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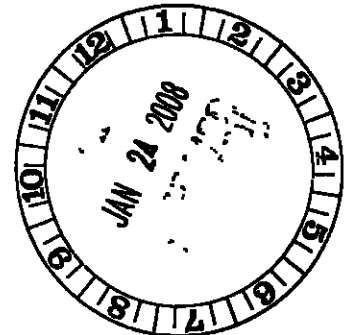
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January 24, 2008

By Hand

Anne K. Quinlan, Esq.
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

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Re STB Docket Nos 42099, 42100, 42101, E I DuPont de Nemours and Company
v CSX Transportation, Inc

Dear Secretary Quinlan

Enclosed, for filing in each of the three above-referenced proceedings, please find the original and ten copies of Defendant CSX Transportation, Inc 's Reply to DuPont's Motion Seeking Award of Attorneys' Fees. Also enclosed is a CD containing an electronic copy of that Reply. Please file this Reply in each of the three above-referenced cases, and date-stamp a copy of the Reply for our files.

Thank you for your assistance. If you have any questions, please contact the undersigned counsel.

Sincerely,

Paul A. Hemmersbaugh

ENTERED
Office of Proceedings

JAN 24 2008

Part of
Public Record

Enclosures

cc Nicholas DiMichael,
Jeffrey Moreno
Ellen Hanson
David Konschnik

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E I DUPONT DE NEMOURS AND COMPANY)

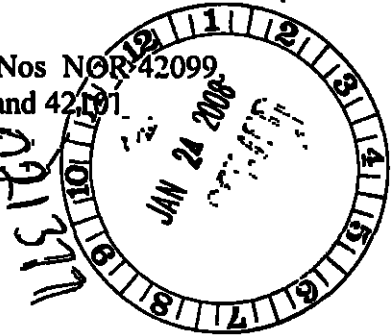
Complainant,)

v)

CSX TRANSPORTATION, INC)

Defendant)

Docket Nos NOR 42099
42100, and 42101



CSXT REPLY TO DUPONT'S MOTION SEEKING AWARD OF ATTORNEYS' FEES.

CSXT respectfully submits this response to DuPont's motion seeking attorneys' fees based on its unfounded claim that CSXT has unreasonably sought to delay these proceedings¹ In discovery and throughout these proceedings, CSXT has worked diligently to adhere to the schedule established by the *Simplified Standards*. DuPont, on the other hand, did not even begin

¹ CSXT has sought clarification of certain aspects of the Board's Decision determining DuPont's Motion to Compel discovery, because they appear to contradict rules and parameters established by the *Simplified Standards*, and CSXT strongly believes clarification is necessary to ensure that the parties' upcoming evidentiary submissions are based upon a correct, common understanding of governing rules, standards, and limitations. See CSXT Motion for Clarification of Board's January 15, 2008 Ruling (Jan 18, 2008). CSXT filed its clarification request within 72 hours of its receipt of the Board's order, to allow the Board a reasonable opportunity to address the issues before the parties submitted their opening evidence, and to afford DuPont an opportunity to provide its views on those issues. See *id*. In its response, DuPont claimed that this prompt and reasonable clarification request, intended to benefit both parties, was somehow an improper delay tactic that warranted an order requiring CSX to pay the attorneys' fees DuPont incurred in responding to the motion. See DuPont Reply to CSXT Motion for Clarification of Board's January 15, 2007 Ruling (Jan 22, 2008). This response addresses only DuPont's motion for sanctions based on its new allegations that CSXT has inappropriately attempted to "inject additional cost and delay into" these cases. Because this is a response to DuPont's motion for sanctions, and not a reply in further support of CSXT's motion for clarification, CSXT believes it is not required to seek leave to file this response under the Board's rules. In the event that the Board determines that leave is required for CSXT to respond to the DuPont's new allegations and new requested relief, CSXT hereby requests that the Board grant it such leave, and accept this response for consideration.

its production of responsive documents until *after* the deadline for *completion* of that production, and did not complete its document production until well after the deadline for completion of all discovery. Indeed, the only delay in the procedural schedule in this case came as a result of DuPont's failure to complete document production in a timely manner, and was granted *at DuPont's request*.

