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January 4, 2008

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Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C.
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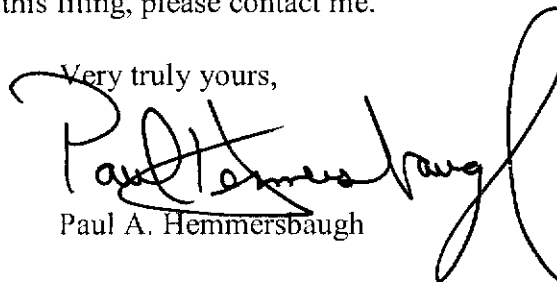
Re: DuPont v. CSX Transportation, Inc., STB Dkt. Nos. 42099, 42100, 42101

Dear Secretary Quinlan:

Enclosed, for electronic filing in the above-referenced cases, are Defendant CSX Transportation's Motion for Leave to File Response to DuPont De Nemours and Company's ("DuPont") Supplemental Submission, and Defendant CSX Transportation's Response to DuPont's Supplemental Submission. Please file this Motion and Response in each of the three above-referenced cases.

We will serve counsel for DuPont with copies of these filings electronically, and by first class mail. If you have any questions about this filing, please contact me.

Very truly yours,



Paul A. Hemmersbaugh

cc: Nicholas DiMichael

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E.I. DUPONT DE NEMOURS AND COMPANY	)	
	)	
<i>Complainant,</i>	)	
	)	
v.	)	Docket Nos. NOR 42099,
	)	42100, and 42101
	)	
CSX TRANSPORTATION, INC.	)	
	)	
<i>Defendant.</i>	)	
	)	

**DEFENDANT CSX TRANSPORTATION INC.’S MOTION FOR LEAVE TO FILE
RESPONSE TO E.I. DUPONT DE NEMOURS AND COMPANY’S
SUPPLEMENTAL SUBMISSION**

Following the conclusion of briefing allowed by the Board’s rules concerning DuPont’s Motion to Compel, DuPont submitted a supplemental memorandum responding to CSXT’s request that the Board clarify whether comparable movements are to be drawn solely from the most recent available year’s Waybill Sample. *See* Reply of DuPont to CSX Transportation’s Reply in Opposition to DuPont’s Motions to Compel (Jan. 2, 2008) (“DuPont Supplement”). As the Board is well aware, these are the very first cases to be considered under its new *Simplified Standards*. Because these are the first cases brought under those new guidelines, the Board must address a number of questions of first impression concerning the implementation of the new standards and procedures. DuPont’s Supplement addresses an important issue with broad implications, which the Board will be required to resolve in these cases – whether comparable movements may be drawn from multiple historical years’ Waybill Samples – and therefore CSXT will not object to DuPont’s request for leave to file the supplemental submission.

DuPont’s assertion that CSXT’s response arguments are somehow “improper,” however, is unwarranted. CSXT’s argument that information concerning Waybill Sample movements from 2001 to 2004 is not relevant to these cases is directly responsive to DuPont’s Motion to Compel discovery. As part of its response to that motion, CSXT explained its position that, under the new *Simplified Standards*, only the most recent Waybill Sample available is to be used for purposes of selecting comparable movements. Because it appears that the parties have a fundamental difference regarding the important question of whether prior years’ Waybill Samples may be used as sources of comparable movements, CSXT requested that the Board advise the parties whether comparable movements must be drawn from the most recent available year’s Waybill Sample.¹ Given CSXT’s position that movements from Waybill Samples for years prior to the most recent available are not relevant, even absent CSXT’s explicit request, the Board very likely would decide this question as part of its determination of DuPont’s Motion. Moreover, CSXT believes that clear resolution of this question is in the best interest of all parties, as it seeks to avoid the potential waste of resources by one or both parties if they developed comparison groups based upon a misunderstanding of the eligible population from which such movements may be selected.

