to which NS does not object. But DuPont’s “Errata” is not an errata at all. Rather, it goes far beyond making minor technical corrections and constitutes an additional and unauthorized filing of new evidence. The “Errata” is also prejudicial because it deprives NS and the Board of the benefit of having DuPont’s new evidence tested in the crucible of the adversarial process.

A. DuPont’s “Errata” Is Unprecedented And Amounts To An Additional Evidentiary Submission.

DuPont’s “Errata” does not merely correct minor or non-substantive errors, but proposes to make significant changes to its SAC evidence. By DuPont’s own calculation, the “Errata” decreases by almost half a billion dollars the “cumulative present value of the difference in overpayments in the DCF model ...” “Errata” at 4. It does so by altering car classification counts, adding trains to its RTC simulation, adjusting the speeds of certain trains, and adding hump yards. *Id.* at 1-2. These changes would have a substantial effect on other aspects of

DuPont's SAC presentation, increasing track miles, increasing yard acres, and increasing road property investment, necessitating increased yard crew and locomotives, and otherwise increasing operating costs.¹ *Id.* at 3-4. By any measure, a 500 million dollar change is more than a mere "technical correction" of the type typically proposed in an errata filing.

DuPont's "Errata" is its *fourth* evidentiary submission in this case, compared to a single evidentiary filing for NS. DuPont's first evidentiary filing was its Opening Evidence, filed on April 30, 2012. DuPont made its second evidentiary filing seventeen days later, on May 18, 2012, when it submitted a lengthy errata that, until this "Errata," was unprecedented in its scope and complexity ("*Opening Errata*"). The *Opening Errata* made significant alterations to DuPont's Opening Evidence, increasing by \$291 million the cumulative present value of the difference in overpayments in the DCF model. *Opening Errata* at 2. Recognizing that DuPont's *Opening Errata* was not contemplated by the procedural schedule and adversely impacted NS's ability to prepare its Reply filing in a timely fashion, the Board extended the time for NS's Reply Evidence by 30 days. *DuPont v. NS*, STB Docket No. 42125 (decided June 11, 2012). DuPont's third evidentiary filing was its Rebuttal Evidence, filed on April 15, 2013. Now, *after* the submission of Final Briefs, DuPont has filed a fourth, significant evidentiary submission that it brazenly mischaracterizes as an "Errata." By contrast, NS has been afforded a single evidentiary filing in which to respond to DuPont's voluminous evidence.²

DuPont's so-called errata is nothing of the kind. In fact, it is clearly an evidentiary response to NS's Brief. DuPont even concedes this point by stating that "[o]n Brief, NS

¹ These are just some of the more significant substantive changes identified by DuPont in its "Errata." Because the "Errata" is so far-reaching, there are other changes to DuPont's evidence not enumerated in this Motion but all of which are objectionable and should be stricken.

² NS did file a minor errata to its Reply Evidence. But NS's errata was not a substantive evidentiary finding. It corrected typographical errors, confidentiality designations, and similar minor issues that errata are typically designed to address.

identified an error” which formed the major basis for the “errata.” “Errata” at 1. But the “error” NS identified was not a typographical or arithmetic error. It was a complete evidentiary failure by DuPont, resulting in a failure of proof on critical SAC issues.³ In a belated and desperate attempt to remedy its evidentiary failures, DuPont’s “Errata” constitutes a blatant and improper attempt to force into the record entirely new and different substantive evidence.

Mischaracterizing that attempt as a simple “Errata” does not obscure the reality of what DuPont has tried to do.

B. DuPont’s “Errata” Is Extremely Prejudicial To NS Because It Denies NS A Timely Opportunity To Reply.

DuPont’s new “Errata” evidence would cause unfair prejudice to NS because it would deny NS a chance to address the new evidence in a timely fashion.⁴ The Board has previously warned that it looks “with disfavor upon the filing of errata that ‘curtail the ability of parties to respond fully and adequately to the record within the time frames [the Board has] established.’” *Potomac Electric Power Co. v. CSX Transp., Inc.*, STB Docket No. 41989, at 7 (decided Nov. 12, 1997).⁵ DuPont’s filing does exactly that, making major substantive alterations to DuPont’s evidence completely outside of the procedural schedule. NS cannot respond to this altered

³ NS’ Brief did not raise any new claims or arguments but rather summarized flaws in DuPont’s evidence that NS had properly identified in its Reply submission and addressed new arguments and evidence that DuPont proffered for the first time on Rebuttal.