I. CSXT's Motions Were Entirely Appropriate and Well-Founded, Have Assisted in Clarifying the Rules Governing These Proceedings, and Have Caused No Delay.

CSXT has filed two entirely appropriate motions designed to protect its legal rights, and a third seeking clarification of fundamental rules called into question by statements in a recent Board ruling. None of those motions has delayed the progress of these cases whatsoever. Below, CSXT briefly discusses each of those motions.

DuPont filed its original complaints, under the superseded Ex Parte 347 (Sub-No. 2) *Non-Coal Guidelines*, on August 21, 2007. Shortly thereafter – and nearly two months before DuPont filed its amended complaints commencing the current proceedings – CSXT filed a motion to dismiss the cases on the ground that DuPont sought to challenge contract rates, which are outside the Board's rate reasonableness jurisdiction. *See* CSXT Motion to Dismiss (filed Sept. 4, 2007).² CSXT's motion was consistent with its position in the Board's pending rulemaking, that CSXT's "Private Price Lists" ("PPLs," sometimes referred to as Private Price Quotes) are private contracts that are outside the Board's jurisdiction. *See Interpretation of the Term "Contract" in 49 U.S.C. 10709*, STB Ex Parte No. 669 (served March 29, 2007). As the Board has stated on several recent occasions, there is "no clear distinction in the statute or our precedent between a

² DuPont simply cannot argue the September motion in any way delayed the progress of these cases. DuPont completed its own briefing of the motion on September 24, 2007, more than a month *before* it filed the amended complaints that commenced these cases.

contract and a common carrier rate . Whether a contract or a common carrier rate exists has been examined on a case-by-case basis in light of the parties intent " *See DuPont v CSXT*, STB Dkt. Nos 42099, 42100, 42101, Decision at 4-5 (served Dec 20, 2007) Because CSXT's intent and understanding is that PPLs are private transportation contracts, and not common carrier rates, a motion seeking to dismiss these cases on that ground was entirely appropriate

The Board ultimately denied CSXT's motion by ruling, based on the particular facts of these cases, that the specific PPLs in question were not contracts *See id* In the interim, however, DuPont filed amended complaints, the parties engaged in mediation, and conducted discovery in accordance with the schedule established by *Simplified Standards* CSXT's motion to dismiss was well-grounded, appropriate, and did not delay these cases at all

Second, because DuPont's complaints sought \$ 1 million of relief with respect to each of the seven movements included in its three complaints, and CSXT understood the \$ 1 million limit to apply on a per complaint (rather than per-movement) basis, CSXT filed a motion seeking clarification that \$ 1 million is the maximum relief available in a Three Benchmark case Also at that time, the most recent Waybill Sample the Board had issued was for 2004 This would have required the parties to present evidence regarding the reasonableness of rates charged in 2007 and 2008 based upon outdated data from 2004 or earlier Because it appeared likely that the Board would issue additional Waybill Samples soon, CSXT also asked in its motion that the Board hold these proceedings in abeyance until it produced such additional Waybill Samples *See CSXT Petition to Hold Proceedings in Abeyance and Motion for Clarification* (Dec 7, 2007)

The Board granted CSXT's motion for clarification, finding that the \$ 1 million cap applies on a per case basis *DuPont v CSXT*, STB Dkt Nos 42099, 42100, 42101, Decision at

3-4 (late-served Jan 22, 2008) In rejecting DuPont's claim that the cap should apply on a per-movement basis, the Board explained that such a rule would allow complainants to abuse and manipulate the process by improperly disaggregating large claims into smaller claims *Id* at 4 Thus, on the very day that DuPont accused CSXT of abusing the Board's processes, the Board applied a limit to DuPont's claims that the Board found necessary "to protect the integrity of its processes from abuse by preventing any improper attempts to disaggregate a large claim into a number of smaller claims " *Id* at 4 (citing *Simplified Standards*)