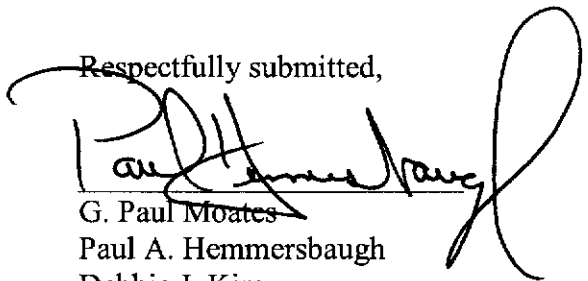
DuPont’s Supplement introduces new arguments and evidence that are not germane to the question of whether the Board’s September 1997 *Simplified Standards* Decision provided for the drawing of comparable traffic the single most recent year for which a Waybill Sample is available, or from four historic years, which is a central legal dispute presented by DuPont’s Motion. Moreover, DuPont’s new argument is misleading and relies entirely on two old,

¹ See *Simplified Standards* Decision at 84 (“[S]everal parties ask for more clarity on what will constitute a proper comparison group. . . . As cases are brought, we provide more direction in those cases and will set precedent to guide future litigants.”).

anomalous ICC cases, one of which was vacated on appeal and the other of which the agency itself abandoned. In order to correct the record, and to eliminate the confusion injected by DuPont's submission, CSXT requests that the Board grant it leave to file the attached short response to the new arguments raised by DuPont in that submission. CSXT believes this clarifying response will eliminate the extraneous historical dispute DuPont's Supplement might otherwise create, and allow the Board to focus on the Motion as it stood when the parties completed briefing on December 28, 2007. Because this is an important issue in the first cases brought under the *Simplified Standards*, if the Board waives its rules to consider DuPont's supplemental submission, it should grant CSXT parallel leave and consider the accompanying short response to DuPont's supplement.

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Respectfully submitted,



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Counsel to CSX Transportation, Inc.

Dated: January 4, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E.I. DUPONT DE NEMOURS AND COMPANY	)	
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<i>Complainant,</i>	)	
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v.	)	Docket Nos. NOR 42099,
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CSX TRANSPORTATION, INC.	)	
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<i>Defendant.</i>	)	
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**DEFENDANT CSX TRANSPORTATION INC.’S RESPONSE TO E.I. DUPONT DE
NEMOURS AND COMPANY SUPPLEMENTAL SUBMISSION**

I. Contrary to DuPont’s claim, the *Simplified Standards* Proceeding Record and the Practice Under the Previous “Three Benchmark” Methodology Demonstrate That Comparable Movements May Not Be Drawn from Historical Waybill Samples.

CSXT demonstrated in its Reply that there was no indication in the *Simplified Standards* proceeding record prior to the final Decision that the Board proposed to allow parties to use Waybill Samples from any year prior to the most recent available year for purposes of identifying potentially comparable movements. *See* CSXT Reply at 2-10. And, there was no indication that any participant in the proceeding understood the Board to be proposing to allow parties to select such comparables from Waybill Samples for multiple historical years. *Id.* To the contrary, the Board’s Notice of Proposed Rulemaking expressly limited parties’ access to the most recent year’s Waybill Sample:

Under our proposal here, once we find that a complainant is eligible to use the Three-Benchmark method, *we would release . . . all movements in the most recent Waybill Sample* that have the same 2-digit STCC code as the issue movement and an R/VC ratio above 180%.

STB Notice of Proposed Rulemaking (“NPRM”), *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), Decision at 32-33 (STB served July 28, 2006) (emphases added).

DuPont’s supplemental submission confuses the question using compound speculation: *First*, that, in *Simplified Standards*, the Board tacitly adopted from *Non-Coal Guidelines* cases a practice of using four years’ Waybill Samples; and *second*, that *Non-Coal Guidelines* (promulgated in response to a new statutory mandate issued in ICCTA in 1995) in turn had silently imported that practice from two 1980s ICC decisions in cases in which the agency was experimenting with variations on several possible alternatives to evaluating rate cases under Constrained Market Pricing.² See Reply of DuPont to CSXT’s Reply in Opposition to DuPont’s Motions to Compel at 2-5 (Jan. 2, 2008). Here, CSXT seeks to eliminate the confusion DuPont’s supplemental submission has injected, clarifying that both of DuPont’s premises are false.