⁴ NS is not providing a substantive response to the new evidence submitted by DuPont’s “Errata” because to do so would only legitimize DuPont’s improper and unfair attempt to end-run the procedural schedule. Moreover, given DuPont’s repeated unsuccessful attempts to paper over fundamental problems in its SAC case, NS expects that this new evidence is only more of the same.

⁵ See also *CSX Corp. and CSXT, Norfolk Southern Corp. and NS – Control and Operating Leases/Agreements – Conrail Inc.*, STB Finance Docket No. 33388, at 7 (served May 30, 1997) (“The procedural schedule that we are adopting should provide parties ample time to build a sufficient record for us to make a reasoned decision in this proceeding. We do not intend to permit this process to be marred by the filing of errata sheets significantly altering the evidence and conclusions contained in earlier submissions, as such filings may curtail the ability of parties to respond fully and adequately to the record within the time frames we have established.”).

evidence under the governing schedule, and the purpose and structure of that schedule would be subverted by DuPont's maneuver.

If the Board were to accept the "Errata,"—and it clearly should not—it would be rewarding DuPont for a flagrant and improper supplementation of the evidentiary record, while simultaneously causing significant unfair prejudice to NS. A primary reason the Board establishes procedural schedules is to avoid circumstances such as these, where one party seeks an unfair advantage over the other by filing substantive evidence at a time or in a manner that deprives the opposing party of an opportunity to respond. DuPont's "Errata" displays a breathtaking disregard for the schedule the Board established for the fair and orderly processing of the evidence and arguments offered by the parties. DuPont's attempted circumvention of the Board's procedures would preclude the fair and timely testing of that new evidence, which is fundamentally prejudicial to NS.

C. DuPont's Flip-Flop On The Need For Hump Yards Demonstrates The Utter Impropriety Of Its "Errata."

The irregular and unfair nature of the "Errata" is demonstrated by DuPont's total reversal on the need for hump yards on the DRR. In all prior evidentiary filings and in its Final Brief, DuPont completely rejected NS's evidence, consistent with real-world practice, on the necessity of hump yards and said that the DRR did not need a single hump yard facility. *See* DuPont Rebuttal III-C-127–28; DuPont Final Brief at 31. Now, after the buzzer has sounded, and under the guise of an errata filing, DuPont has flip-flopped and embraced the need for *seven* hump yards. "Errata" at 3. DuPont's twelfth-hour inclusion of hump yards is a poster child for the many significant, substantive and entirely improper changes in the "Errata."

Hump yards are instrumental infrastructure for large railroads with rail networks spanning multiple states. Indeed, all Class I carriers operate large hump yards for the purpose of

classifying cars into blocks moving to common points further along the rail network, an activity necessary to facilitate the handling of large volumes of carload traffic. *See* NS Reply III-C-55. In its Opening Evidence and *Opening Errata*, DuPont completely ignored the need for hump yards. In Reply, NS determined whether a hump yard was necessary on the basis of the anticipated daily volume of activity at a specific yard location. If the aggregate daily volume of outbound rail car blocks was at least 900 cars, a hump yard would need to be built and operated to efficiently classify cars. *See* NS Reply III-C-174. On that basis, NS proposed a total of eight hump yards. *Id.*

In Rebuttal, DuPont doubled-down on its hump yard position and maintained “that no hump yards are required on the DRR system.” DuPont Rebuttal III-C-124. According to DuPont, “the classification car counts based on NS’s car event data associated with the actual trains moving on the DRR system do not warrant the construction of hump yards on the DRR in the Base Year.” *Id.* at III-C-127. Further, “NS’s 900 car per day threshold is not a requirement but an approximate classification car count” *Id.* In its Final Brief, DuPont continued to “reject[] NS’s inclusion of ‘hump yards’ on the DRR.” DuPont Final Brief at 31. For its part, NS restated in its Final Brief that DuPont’s failure to include even a single hump yard was not consistent with real-world railroading. *See* NS Final Brief at 28.

