

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**CSXT MOTION FOR CLARIFICATION OF BOARD’S JANUARY 15, 2008 RULING:
EXPEDITED CONSIDERATION REQUESTED**

Pursuant to 49 C.F.R. §§ 1115.3, 1115.5, 1117.1 and other applicable law and authority, CSXT hereby moves the Board to reconsider and clarify its ruling on E.I. DuPont de Nemours and Company’s (“DuPont”) Motions to Compel.

I. LANGUAGE IN THE BOARD’S DECISION SUGGESTS THAT IT MAY BAR THE USE OF IMPORTANT RELEVANT EVIDENCE THAT *SIMPLIFIED STANDARDS* INTENDED TO BE USED IN THREE BENCHMARK CASES.

Earlier this week, the Board issued a Decision granting in part and denying in part Motions to Compel filed by Complainant DuPont. See Decision, E.I. DuPont de Nemours and Company v. CSX Transportation, Inc. (served January 15, 2008) (the “Decision”). In that Decision, the Board appeared to rule that parties to a “Three Benchmark” case must base their selection of a comparison group and any advocacy for a particular comparison group solely on: (i) the Waybill Sample data released to the parties by the Board or (ii) publicly available information, and that all other evidence or information concerning comparable movements is inadmissible. See Decision at 2-3. Specifically, the Decision stated that, although some of the

information sought in DuPont's Motions might be relevant to developing or supporting a comparison group,

we will deny the motion to compel because the information sought is inadmissible in the selection group process. . . . [T]he selection of the comparison group is to be based only on information set forth in the confidential Waybill [Sample] released to parties and on any other publicly available information. Neither the carrier nor the shipper is permitted to use information from the carrier's files to advocate for a particular comparison group. . . . The information DuPont seeks falls squarely in the category of information contained in the carrier's files that, while it would otherwise bear on the proper comparison group, has been deemed inadmissible by rule in *Simplified Standards*.

Decision at 2-3 (emphasis added). Because of the limited data available in the Waybill Sample and public sources, CSXT believes the foregoing limitation would be inconsistent with the *Simplified Standards* and would unduly limit comparability factors, evidence, and argument.¹

Simplified Standards stated that, in determining comparability, the Board would consider a variety of factors, including (without limitation) "commodity type, traffic densities of the likely routes involved, and demand elasticity." *Simplified Standards*, STB Ex Parte 646 (Sub-No. 1), Decision at 17 (served Sept. 5, 2007). The Board further ruled that "the comparison group should consist of only captive traffic over which the carrier has market power," (*id.*), and that another relevant factor in evaluating comparison groups would be the amount of contract traffic in the comparison group: "[H]olding everything else constant, a comparison group that consists of just common carrier traffic will be selected over a group that includes contract traffic." *Id.* at

¹ In an appendix to *Simplified Standards*, there is a statement that the comparison group will be selected based upon information from the Waybill Sample and publicly available information. See *Simplified Standards* at 83. In context, however, it appears that statement refers to Board's intention not to allow defendant carriers to propose movements from outside the Waybill Sample for the comparison group. See *id.* ("[I]nformation in the defendant railroad's files about other comparable movements could not be used and need not be produced.").

83. Finally, the Board made clear that parties would be allowed to submit “evidence of ‘other relevant factors’” bearing on rate reasonableness. *See, e.g., Simplified Standards* at 22.

Without evidence from outside the Waybill Sample, however, neither the parties nor the Board could determine or evaluate several of the factors the Board expressly highlighted, let alone the various other factors the parties might believe are relevant to comparability. Because the Waybill Sample provides no information about traffic densities on different lanes and routes of movement, the parties would be barred from introducing evidence concerning “traffic densities of the likely routes involved.” *See id.*² Because the Waybill Sample does not state whether a particular movement is “captive” or whether a carrier has market power over that movement, the parties would not be able to confine comparable movements to captive traffic over which the carrier has market power as *Simplified Standards* requires. *See id.*³ Nor does the Waybill Sample measure “demand elasticity.” *Id.*⁴ And, while the Waybill Sample identifies by STCC the commodity carried in a particular movement, that information may not be sufficient to explain why that commodity is or is not comparable to that of an issue movement.