Under the previous *Non-Coal Guidelines* benchmark approach — from which DuPont asserts the Board adopted the R/VC_{COMP} benchmark without modification — parties were given access to only a single year’s (the most recent year) Waybill Sample. See, e.g., *B.P. Amoco Chemical Co. v. Norfolk Southern Railway Co.*, STB Dkt. No. 42093, Letter Ruling from STB OEEAA Director L. Gardner (June 8, 2005) (releasing most recent Carload Waybill Sample, filtered by the Board to include only chemical movements with an R/VC greater than 180%, to counsel for party, for the sole purpose of use in a benchmark proceeding brought under *Non-Coal Guidelines*). The complainant appealed to the Board the limitation of the released Waybill Sample data to chemicals (STCC 28) and to traffic generating R/VC ratios greater than 180%. See *B.P. Amoco Chemical Appeal to Chairman of Decision Denying*, in Part, Access to Costed

² “*Simplified Standards*” refers to STB Ex Parte No. 646 (Sub-No. 1), “Simplified Standards for Rail Rate Cases,” Decision (served Sept. 5, 2007). “*Non-Coal Guidelines*” refers to STB Ex Parte No. 347 (Sub-No. 2) Decision (served December 31, 1996), 1 S.T.B. 1004.

Waybill Sample (June 14, 2005), STB Dkt. No. 42093.³ Significantly, complainant's appeal did not challenge the limitation of the Waybill Sample to the single most recent year or make any suggestion whatsoever that the parties were entitled to access to similar data from prior years' Waybill Samples. *See id.*

Thus, in one of the very few cases filed under *Non-Coal Guidelines*, neither the complainant, nor the defendant, nor the Board believed Waybill Samples from multiple years were authorized, or appropriate, for use in the selection of a comparable movements. If, as DuPont argues, the *Simplified Standards* adopted wholesale the R/VC_{COMP} selection practice the Board followed under *Non-Coal Guidelines*, then *B.P Amoco* compels the conclusion that the only Waybill Sample from which the parties may select potential comparable movements is the most recent Sample released by the Board. *See Simplified Standards* NPRM at 32-33, STB Ex Parte No. 646 (Sub-No. 1).

II. DuPont's Argument for the Use of Multiple Years' Waybill Samples in Three Benchmark Cases is Based Upon Two Invalid and Inapposite Decisions From Twenty Years Ago That The Board Long Ago Abandoned In Favor of its Three Benchmark Approach.

DuPont's contention that the Ex Parte 646 NPRM silently proposed that the parties would select comparable traffic from four years of historic Waybill Samples relies entirely on intermediate decisions in two outlier cases from the 1980s, issued well before the ICC first *proposed* a "three benchmark" approach in 1995, and well before the passage of the Interstate Commerce Commission Termination Act. ("ICCTA"). As briefly demonstrated below, those two decisions are not good law, have no precedential value, and provide no support for DuPont's contention that the Board gave notice — by silent incorporation of anomalous provisions of

³ The parties subsequently reached a voluntary resolution of their dispute and the Board dismissed the case before it ruled on complainants' appeal.

decisions that today are no more than historical curiosities – of an intention to use four historical years of Waybill Samples for the selection of comparable movements in three benchmark proceedings.

