

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**DUPONT REPLY TO CSXT MOTION FOR CLARIFICATION OF
BOARD'S JANUARY 15, 2008 RULING**

Complainant, E.I. du Pont de Nemours and Company ("DuPont") hereby replies to the "CSXT Motion for Clarification of Board's January 15, 2008 Ruling," filed on January 18, 2008. CSXT's Motion is an attempt to reopen issues that were resolved in *Simplified Standards*, Ex Parte No. 646 (Sub No. 1) (served Sept. 5, 2007) ("*Simplified Standards*"), and thus the clarification that CSXT seeks is unnecessary. The Motion should be denied, for the reasons set forth herein.

I. CSXT IMPROPERLY BLURS THE DISTINCTION BETWEEN EVIDENCE ON COMPARABLE TRAFFIC AND "OTHER RELEVANT FACTORS."

Throughout its Motion, CSXT confuses two separate issues: (i) the evidence admissible for the selection of the comparable traffic group; and (ii) the evidence admissible for demonstrating "other relevant factors." The Board addressed only the former in its January 15th Decision. At pages 2 - 4, the Board clearly stated:

In *Simplified Standards* at 83, we stated we will select the comparison group based on information contained in the Waybill Sample released to the parties at the outset of the case and other publicly available information.

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[T]he selection of the comparison group is to be based only on information set forth in the confidential Waybill 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.

* * *

[I]nformation contained in the carrier's files that would bear on the proper comparison group is not discoverable in a Three-Benchmark proceeding because neither the carrier nor the shipper can rely on that information. The only information the parties can rely on for creating and advocating their comparison groups is the 4 years of waybill data released to the parties and any publicly available information. [emphasis added]

The Board's decision did not address the submission of evidence beyond the waybill sample and publicly available information for the purpose of demonstrating "other relevant factors."

CSXT's Motion demonstrates a fundamental misunderstanding of the distinction between evidence relevant to selection of the comparable traffic group and evidence of "other relevant factors." CSXT mistakenly believes that evidence as to "other relevant factors" can be used to argue for or against the inclusion of specific movements in the comparable group. But the Board left no doubt that selection of comparable movements is to be based solely upon the waybill sample and publicly available information. Once the comparable group is selected, the three benchmark figures are plugged into the formula adopted in *Simplified Standards* to determine a rate. "Other relevant factors" come into play only after the proper comparison group is selected to adjust that rate up or down as the Board deems appropriate.

In *Simplified Standards*, the Board responded to requests for more guidance on how to apply the Three-Benchmark method by proposing a "more formulaic approach..., under which the maximum lawful rate could be readily determined once the comparison group was selected."

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Simplified Standards, p. 77 [emphasis added]. However, in response to carrier and shipper requests for more flexibility than that offered by a strictly formulaic approach, the Board declared:

We will provide for more flexibility in the rate standard under the Three-Benchmark approach. As such, either party will be permitted to introduce evidence of "other relevant factors" to show that the maximum lawful rate should be higher or lower. However, the party introducing such evidence will be required to quantify this evidence, so that the Board will have an objective, transparent means of adjusting the maximum lawful rate upwards or downwards.

Id. [emphasis added]. Thus, the Board has made it absolutely clear that "other relevant factors" and evidence in support thereof do not play any role in selection of the comparable group. Such factors, if quantified, may be used only to adjust the rate derived from the comparable group in order to determine a final maximum lawful rate.

Even then, the Board established strict limits upon evidence of "other relevant factors."

We share the concerns of Interested Parties that evidentiary disputes over "other relevant factors" not get out of hand and defeat the purpose of this simplified approach. Accordingly, we will set certain limits on the kinds of evidence that will be permit [sic]. Based on our experience in Full-SAC cases with product and geographic evidence and movement-specific adjustments to URCS, opening the door to such evidence would unduly complicate these procedures. Accordingly, we will not permit any evidence of product and geographic competition as to specific movements or of movement-specific adjustments to URCS. We reserve the right to proscribe other categories of evidence that would lead to complex or protracted litigation or otherwise significantly increase the expense of this simplified approach.

