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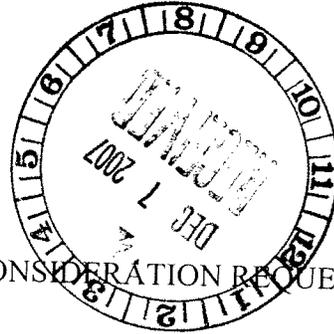
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FOUNDED 1866

December 7, 2007

By Hand

Vernon Williams
Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C.
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EXPEDITED CONSIDERATION REQUESTED

Re: DuPont v. CSX Transportation, Inc., STB Dkt. Nos. 42099, 42100, 42101

Dear Secretary Williams:

Enclosed, for filing in the above-referenced cases, are the original and ten copies of CSXT's Petition to Hold Proceedings in Abeyance and Motion for Clarification. Also enclosed is a computer disk containing an electronic copy of CSXT's filing. Please file this Petition in the three above-referenced cases and file-stamp the additional copies and return them to our messenger for our files. Please note that CSXT requests that the Board give this motion expedited consideration.

If you have any questions about this filing, please contact me.

Very truly yours,

Paul A. Hemmersbaugh

cc: Nicholas DiMichael

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BEFORE THE
SURFACE TRANSPORTATION BOARD

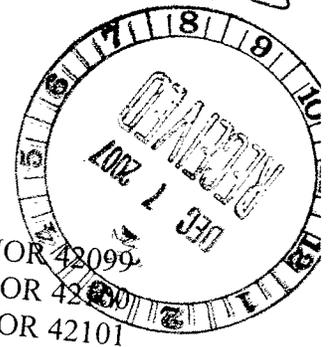
E.I. DUPONT DE NEMOURS AND COMPANY)
Complainant,)
v.)
CSX TRANSPORTATION, INC.)
Defendant)

ENTERED
Office of Proceedings

DEC 7 - 2007

Part of
Public Record

Docket No. NOR 42099
Docket No. NOR 42100
Docket No. NOR 42101



**DEFENDANT CSX TRANSPORTATION, INC.'S PETITION TO HOLD
PROCEEDINGS IN ABEYANCE AND MOTION FOR CLARIFICATION
- EXPEDITED CONSIDERATION REQUESTED -**

Pursuant to 49 C.F.R. § 1117.1 and other applicable rules and authority, Defendant CSX Transportation, Inc. ("CSXT") petitions the Board to stay proceedings in the three above-captioned cases brought by Complainant E.I. du Pont de Nemours and Company ("DuPont") until such time as the Board can provide the parties with 2006 Carload Waybill Sample data. In each of these cases DuPont is challenging 2007 CSXT rates. The Carload Waybill Sample data provided to the parties by the Board on November 8, 2007, however, only includes data on movements through 2004. Because outdated 2004 data cannot provide meaningful comparisons for a 2007 rate and cannot form the basis of a sound and rational rate reasonableness determination in these cases, and because more current data is likely to be available soon, the Board should stay proceedings in the three cases until more current data is available.¹

¹ CSXT respectfully requests that the Board decide its motion for a stay expeditiously, in order to avoid the potentially needless expenditure of the parties' time and resources on development of evidence based upon incomplete data, or data that the Board decides not to use (or to revise substantially) in these cases.

In addition, CSXT moves the Board for an order clarifying that \$1 million is the maximum available relief in a case invoking the Three Benchmark Approach set forth in *Simplified Standards for Rail Rate Cases*, Ex Parte No. 646 (Sept. 5, 2007) ("*Simplified Standards*"). While the Board's decision in *Simplified Standards* plainly mandated that "Complainants that proceed under the Three-Benchmark methodology will be limited to \$1 million of rate relief over a 5-year period," *Simplified Standards* at 27, DuPont is seeking \$3 million in relief in NOR 42099 and \$3 million in relief in NOR 42100. The Board should make clear that DuPont is limited to \$1 million per case considered under the Three Benchmark approach.