- DuPont fails to advise the Board that the *McCarty Farms* decision it relies upon, and particularly the R/VC method it employed, were reversed and remanded by the D.C. Circuit as arbitrary and “lack[ing] any visible intellectual coherence.” See *Burlington Northern Railroad Company v. ICC*, 985 F.2d 589 (D.C. Cir. 1993). Rather than attempting to fix the ICC’s fatally flawed R/VC_{COMP} method on remand, the case proceeded under the SAC methodology.
- The other decision DuPont relies upon was so flawed (both complainant and defendant challenged the R/VC_{COMP} test used by the ICC and the selection and validity of the comparison group) that the ICC declined to defend it in court, instead abandoning the decision and reopening the proceeding. See *Southwest Railroad Car Parts Company v. Missouri Pacific Railroad Company*, ICC No. 40073 Decision at 3 (STB-served Dec. 31, 1996). On reopening, the Board applied the then-new three benchmark approach and effectively reversed the decision DuPont cites, by preliminarily finding the challenged rates were not unreasonable. See *id.* at 9. The Board subsequently dismissed the case. See *Southwest RR Car Parts*, STB Dkt. No. 40073, Decision (served April 9, 1998).
- The Board adopted a new three benchmark approach largely in response to the inadequacy of the R/VC_{COMP} approach demonstrated in *McCarty Farms* and *Southwest RR Car Parts*. Neither the NPRM nor the final decision in *Non-Coal Guidelines* indicates that the Board intended to implement the R/VC_{COMP} in the same manner used in those two cases. To the contrary, the Board cited those two cases as its primary examples of the inadequacy of the previous R/VC_{COMP} method. See *Non-Coal Guidelines* Ex Parte 347 (Sub-No. 2), 1 STB 1004, 1011 (1996). (noting that *McCarty Farms* was the only case that had relied solely upon the R/VC_{COMP}, and it was reversed on appeal).
- Even if the two non-three benchmark, pre-ICCTA cases DuPont cites had been viable, valid precedents when the Board adopted *Simplified Procedures* – and they were not – they would still be inapposite. *McCarty* was a *sui generis* class action filed on behalf of numerous grain shippers, involving “an extremely large number of movements spanning ten years.” *McCarty Farms*, 4 I.C.C.2d 262, 282.
 - The Waybill Sample data used in *McCarty* was for years actually covered by the rate complaint, and for which complainants could seek reparations. See *id.* at 263-64, 277-78, 281-82. Ultimately, all of the relief awarded in *McCarty* prior to remand was retrospective. See *McCarty Farms*, Decision at 4 (served Nov. 26, 1991). In the instant case, none of the Waybill Samples data DuPont seeks to use applies to the period covered by the Complaint – instead, they stretch back more than five years prior to the effective date of the challenged rate, while the relief DuPont seeks is primarily prospective.

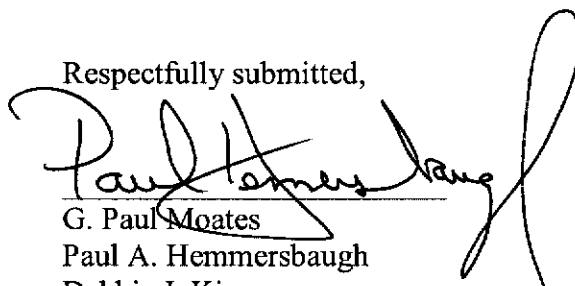
- Neither case even suggests that *four* years of historical Waybill Samples is an appropriate comparison selection pool. In *McCarty*, the ICC used "all available data," consisting of seven years' Waybill Samples in *McCarty*. DuPont does not propose to use *either* all available years or seven years of Waybill Sample data. In the subsequently abandoned *Southwest Car Parts* decision, the Board used data from five years' (not four) Waybill Samples. See *Southwest RR Car Parts*, ICC Dkt. No. 40073, 1988 ICC LEXIS 370 at *14.
- *McCarty Farms* involved shippers who shipped in some years covered by the complaint and not in others, and the ICC was concerned that such shippers not over- or under-recover reparations. See *McCarty Farms*, ICC Dkt. No. 37809 Decision, 1989 ICC LEXIS 38, *14-15. DuPont is the sole complaining shipper in each of these three cases, and all of the relief it seeks is for periods well after the year covered by even the most recent Waybill Sample.

CONCLUSION

The cases cited in DuPont's Supplement are irrelevant to its Motion and have no precedential value in these cases, nor any bearing on whether comparable movements in these cases must be drawn solely from the most recent Waybill Sample.

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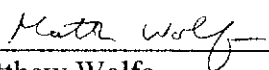
Counsel to CSX Transportation, Inc.

Dated: January 4, 2008

CERTIFICATE OF SERVICE

I hereby certify that, on this 4th day of January, 2008, I served a copy of the foregoing
via first-class mail, postage prepaid on the following:

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Matthew Wolfe