We do not believe that a page limit is appropriate at this time. We believe the better approach is to apply strict discovery standards, under which greater emphasis will be placed on the burden imposed. Even if the information sought is relevant, we may not permit discovery if the burden is considerable. Parties are strongly encouraged to narrowly tailor any discovery request relating to "other relevant factors." Parties seeking such evidence will have to

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show how the information requested is consistent with the expedited and simplified nature of this process.

Simplified Standards, pp. 77-78 [emphasis added]. The very fact that discovery of "other relevant factors" is contemplated indicates that the Board did not intend to restrict such factors to the waybill sample and publicly available information.

Nevertheless, the Board also did not want the presentation of "other relevant factors" to become the tail that wags the dog by converting the simplified and expedited Three-Benchmark approach into a complex, time-consuming, and costly endeavor. Unfortunately, that appears precisely to be CSXT's objective.

II. THE BOARD HAS CONSIDERED AND REJECTED CSXT'S ARGUMENTS.

CSXT's principal argument for using non-public information to select comparable movements was expressly considered and rejected by the Board in *Simplified Standards*. CSXT contends that:

Because of the limited data available in the Waybill Sample and public sources, CSXT believes the foregoing limitation [to the waybill sample and publicly-available information] would be inconsistent with the *Simplified Standards* and would unduly limit comparability factors, evidence, and argument.

* * *

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.

CSXT Motion, pp. 2, 3.

The Board responded to these very same arguments in *Simplified Standards*, p. 84:

While UP and BNSF maintain that carriers should be permitted to submit any evidence on the appropriate comparison group, they have offered no means of controlling the litigation costs such a

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proposal would inevitably create.¹⁶³ We conclude that limiting the evidence to information already in the Waybill Sample, or other publicly available information that both parties could access, is the best procedure.

The express arguments rejected by the Board in the above quote are those cited in footnote 163, which refers to the Opening Comments of the Union Pacific Railroad ("UP"). That citation is to the beginning of five pages in which UP, as quoted below, correctly understood the Board's proposal and made precisely the same arguments as CSXT has presented in its Motion:

The Board must modify its Benchmark proposal to allow parties to submit any relevant information that would help the Board select the most appropriate comparison group. * * * Under the Board's proposal, however, the parties would be restricted in their efforts to challenge the other party's comparison group and support their own because "the analysis and arguments must rest on publicly available information or on (non-rate) information provided in the Waybill Sample."

* * *

In the *NPRM*, the Board claims that it will assess comparability by "reviewing a variety of factors" that "could affect demand characteristics and operating costs." *NPRM* at 20. However, its actual proposal—to restrict its consideration to publicly available information and (non-rate) information provided in the Waybill Sample—would preclude parties from presenting evidence that indisputably would be relevant in deciding whether their own or their opponent's final offer comparison group is most comparable to the issue traffic in terms of both demand characteristics and operating costs.

UP Opening Comments, pp. 61-62. Thus, in citing to and rejecting UP's arguments, the Board made a fully informed decision to restrict the selection of comparable traffic to the waybill data and publicly available information. The very same arguments presented in CSXT's Motion should likewise be rejected.

The specific examples provided by CSXT to illustrate its position do not provide any basis to alter the Board's determination in *Simplified Standards*. In most of those examples (e.g.

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density, contracts) CSXT does not claim an absence of publicly available or waybill data, but instead asserts that such data is not the best information available. The Board, however, clearly made that trade-off in order to ensure that the Three-Benchmark approach remained "simplified."

CSXT demonstrates a fundamental misunderstanding of *Simplified Standards* when it contends that non-public information is needed to determine whether waybill movements are "captive."¹ See CSXT Motion, p. 3. The Board has established a conclusive presumption that all movements in the waybill sample with an R/VC greater than 180 are captive:

While it is true that not all >180 traffic is necessarily captive, Congress has defined market dominance such that all traffic over which a carrier has market dominance will be in the >180 traffic group. Thus, the >180 group constitutes all potentially captive traffic. Because we cannot practicably make a market dominance determination in an individual case as to all the other traffic handled by the carrier(s) involved, the next best (and clearly reasonable) approach is to base our analysis on all potentially captive traffic.