The Board denied the portion of CSXT's motion requesting that the Board hold the cases in abeyance until it issued additional Waybill Samples, in part because it had issued the 2005 Waybill Sample while the motion was pending *See id* at 2-3 In addition, the Board indicated that, contrary to CSXT's understanding, it likely would be some time before the 2006 Waybill Sample would be available *See id* Again, however, there was no delay in discovery or any other aspect of these cases as a result of CSXT's motion

Third, DuPont complains that, in its opposition response to DuPont's motions to compel discovery, CSXT presented its understanding and position that comparable movement selection should be limited to the most recent year for which a Waybill Sample is available³ *See* DuPont Reply at 10 Accordingly, CSXT contended, information related to prior years' Waybill Samples was not relevant and the burden of gathering and producing such information outweighed any potential relevance *See* CSXT's Reply in Opposition to the Motion to Compel of DuPont (Dec 28, 2007) In addition, to avoid waste of resources by the parties based on a mistaken understanding of what movements were eligible for inclusion in a comparison group, CSXT

³ Ironically, DuPont filed its motion to compel CSXT to produce documents before DuPont had produced a single document to CSXT, and after the deadline for completion of production of all documents *See* CSXT Reply at 4, n 4 (Dec 28, 2007)

asked the Board to clarify whether comparable movements could be selected from the most recent available Waybill Sample only, or from a broader selection of historical years' Waybill Samples *See id* ⁴

The only delay in the procedural schedule in this case has been at the request of DuPont. On January 10, DuPont filed a motion seeking a two-week extension of the procedural schedule, based upon its failure to produce documents in the time provided by the Board's rules and the *Simplified Standards* ⁵ *See* DuPont Motion at 1-2 (Jan 10, 2008). The Board granted that motion in part and denied it in part, extending the procedural schedule by one week *See* Decision (Jan 15, 2008).

DuPont now complains that CSXT has asked for clarification of fundamental parameters of Three Benchmark cases that were called into question by statements in the Board's ruling on DuPont's Motions to Compel. As CSXT explained, those statements appear directly to contradict *Simplified Standards*' express listing of relevant criteria for comparison group selection as well as other important fundamental rules established by the *Simplified Standards* decision. *See* CSXT Motion for Clarification of Board's January 15, 2008 Ruling (Jan 18,

⁴ DuPont filed a supplemental brief further addressing the question. CSXT did not object to that unauthorized response, and filed its own response to that supplemental brief, because this is an important issue to be decided in the first cases evaluated under the new *Simplified Standards*. *See* CSXT's Response to DuPont's Supplemental Submission (Jan 4, 2008). Based upon the importance of the issue and the need to have it clarified before the filing of opening evidence, DuPont subsequently elected to file yet another supplemental response. *See* Letter from N. DiMichael and J. Moreno to Secretary Williams (Jan 8, 2008).

⁵ DuPont's delay was more significant than the Board's decision indicated. DuPont did not produce *any* documents by the deadline imposed by the Board's rules, December 18, 2008. DuPont produced its first documents after the close of business on Friday, December 21 (the Christmas holiday weekend), and produced a few more documents on December 26. Under the Board's rules, discovery closed on December 31, 2007. DuPont did not produce additional documents during the first week of January, and did not complete its production until January 9, 2008. Thus, DuPont was more than three weeks late in completing its document production, when the entire discovery period was supposed to be only four weeks long.

2008) Providing a clear, common understanding of such fundamental rules and requirements before the parties file their evidence is plainly in the best interest of everyone concerned, including CSXT, DuPont, and the Board. The fact that DuPont disagrees with CSXT regarding the requested clarifications only further highlights the need for resolution of those important issues before the parties file their opening evidence.⁶ The alternative would be to have one or more parties expend substantial resources to develop, support, and file evidence based on a genuine and entirely reasonable, but erroneous, interpretation of the Board's rulings regarding basic rules and standards governing these cases.