BACKGROUND

Complainant DuPont is a multinational corporation that is one of the world's largest manufacturers of chemicals, plastics, and other products. DuPont ships millions of tons of commodities via rail every year. A great many of those products are hazardous materials, including toxic-by-inhalation chemicals ("TIH chemicals"). DuPont ships much of this rail freight on the lines of Defendant CSXT, whose common carrier rates are subject to the jurisdiction of the Board. Annually, CSXT transports more than twenty-thousand carloads over hundreds of different routes for DuPont, one of CSXT's largest customers.

For most of the past two decades, CSXT has transported commodities for DuPont pursuant to an omnibus contract for approximately \$65 million worth of DuPont's traffic on CSXT. While CSXT and DuPont attempted to negotiate a renewal of that contract in 2006 and 2007, they have been unable to reach agreement on a new contract for DuPont's hundreds of lanes of traffic (*i.e.*, origin-destination pairs) on the CSXT system. The last version of the parties' master contract expired on June 15, 2007. When the contract expired without the parties reaching agreement on a new contract, CSXT offered DuPont private prices for the movements

that had been covered by the expired contract, in the form of DuPont Private Price Lists (PPLs). These PPLs were confidential, private contract offers that were offered and intended for DuPont alone, and are distinct from CSXT's public common carrier rates. *See* CSXT Mot. to Dismiss at 7-9 (filed Aug. 31, 2007). DuPont has shipped freight pursuant to all but one of the Private Price Lists covering the movements at issue in the Complaints, thereby accepting CSXT's offer and creating private transportation contracts for each of those shipments.²

PROCEDURAL HISTORY

On August 21, 2007, DuPont filed Complaints in the three instant cases: NOR 42099 (the "Plastics Case"), NOR 42100 (the "Chlorine Case"), and NOR 42101 (the "Nitrobenzene Case"). Each case challenged the PPL rate CSXT offered DuPont in June 2007. DuPont's initial Complaints sought relief under the simplified standards adopted in Ex Parte 347 (Sub-No. 2), *Rate Guidelines—Non-Coal Proceedings*, 1 S.T.B. 1004 (1996). *E.g.*, First Plastics Complaint at 9. CSXT moved to dismiss those cases, arguing both that the Complaints challenged contract movements outside the Board's jurisdiction and that challenges to rail rates for TIH chemicals and other highly hazardous materials were not appropriate for consideration under simplified methods and standards. *See* CSXT Mot. to Dismiss (filed Aug. 31, 2007).³ On September 7, 2007, the Board ruled that DuPont's complaints would be considered under the newly-issued *Simplified Standards*, and directed DuPont to amend its complaints as necessary to conform them to the *Simplified Standards*. *See* Decision at 1, NOR 42099, 42100 & 42101 (Sept. 7, 2007).

² DuPont has not shipped chlorine over CSXT between Niagara Falls, New York and New Johnsonville, Tennessee – one of the challenged movements in NOR 42100 – since early 2007.

³ CSXT's Motion to Dismiss is still pending before the Board, and CSXT respectfully requests that the Board accord that motion expedited consideration as well.

DuPont filed Amended Complaints in the three cases on October 30, 2007. The Amended Complaints challenged the PPL rates over seven lanes: three movements of plastic and plasticizers (challenged in the “Plastics Case”), one movement of the hazardous material nitrobenzene (challenged in the “Nitrobenzene Case”), and three movements of TIH chlorine (challenged in the “Chlorine Case”). DuPont seeks reparations “not to exceed a value of \$1 million per challenged movement, excluding interest.” *E.g.*, Chlorine First Am. Compl. ¶ 21; Plasticizers First Am. Compl. ¶ 19. For both the Chlorine Case and the Plastics Case, therefore, DuPont seeks to use the Three Benchmark Approach to recover reparations of up to \$3 million per case.

Pursuant to the Three Benchmark procedures set forth in *Simplified Standards*, on November 9, 2007, the Board provided the parties with access to unmasked Carload Waybill Sample data. That Waybill Sample only includes movements from 2001 through 2004, but does not include any movements that postdate 2004.