Now, almost seven months since NS explained why DuPont needed to include hump yards in its Reply Evidence, over three months since DuPont rejected NS’s evidence in its Rebuttal Evidence, and over a month after DuPont confirmed its unwavering position in its Final Brief, DuPont has reversed itself by asserting that the DRR would require seven hump yards. “Errata” at 3 (changes in the “Errata” include “Addition of ‘hump’ facilities at seven (7) yards”). DuPont provides no explanation for its newfound realization that it must include hump

yards. It asserts that it is adding hump yards “where the number of cars classified in the Base Year exceed 900 per day.” *Id.* But as NS demonstrated on Brief, DuPont’s own calculation showed at least one yard already met this standard before DuPont’s post-Brief changes to include additional trains in the RTC and corrections to classification car counts. *See* NS Brief at 25, Table 2 (Elkhart Yard had 937 cars in the Base Year under DuPont’s flawed calculations). DuPont’s dramatic change of position on hump yards is not merely a result of adjustments to car counts, it is an effort to completely change its position on the standard to use in determining when hump yards are necessary. This and all of the other sand-bagging changes in the “Errata” must be stricken, and DuPont must be required to live with the consequences of its inadequate and unsupported evidence as detailed in NS’s Reply Evidence and Brief.

D. DuPont’s “Errata” Concedes That NS’s Criticisms Of DuPont’s Case-In-Chief Are Correct.

By attempting to submit new evidence as an “Errata” after making three evidentiary submissions, DuPont has effectively conceded that NS’s criticisms of DuPont’s evidence on Reply and on Brief are accurate. These criticisms include NS’s demonstrations that DuPont’s operating plan is fatally flawed and its road property investment and operating costs evidence are wrong. That leaves the Board only with NS’s evidence on multiple aspects of this case, including the operating plan, yard sizes, car classification, much of the road property investment, and both Train & Engine and Maintenance-of-Way employees.

E. DuPont’s “Errata” Cannot Be Viewed As Supplementing The Record.

To the extent that DuPont may now ask that the Board interpret DuPont’s filing as a petition to supplement the evidentiary record—and it should not given DuPont’s failure to seek the Board’s permission to file—DuPont cannot meet the standard for granting such a petition. Specifically, a petitioner must “demonstrate that the material sought to be introduced is central to its case, could not reasonably have been introduced earlier, and would materially influence the

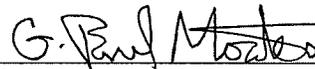
outcome of the case.” *Duke Energy Corp. v. CSX Transp., Inc.*, STB Docket No. 42070, at 4 (decided Mar. 21, 2003); *see also Intermountain Power Agency v. Union Pacific R.R. Co.*, STB Docket No. 42127, at 2 (decided Apr. 2, 2012). DuPont has not even attempted to make such a showing and instead has presumptively submitted this new evidence for the Board’s acceptance without presenting a single argument why it should do so.

If DuPont’s rationale for its “Errata” is that NS’s Brief contained impermissible surrebuttal—and DuPont has not made such an allegation in its “Errata” for the good reason that NS did not do so—then the appropriate remedy would have been to file a motion to strike. *See SunBelt Chlor Alkali P’ship v. Norfolk Southern Ry. Co.*, STB Docket No. 42130, at 2 (decided July 15, 2013) (stating that the proper vehicle to address improper rebuttal evidence is a motion to strike). A unilateral, supplemental evidentiary filing disingenuously characterized as “Errata” is not appropriate and cannot be allowed to stand.

CONCLUSION

For the foregoing reasons, DuPont's "Errata" should be stricken from the record, and the Board should not rely on any such evidence in its consideration of this case.

Respectfully submitted,



G. Paul Moates
Paul A. Hemmersbaugh
Terence M. Hynes
Matthew J. Warren
Hanna M. Chouest
Marc A. Korman
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

John M. Scheib
David L. Coleman
Christine I. Friedman
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

Counsel to Norfolk Southern Railway Company

Dated: July 25, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July 2013, I caused a copy of the foregoing

Motion to Strike to be served by email and hand-delivery upon:

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



Marc A. Korman