II. It is Well-Established That the Board Will Not Award Attorneys' Fees as Sanctions For Allegedly Frivolous Motions.

Even if CSXT had filed a motion that might plausibly be described as frivolous or seeking delay – which, as demonstrated, it has not – neither the Board's precedents nor its regulations provide for the award of attorneys' fees based on a finding that a motion is frivolous or otherwise filed in bad faith. The Board, and the ICC before it, have considered requests for attorneys' fees on several occasions and, with one exception, have consistently determined that sound public policy dictates that the agency should not award attorneys' fees. *See, e.g.,*

Burlington Northern, Inc. - Control and Merger - St. Louis-San Francisco Rwy. Co., Fin. Dkt. No. 28583 (Sub-No. 25), 6 I.C.C. 2d 351, 357 (1990) ("All of the specific statutory provisions for

⁶ Here again, DuPont's own arguments demonstrate it is hardly in a position to accuse CSX of causing undue delay or expense. DuPont now argues that documents it sought in discovery, and which CSXT expended very substantial time and resources to identify, gather, develop, and produce, are not admissible in these proceedings. *See* DuPont Reply at 9 (indicating DuPont's position that information CSX produced at DuPont's request regarding potentially comparable movements is not admissible). These are some of the very same documents that DuPont's Motions sought to compel CSXT to produce. *See* DuPont Motions to Compel at 2-5. If any practice is unduly burdensome and vexatious, it is requiring an opponent to produce documents, and seeking to compel it to produce more documents, that the requesting party contends are not admissible in evidence.

attorney's fees in the ICA address the power of the courts, not the Commission, to award attorney's fees. Second, it is well settled, in our view, that the Commission does not have the authority to award attorney's fees ") (internal citations omitted), *Kokoku Wire Indus. Corp - Petition for Declaratory Order - Certain Rates and Practices of R-W Serv Sys, Inc*, No 40968 (Dec 2, 1994) (rejecting argument that the Commission was vested with the authority to award attorney's fees pursuant to 49 U S C 11705(b)(3), 49 U S C 11701, and 49 U S C 10101, and stating "Th[os]e general statutory provisions merely allow us to compel compliance with the Interstate Commerce Act, and they make no provision for attorney fees "). Similarly, the ICC found it lacked authority to award attorney's fees pursuant to Fed R Civ P 11 or 28 U S C 1927, stating that "neither provision authorizes the Commission to award damages" and "the Commission lacks jurisdiction to make such an award " *Petition of Canadian Nat'l Rwy Co for Institution of Practitioners Proceeding*, Ex Parte No 453 (June 7, 1984) ⁷

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In sum, DuPont's request for sanctions is utterly groundless. CSXT's motions and responses in these cases have been entirely appropriate and consistent with the fair and efficient administration of these cases under the rule of law, and none has caused any delay in this case.

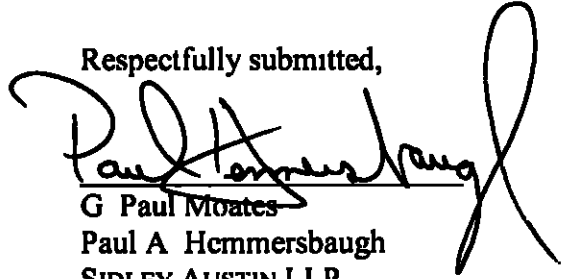
⁷ The Board's regulations provide for an award of attorneys' fees in one exceptional circumstance. When the Board issues an order to compel certain discovery and the party to which the order is directed does not comply, the Board may "require the party failing to obey the order or the attorney advising that party, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Board finds that the failure was substantially justified or that other circumstances make an award of expenses unjust " 49 C F R 1114.31(b)(2)(iv). This regulation is obviously not applicable here, as there is no allegation that any party has failed to comply with a Board order compelling discovery.

CONCLUSION

DuPont's Motion for sanctions should be denied, and the Board should address the issues discussed in CSXT's Motion for Clarification expeditiously, in order to allow the parties to develop their opening evidence in accordance with clear governing rules

Peter J Shudtz
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Respectfully submitted,



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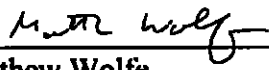
Counsel to CSX Transportation, Inc

Dated: January 24, 2008

CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of January, 2008, I served a copy of the foregoing
via email and first-class mail, postage prepaid, on the following

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Matthew Wolfe