² While there may exist some public versions of some rail density maps generated by outside organizations, any such maps would not necessarily be complete, accurate, or current.

³ To CSXT’s knowledge, there is no current, comprehensive, and reliable public data source indicating what origins and destinations are solely served by one rail carrier, let alone the more difficult questions of whether those stations are truly “captive” (e.g. a station that is directly served by only one rail carrier may nonetheless have competitive transportation options, including the option of service by other modes), or subject to the exercise of carrier “market power.”

⁴ While it might be argued that relative elasticity of demand is reflected in R/VC ratios, the Board has correctly ruled that R/VC ratios are not an appropriate comparable movement selection criterion. Indeed, using R/VC ratios as a selection criterion could make the Three Benchmark process both circular and pointless.

It is also not clear that the Waybill Sample provided to the parties necessarily fully distinguishes between contract and public, common carrier tariff movements. If that Waybill Sample does not provide all of the information necessary to conclusively identify each movement in that Sample as a contract or common carrier tariff movement, the parties might not be able to distinguish between those two types of traffic or use that distinction in developing their comparison groups without additional information. *Cf. Simplified Standards* at 17.⁵

Beyond the illustrative factors specifically identified in *Simplified Standards*, other factors bearing on comparability also are not capable of determination or support using only the Waybill Sample and public information. For example, the precise nature, characteristics, and value of various commodities transported by the Defendant carrier cannot be determined from the Waybill Sample.⁶ Each of those attributes, however, may be a relevant and important to a determination of whether movements are comparable.

Finally, most “other relevant evidence” will not be available in the Waybill Sample or public data. For example, information concerning the unique and very important characteristics

⁵ CSXT’s consultants’ review of the unmasked Waybill Samples provided by the Board has identified a field that appears to distinguish between movements whose revenues were previously masked and movements whose revenues were not masked (the “Calculated Rate Flag” field). If all contract revenues were masked and all common carrier revenues were not masked, it would appear that this field would allow the parties to determine which traffic moved under contracts. It may be that the Board intends the parties to use the Calculated Rate Flag field indirectly to differentiate between contract and non-contract movements in these cases. Because no party has previously been allowed access to Waybill Samples with unmasked revenues however, CSXT is uncertain whether this method would work. If there is not a consistent, direct, and definitive relationship between masked revenues and movement under contracts in all cases, this derivative approach may not reliably distinguish between contract and common carrier movements.

⁶ Nor can those attributes necessarily be determined from public sources. It is unlikely, for example, that CSXT would be able to obtain from public information an accurate estimate of the value (to DuPont or its relevant customers) of the specific types of plasticizers or plastic pellets contained in the issue movements. And, it would be even more difficult to find in public sources similar information regarding attributes of non-issue movements.

of chlorine (including very significant additional costs to the carrier of handling and transporting such materials) is not reflected in the Waybill Sample or in public data. Thus, although such information is very important to a fair and reasonable evaluation of chlorine rates under a benchmark R/VC comparison-based approach, that evidence arguably might not be admissible under the rule announced in the January 15 Decision. Regardless of the stage of the case at which such evidence is introduced, an argument might be made that evidence differentiating the issue traffic from the comparison group concerns “the selection group process,” or is being used “to advocate for [or against] a particular comparison group” and is thus inadmissible. *See* Decision at 2-3.

If the categories of evidence described above are deemed inadmissible in a Three Benchmark proceeding, then a methodology that is already crude, inaccurate and largely divorced from sound economics and core regulatory principles would be rendered entirely arbitrary and meaningless. CSXT does not believe the Board intended the Decision to have the effects described above, and therefore seeks clarification and direction from the Board regarding the meaning and effect of those aspects of the Decision.

