

January 8, 2008

The Honorable Vernon Williams
Secretary
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

RE: Docket No. NOR 42099; *E.I. du Pont de Nemours and Company v. CSX Transportation, Inc.*
Docket No. NOR 42100; *E.I. du Pont de Nemours and Company v. CSX Transportation, Inc.*
Docket No. NOR 42101; *E.I. du Pont de Nemours and Company v. CSX Transportation, Inc.*

Dear Secretary Williams:

On January 4, 2008, CSX Transportation, Inc. ("CSXT") filed a "Motion for Leave to File Response to E.I. du Pont de Nemours and Company's Supplemental Submission," filed on January 2, 2008, in all three of the above-referenced dockets. In the interest of clarifying this important issue before the submission of opening evidence, DuPont does not object to CSXT's Motion and the Board's consideration of CSXT's accompanying response. DuPont, however, requests that the Board take notice of the following points:

1. CSXT contends that, in *Rate Guidelines—Non-Coal Proceedings*, 1 S.T.B. 1004 (1996), the Board could not have intended the use of four years of Waybill Sample data because the Board staff only released a single year's Waybill Sample to the parties in *B.P. Amoco Chemical Co. v. Norfolk Southern Ry. Co.*, STB Dkt. No. 42093, Letter Ruling from STB OEEAA Director L. Gardner (June 8, 2005) ("June 8th Letter"). Because neither the June 8th Letter nor BP Amoco's request for the waybill sample are posted in the docket of that proceeding, DuPont is unable to ascertain whether BP Amoco even requested more than one year of waybill data.¹ Absent such a request, the Letter hardly can be described as denying B.P. Amoco access to such data. Furthermore, note 1 in B.P. Amoco's appeal to the Chairman of the staff's June 8th Letter reflects B.P. Amoco's understanding that the Letter "is without prejudice to access to the entire [waybill] sample for use in the litigation, if the ongoing mediation does not succeed...." (filed by B.P. Amoco in STB Dkt. No. 42093 on June 14, 2005). Thus, it is clear that B.P. Amoco believed that this Letter decision did not apply beyond the mediation stage of its case. Finally, this Letter issued by Board staff does not bind the Board or establish Board precedent.
2. CSXT contends that DuPont's reliance upon the ICC's decisions in *McCarty Farms v. Burlington Northern Inc.*, 4 I.C.C. 2d 262 (1988), and *South-West R.R. Car Parts Co. v. Missouri Pac. R.R. Co.*, Docket No. 40073, 1988 ICC LEXIS 370 (Dec. 1, 1988), for the use of Waybill Sample data from multiple years is misplaced, because those decisions are not good law and thus lack precedential value. Although both decisions were later reversed, they were reversed on grounds other than the number of years of Waybill Sample data used. An appeals court remanded *McCarty Farms* because the R/VC comp benchmark was considered insufficient *by itself* to determine rate reasonableness, since it did not account for the

¹ CSXT's counsel, however, would know this fact, since they also were counsel to Norfolk Southern in *B.P. Amoco*.

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defendant carrier's revenue needs. The ICC itself reversed *South-West Car Parts* in response to both party's challenge to selection of the comparable group from dissimilar commodities, not the dates of the Waybill Samples. As a result of the *McCarty Farms* remand, the ICC abandoned R/VC comp as the *sole* determinant of reasonableness, but proposed to continue using it in combination with RSAM and R/VC > 180 in Ex Parte No. 347 (Sub No. 2), *Rate Guidelines—Non-Coal Proceedings*, 1995 ICC LEXIS 301, *11, *23-24 (served Dec. 1995). Despite the court remand in *McCarty Farms*, the ICC cited to that decision as the example of how to apply the R/VC comp benchmark as part of the newly-proposed three benchmark approach. *Id.* at *30-31, n. 32. Thus, *McCarty Farms* clearly remained a viable precedent for that purpose both then and now.

3. CSXT offers absolutely no response to the holding in *McCarty Farms* that "Evaluation of R/VC ratios over several years tends to balance out cyclical fluctuations and provide a better estimate of maximum reasonableness from a long run perspective." This is precisely the same rationale the Board has given for using four years of Waybill Sample data to calculate the RSAM and R/VC > 180 benchmarks. Nor has CSXT challenged DuPont's argument that comparable movements must be drawn from the same Waybill Sample data as the RSAM and R/VC > 180 benchmarks.

For the foregoing reasons, DuPont believes that the Board said what it meant, and meant what it said, in *Simplified Standards for Rail Rate Cases*, Ex Parte No. 646, slip op. at 18 (served Sept. 5, 2007), where it declared that comparable movements "must be drawn from the Waybill Sample provided to the parties by the Board at the outset of the case."

Sincerely,



Nicholas J. DiMichael
Jeffrey O. Moreno

cc: G. Paul Moates, Esq.
Counsel for CSX Transportation, Inc.