Rate Guidelines—Non-Coal Proceedings, 1 S.T.B. 1004, 1025-26 (1996) ("*Non-Coal Guidelines*"). The Board did not express any intent to deviate from this conclusion in *Simplified Standards*. Indeed, any such deviation would be inconsistent with both the Board's desire for a simplified process and its decision to limit the selection of comparable movements to the waybill sample and publicly available information. Moreover, a movement-by-movement determination of market dominance for potentially hundreds of movements of comparable traffic would require a process that would likely eclipse Full-SAC in cost, time and complexity.

Although CSXT implies that demand elasticity cannot be determined from publicly available information, that is not true. For example, CSXT applies the exact same rate structure to a multitude of different commodities in its public tariffs CSXT Tariff Nos. 28211 and 28003,

¹ This also is one of the arguments made by UP and rejected by the Board in *Simplified Standards*, p. 84, n. 163. See UP Opening Comments, pp. 62-63.

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which encompass two of the commodities at issue in DuPont's complaints. Thus, those tariffs constitute publicly available evidence that all of the commodities listed therein have a similar demand elasticity.

A fundamentally erroneous assumption underlying CSXT's Motion is that there must be evidence in every case of every conceivable factor that might be relevant to comparability. The Board never said that. Rather, the Board identified a non-exclusive list of factors that may be relevant and has identified the sources to which the parties may look for evidence of such factors. The possibility that there may be no information in those sources for some factors in some cases does not mean that the Board must complicate the Three Benchmark approach by allowing the parties to serve discovery and present evidence that would undermine this simplified approach. If there is no evidence from the waybill samples or public sources on a particular factor, that factor can be omitted from consideration as to the issue movement.

CSXT makes a vague allegation that "[i]t is also not clear that the Waybill Sample provided to the parties necessarily fully distinguishes between contract and public, common carrier tariff movements." In this connection, DuPont notes that it intended to rely upon the "Calculated Rate Flag" in the waybill samples to distinguish contract from common carrier movements. However, information provided by CSXT in discovery has revealed substantial inconsistencies in the way that CSXT has coded different movements governed by the same rate authority.

In response to DuPont's discovery request for production of various Private Price Quotes ("PPQs"), CSXT agreed to provide DuPont with a list of the requested PPQs and to match those PPQs to specific movements in the 2004 and 2005 Waybill Samples. In Exhibit 1, DuPont has sorted and grouped the waybill data by PPQ number (column 8). The Calculated Rate Flag

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(column 16) contains a "0" for tariff moves and a "1" for contract moves. These two columns reveal that CSXT frequently has flagged different movements governed by the same PPQ as contract and common carrier moves.² But the same PPQ cannot be both a contract and a tariff. Clearly, CSXT has failed to properly code contract and tariff movements in the Waybill Sample. Given CSXT's inconsistencies in coding contract and tariff movements in the Waybill Sample, DuPont may argue in this particular case that the Board should drop its presumption in favor of the comparison group with the fewest contract movements. *Simplified Standards*, p. 83.

III. RESPONSES TO SPECIFIC CLARIFICATION QUESTIONS.

In addition to CSXT's general questions, which DuPont has addressed in the preceding two sections, CSXT has posed six specific questions for the Board to answer. Based on the foregoing arguments, DuPont believes those questions should be answered as follows:

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?

Response: No, except to address the effects of CSXT's coding inconsistencies in the Calculated Rate Field in this case.

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?

Response: Yes, as to the selection of comparable traffic.

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?

² This issue also has been raised more broadly by the Board, on its own initiative, in Ex Parte No. 669, *Interpretation of the Term "Contract" in 49 U.S.C. 10709*. Clearly, this case has shown the need for the Board to establish rules concerning the types of arrangements that fall within Section 10709 contracts, and those that do not. Once the Board establishes such a rule, then the Board should require carriers to review the Waybill Sample designations to conform to the rule.