II. SPECIFIC CLARIFICATION QUESTIONS

CSXT requests that the Board thoroughly address the issues and questions raised above, in large part because the answers will have a significant effect on the evidence the parties are presently developing and are required to submit to the Board in approximately two weeks. If the parties develop and submit evidence under a mistaken understanding of the governing rules and standards, they will have wasted their resources and those of the Board, and the cases may not be presented in a manner that allows a fair and rational evaluation of the reasonability of the challenged rates. Because these are the first cases to be considered under the new *Simplified*

Standards, they will set precedents for future cases, and it is important that the Board's rulings in these cases establish clear, consistent, and fair rules. In addition to the general questions and issues raised by this Motion, CSXT requests that the Board answer the following specific questions.

1. May the parties, in their evidentiary submissions or arguments regarding comparison groups and comparability of Waybill Sample movements, rely upon any information that is not set forth in the Waybill Samples the Board provided to the parties to this case, or is otherwise publicly available? If the answer is yes, what types, categories, or nature of additional information is admissible for consideration by the Board in these cases?

2. Does the Board's prohibition against use of information "from the carrier's files" apply equally to the use of information from the complainant's files?

3. CSXT produced to DuPont in discovery information that appears to fall within the categories of information the Decision says are inadmissible (*e.g.*, information concerning Waybill Sample movements that is not available in that Sample or from public sources). Is such information inadmissible in these proceedings?

4. Does the prohibition against use of evidence not contained in the Waybill Sample or publicly available apply only to the selection of comparison groups and the advocacy of a particular selection group, and not to other parts or phases of these Three Benchmark cases? If the answer to the preceding question is yes, what criteria will the Board use to distinguish between: (i) evidence or an argument pertaining to selection or advocacy of comparison groups; and (ii) evidence or argument that concerns (in whole or in part) comparability or similarity of movements (or lack thereof) but is not used to argue directly for or against the selection of a particular comparison group?

5. Are "commodity type," "traffic densities of likely routes involved," "demand elasticity," whether a movement is "captive" and whether or not it moves under contract still relevant factors for the determination of comparability? If so, how are those factors to be evaluated and presented in these cases if evidence outside the Waybill Samples and public information is not admissible?

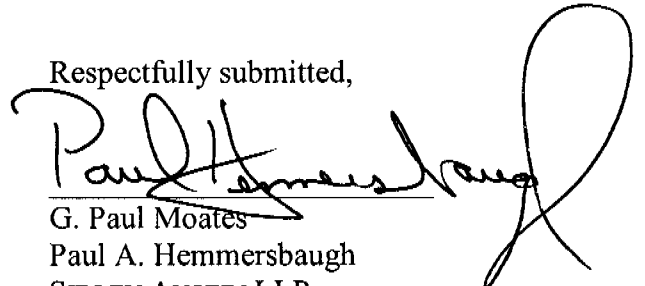
6. Should the parties use and rely upon the Waybill Samples' "Calculated Rate Flag" field as definitive evidence of whether a particular Waybill Sample record concerns a contract movement or a common carrier ("tariff") movement? If not, what evidence may the parties use to establish whether potentially comparable movements move under contracts or common carrier rates?

CONCLUSION

CSXT believes it is important to the parties, the process, and fundamental fairness that the Board clarify the matters discussed in this Motion well before it requires the parties to submit their opening round of evidence. Accordingly, CSXT requests that the Board give this Motion expedited consideration, and promptly clarify the questions and issues raised herein.

Peter J. Shudtz
Paul R. Hitchcock
Steven C. Armbrust
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

Respectfully submitted,


G. Paul Moates
Paul A. Hemmersbaugh
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
(202) 736-8711 (fax)

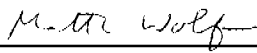
Counsel to CSX Transportation, Inc.

Dated: January 18, 2008

CERTIFICATE OF SERVICE

I hereby certify that, on this 18th day of January, 2008, I served a copy of the foregoing
via email and first-class mail, postage prepaid, on the following:

Nicholas J. DiMichael
Jeffrey O. Moreno
Thompson Hine LLP
1920 N St., NW
Suite 800
Washington, DC 20036



Matthew Wolfe