ARGUMENT

I. The Board Should Hold Proceedings in the Three Cases in Abeyance Until It Issues a More Recent Waybill Sample

The Board should stay these proceedings because a Waybill Sample including movements from 2001 to 2004 cannot provide a meaningful comparison group for rates that CSXT established in June 2007.⁴ The acute “regulatory lag” between movements dating from 2004 or earlier and the issue movements, which date from 2007 (and soon 2008) would seriously undermine the accuracy of any “comparison” between rates from the two eras, particularly in light of the substantial changes in market conditions, rates and costs over the last several years.

⁴ Alternatively, the Board might rule that origin-destination pairs over which traffic challenged commodities moved in 2004 (or, potentially, earlier) could be comparable movements, but that current rates and costs would be applied to determine R/VC ratios.

The effects of this extraordinary regulatory lag could be significantly (but not completely) mitigated by using a more recent Waybill Sample. For this reason, the Board should stay proceedings until it issues the 2006 Waybill Sample for the parties' use in these cases.

The keystone of the Three Benchmark Approach is the creation of a comparison group of movements similar to the issue movement. That comparison group is the key input for deriving the R/VC_{COMP} , which is an essential element of the Board's determination of whether the challenged rates are reasonable. Under the *Simplified Standards*, all movements in the comparison group "must be drawn from the Waybill Sample provided to the parties by the Board at the outset of the case." *Simplified Standards* at 18. As a result, use of data from an outdated Waybill Sample affects the accuracy of the entire Three Benchmark Approach.

The Board recognized the problem of using outdated Waybill Sample data in *Simplified Standards*, where it acknowledged that the "regulatory lag" between the time of the movements in the Waybill Sample and the issue movements was an issue of concern. *Simplified Standards* at 85. Indeed, the Board noted that a "regulatory lag" of just one to two years between the comparison group and the challenged rate was a relevant factor that the Board might be required to consider in assessing the reasonableness of a challenged rate. *Id.* Everything else being equal, the larger the time lag between the comparison data and the challenged rates, the greater the potential distortion of the rate comparison process that lies at the heart of the Three Benchmark approach.

Here, the outdated Waybill Sample data provided to the parties creates a far more serious "regulatory lag" than that contemplated by the Board in *Simplified Standards*. In each of the three cases, DuPont has challenged a mid-2007 CSXT rate. But the 2004 Waybill Sample provided by the Board means there will be at least a minimum 3½ year time gap between the

issue movement and any comparison group. Indeed, if this case were decided on the present schedule based on the 2004 Waybill Sample data, that data would be 4½ years old at the time of the Board's rate reasonableness determination (presently scheduled for June 2008). This disconnect is intolerable, because it would generate arbitrary and capricious rate reasonableness determinations, particularly in light of the very substantial industry-wide changes in rail rates and costs over the past several years – changes which have been especially pronounced for chemicals traffic. To take but one example, the price of diesel fuel has more than doubled between January 2004 and the present. *See United States Energy Information Administration data, available at <http://tonto.eia.doe.gov/oog/ftparea/wogirs/xls/psw18vwall.xls>* (showing increase from \$1.503 per gallon on January 5, 2004 to \$3.416 per gallon on December 3, 2007). And, from January 2005 to the present, rail rates for most commodities – and hazardous chemicals in particular – have increased dramatically. Since the fourth quarter of 2005, CSXT's average revenue per car has grown by an average of 9.9% per year. Over the same period, Norfolk Southern's average revenue per car grew by an average of 6.7% per year, BNSF's grew by 9.5% per year, and Union Pacific's grew by 8.1% per year.⁵ Rate increases for chemicals traffic, such as the issue traffic in these cases, have been even more pronounced. CSXT's average revenue per car for chemicals traffic has increased by approximately 30% since the end of 2004.⁶

⁵ These figures are derived from publicly available data provided to the SEC in the rail carriers' annual 10-K and quarterly 10-Q submissions.