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Response: Yes, as to the selection of comparable traffic, except to address the effects of CSXT's coding inconsistencies in the Calculated Rate Field in this case.

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?

Response: Yes. "Other relevant factors" may not be used to narrow or expand the comparable group. "Other relevant factors" are distinguished by the fact that they must be quantified to justify an increase or decrease to the rate produced by the Three Benchmark formula after the selection of the comparable traffic 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?

Response: Yes, except that captivity is conclusively presumed as to all traffic with an R/VC >180. If reliable evidence of any one factor is not available from the Waybill Samples or public information in a case, that factor may be omitted.

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?

Response: No, given the evidence of CSXT's coding inconsistencies adduced in this particular case.

IV. THE BOARD SHOULD SANCTION CSXT'S FRIVOLOUS MOTION PRACTICE.

The Board should put a stop to CSXT's repetitive attempts to relitigate issues from the *Simplified Standards* proceeding and to inject additional cost and delay into the simplified process. Although DuPont believed, at the beginning of these cases, that the Board might

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properly allow some procedural latitude given the fact that these cases are the first ones filed under the new rules, a clear pattern of abuse has now emerged.

First, CSXT filed a motion to dismiss DuPont's complaints in which CSXT contended that PPQs it had described to DuPont as "tariffs" were in fact contracts beyond the Board's jurisdiction. CSXT asked the Board to declare that the Three Benchmark approach was inappropriate for any rate case involving a hazardous material. Indeed, the Board itself took CSXT to task for not raising this objection in the *Simplified Standards* proceeding. Decision at 6 (served Dec. 20, 2007).

Second, CSXT filed a motion to hold these cases in abeyance and to impose a \$1 million relief cap upon each case rather than each movement. CSXT has requested an open-ended delay to this case, contrary to the expedited nature of a Three Benchmark proceeding. In addition, the relief cap requested by CSXT is directly contrary to *Simplified Standards*. The Board has not yet ruled on that motion.

Third, in response to DuPont's motion to compel discovery, CSXT asked the Board to restrict the universe of comparable movements to the most recent year's waybill sample, even though the Board explicitly stated, in *Simplified Standards*, that the parties could use 4 years of waybill sample data.

The Board's decision rejecting CSXT's request has now prompted CSXT's fourth, and most recent, motion in this case, which is another attempt to reopen issues that were decided in *Simplified Standards*. This motion, filed only two weeks before the submission of opening evidence, appears intended, in part, to force the delay in this proceeding that CSXT has been unable to obtain through its other motions.

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In total, CSXT's motions have required DuPont to divert significant time and energy from the preparation of its evidence, and to incur substantial additional costs in attorney and consultant fees. This type of motion practice is precisely the conduct over which shippers expressed concern in the *Simplified Standards* rulemaking. It also is why shippers have asked for higher relief caps. Otherwise, rail carriers have every incentive to discourage small rate cases by engaging in a "scorched earth" litigation strategy that will consume any relief a shipper obtains in litigation costs.

DuPont asks the Board to take a stand against further tactics of CSXT by awarding DuPont attorneys fees for its defense of the instant motion.³

Respectfully submitted,



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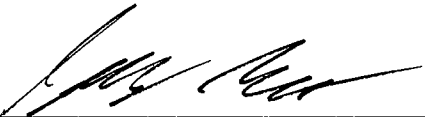
³ CSXT's gamesmanship is also exhibited by, and compounded by, the fact that each one of the above motions was served upon DuPont at 4:55 P.M. or later on a Friday afternoon.

EXHIBIT 1

Highly Confidential Material Redacted

Certificate of Service

I hereby certify that I have on this 22nd day of January 2008, served a copy of the foregoing "Reply to CSXT Motion for Clarification of Board's January 15, 2008 Ruling" on Paul Moates and Paul Hemmersbaugh, Sidley and Austin, Washington, D.C. 20005, via regular mail and email.



Jeffrey O. Moreno