⁶ The potential for arbitrary results in these cases absent a temporary stay is exacerbated by the Board's pending "Cost of Capital" Methodology proceeding, STB Ex Parte No. 664. If, during the pendency of these cases, the Board were to issue a decision in Ex Parte 664 that would significantly alter its railroad cost of capital calculation, that decision could require significant changes in URCS cost calculations, which in turn would materially change R/VC ratios. Particularly if the Board were to consider allowing comparison group traffic to be selected from a Costed Waybill Sample for a year other than the most recent year for which that data is available, this could result in R/VC comparisons and rate reasonableness determinations based upon materially different – and hence not comparable – data sets and calculations. At the very

Moreover, the regulatory lag could be mitigated with a minimum of delay, if the Board were to postpone further proceedings in this case until it issues a Carload Waybill Sample updated to include 2006 data.⁷ 2006 waybill data was submitted to the Board earlier this year (2007), and that data is far more comparable to 2007 rail rates than is 2004 waybill data. Because the Board already has both 2005 waybill data and 2006 waybill data and is presumably in the process of developing Carload Waybill Samples using that data, it is likely that the Board could produce 2006 Waybill Sample expeditiously. The Board's duty to "examine the relevant data" in deciding this case requires the Board to consider the most accurate data in its possession—not data that is more than three years out-of-date. *E.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Put differently, if the Board is to determine rate reasonableness by looking at rates and costs of comparable movements, it must consider movements that are as close in time to the issue movements as reasonably possible.

While it prepares 2006 Waybill Sample data, the Board should stay proceedings to prevent the parties from needlessly expending resources on developing comparison groups from the 2004 Waybill data. Absent a stay, the parties may develop and submit evidence based on outdated data, only to be required to duplicate those efforts and expenditures of resources when the Board issues more recent data. Such inefficient use of the parties' resources would not be consistent with the Board's statutory charge to implement simplified and less costly methods

least, such an eventuality would require the parties and the Board to expend significant time and resources debating and determining how to adjust and revise those data sets and their multiple moving parts and components, to allow an apples-to-apples comparisons and a rational, non-arbitrary rate reasonableness determination.

⁷ While using the 2007 Waybill Sample would more fully mitigate the regulatory gap, CSXT recognizes that waiting for that 2007 data could delay these proceedings in a manner inconsistent with the Board's intent to process simplified cases expeditiously. In any event, CSXT reserves its rights to address the regulatory gap between 2006 Waybill Sample data (or any earlier year's Waybill Sample data) and the rates at issue in this proceeding (e.g., by seeking to use current rates for the comparison group traffic).

for rate proceedings in which a full SAC proceeding is too expensive. *See* 49 U.S.C. § 10701(d); *Simplified Standards* at 4. Because the Board already has 2006 waybill data, it is not likely that any stay would unduly delay the resolution of these cases. CSXT respectfully submits that any short-term delay needed to prepare a 2006 Waybill Sample would be more than justified by the substantially greater accuracy of using more current data.

II. The Board Should Clarify That The Maximum Value of a Three Benchmark Case is \$1 Million Per Case

The parties' efforts to resolve this case without the Board's intervention thus far have been unsuccessful, in part because of the parties' substantial disagreements about many issues in this case. One issue about which the parties disagree is the amount of relief available in a case brought under the Three Benchmark approach. DuPont apparently believes it is not limited to a maximum of \$1 million in relief per Three Benchmark case, and instead is entitled to \$1 million in relief for each origin-destination-pair movement challenged in a single case. DuPont's position is inconsistent with the letter and the spirit of the *Simplified Guidelines*, and the Board should clarify that DuPont is limited to \$1 million per Three Benchmark case.

The *Simplified Guidelines* modified the Maximum Value of the Case proposal set forth in the Board's initial Notice of Proposed Rulemaking, replacing it with a "limit-to-relief approach" under which complainants "elect to use either the Simplified-SAC or Three-Benchmark approach." *Simplified Guidelines* at 27. Complainants may elect to proceed under any of the three available approaches (SAC, Simplified SAC, or Three Benchmark). But that choice has consequences. Recognizing that the Three-Benchmark methodology is "a cruder methodology" that should be limited to the smallest cases, the Board provided that complainants who choose that approach "will be limited to \$1 million in rate relief over a 5-year period." *Id.*

at 27-28.⁸ The Board clearly indicated that this limit was based on the “value of the case.” *Id.* at 28.

Under the plain language of the *Simplified Guidelines*, therefore, DuPont is limited to a maximum relief of \$1 million in each of the three cases it has filed, including the Chlorine Case and the Plastics Case. There is no support in the *Simplified Guidelines* for DuPont’s position that the \$1 million cap is a per-movement limit. Indeed, DuPont’s position is fundamentally inconsistent with the Board’s limit-to-relief approach. Under the view embodied in DuPont’s Amended Complaints, it could bring rate cases worth many millions of dollars for consideration under the Three Benchmark approach, so long as it seeks no more than \$1 million in relief for any single movement. Thus, for example, a large utility would be allowed to bring a rate case involving numerous mine origins and tens of millions of dollars under the crude Three Benchmark approach, so long as it limited the relief it sought for each mine origin to \$1 million over five years. This subversion of the Board’s simplified approach for small rate cases would allow large, well-financed complainants (like DuPont) to bring multimillion dollar Three-Benchmark cases that select that approach not because a SAC or Simplified SAC presentation is “too costly given the value of the case,” 49 U.S.C. § 10701(d)(3), but rather because of a belief that the Three Benchmark approach affords an inexpensive opportunity to obtain quick rate reductions through regulatory intervention. The purpose of the Board’s limit-to-relief rule is that approaches will be selected based on the size of the case, not on an assessment of whether the approach offers potential for quick and cheap rate reductions without regard for the size of the dispute, sound regulatory economics, or demand-based differential pricing principles. Allowing DuPont to bring and maintain Three Benchmark approach cases seeking more than \$1 million is

⁸ It is worth noting that the Board raised this limit from its original Notice of Proposed Rulemaking proposal of \$200,000.

incompatible with the purpose and intent of Congress and the Board in adopting simplified guidelines and with the Board's recognition that "an overly simplified approach should not be applied to a case when the amount in dispute justifies the use of a more robust and precise approach." *Id.* at 27. If DuPont wishes to bring rate cases seeking more than \$1 million in relief, it may do so, but it must subject those cases to the more rigorous and precise approaches of SAC or Simplified SAC, as appropriate.

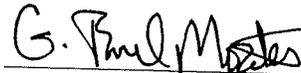
By asking the Board to hold these proceedings in abeyance and to clarify that DuPont may not seek to recover more than a maximum of \$1 million of relief for each of its three Complaints, CSXT does not waive the argument that the Three-Benchmark methodology is not the appropriate rate reasonableness standard for them. As CSXT's evidence will demonstrate, DuPont filed these cases when the parties failed to reach agreement on a renegotiated "master contract" of the type that has governed the very large amount of traffic that CSXT handles for DuPont in a multitude of different "lanes" (*i.e.*, traffic corridors in which movements of various commodities moving for DuPont's account are handled). The reality is that the seven lanes identified in these three Complaints constitute only a relatively small portion of the approximately \$65 million of annual business that CSXT handles for DuPont, and DuPont is apparently using these cases in the hope of creating leverage against CSXT in private negotiations involving the balance of its traffic. CSXT also is concerned that DuPont may intend to bring additional cases under the Three Benchmark Standard – challenges that, if they in fact are brought, should be considered under the Board's Simplified Stand Alone Cost Standard or even the full Stand Alone Cost Standard. CSXT recognizes that the Board may not act on complaints not before it, or on speculation (no matter how informed), but the Board can and should recognize that its processes should not be "gamed." At a minimum, that certainly

includes holding a shipper that invokes the Three Benchmark test to a limit of \$1 million per case.

CONCLUSION

For the above reasons, the Board should stay proceedings in these cases until such time as the Board can develop 2006 Waybill Sample data for use by the parties. Moreover, the Board should clarify that the maximum available relief in STB Docket Nos. NOR 42099, NOR 42100, and NOR 42101 is \$1 million per case.

Respectfully submitted,



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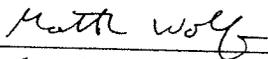
Dated: December 7, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2007, I caused a copy of the foregoing Petition to Hold Proceedings in Abeyance and Motion for Clarification of CSX Transportation, Inc. to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery:

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Matthew Wolfe