

**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.	)	
	)	

**MOTION OF E.I. DUPONT DE NEMOURS AND COMPANY
FOR LEAVE TO REPLY TO CSXT’S REPLY IN OPPOSITION TO
DUPONT’S MOTIONS TO COMPEL**

On December 20, 2007, Complainant, E.I. du Pont de Nemours and Company (“DuPont”), filed a motion to compel CSX Transportation, Inc. (“CSXT”) to respond more completely to certain of DuPont’s “First Discovery Requests” in each of the above-captioned proceedings. CSXT filed a consolidated reply in opposition to all of DuPont’s Motions on December 28, 2007 (“CSXT Reply”). The Board’s rules at 49 C.F.R. 1104.13(c) generally prohibit a reply to a reply. For the following reasons, DuPont requests that the Board waive this rule and accept the attached reply to CSXT’s Reply.

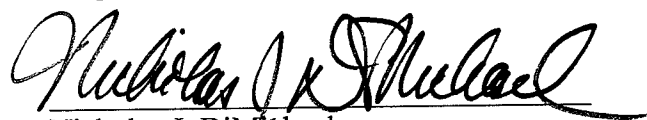
The CSXT Reply does much more than reply to DuPont’s motion to compel. CSXT also requests that the Board “clarify that each party’s proposed [comparable traffic group] may include only origin-destination pairs drawn from the most recent Waybill Sample data (presently for the year 2005) provided to the parties.” CSXT Reply at 2 (underline in original). Although such a request should be made in a motion to which DuPont would have an opportunity to reply,

CSXT has chosen to make its request in its reply to DuPont's Motions to Compel, thereby denying DuPont an automatic right to reply.

The Board's decision in *Simplified Standards for Rail Rate Cases*, Ex Parte No. 646, slip op. at 18, 80 (served Sept. 5, 2007) ("*Simplified Standards*"), clearly states that comparable movements "must be drawn from the Waybill Sample provided to the parties by the Board at the outset of the case," which is comprised of the most recent 4 years of waybill data for which the Board has published RSAM figures." Moreover, the Board has drawn comparable traffic from multiple years of waybill data in the only two decisions to ever apply the R/VC Comp benchmark. See *South-West R.R. Car Parts Co. v. Missouri Pac. R.R. Co.*, Docket No. 40073, 1988 ICC LEXIS 370, *14 (Dec. 1, 1988) and *McCarty Farms v. Burlington Northern Inc.*, 4 ICC.2d 262, 277-78 (1988).

Thus, in a reply to a discovery motion, CSXT has asked the Board to restrict the evidence that DuPont may submit in this case to less than what both Board precedent and the *Simplified Standards* expressly permit. This is a highly unorthodox and procedurally improper request. Therefore, in the interest of fairness, DuPont asks the Board to accept the attached reply addressed to this limited issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nicholas J. DiMichael".

Nicholas J. DiMichael
Jeffrey O. Moreno
Karyn A. Booth
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036
(202) 331-8800

January 2, 2008

ATTACHMENT

**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.	)	
	)	

**REPLY OF E.I. DUPONT DE NEMOURS AND COMPANY TO
CSX TRANSPORTATION INC.'s REPLY IN OPPOSITION TO
DUPONT'S MOTIONS TO COMPEL**

Complainant, E.I. du Pont de Nemours and Company ("DuPont"), hereby submits this "Reply" to "Defendant CSX Transportation Inc.'s Reply in Opposition to the Motion to Compel of E.I. du Pont de Nemours and Company," filed on December 28, 2007. By a separate motion filed contemporaneous with this "Reply," DuPont has asked the Board to waive its rule at 49 C.F.R. 1104.13(c) to permit this reply to CSXT's reply. DuPont's Reply is limited solely to CSXT's unorthodox request that the Board "clarify that each party's proposed [comparable traffic group] may include only origin-destination pairs drawn from the most recent Waybill Sample data (presently for the year 2005) provided to the parties." CSXT Reply at 2 (underline in original).

In *Simplified Standards for Rail Rate Cases*, Ex Parte No. 646, slip op. at 18 (served Sept. 5, 2007) ("*Simplified Standards*"), the Board declared that comparable movements "must be drawn from the Waybill Sample provided to the parties by the Board at the outset of the case." The Board also stated that "once a shipper files a complaint under the Benchmark

methodology, we will release the unmasked Waybill Sample for the defendant carrier...for the 4 years that correspond with the most recently published RSAM figures.” *Id.* at 80. In accordance with these statements, the Board initially provided DuPont with the Waybill Sample for 2001-2004, which corresponded with the four most recently published years of RSAM figures. Subsequently, upon the issuance of the 2005 RSAM figure, the Board also provided the parties with the 2005 Waybill Sample. Despite the clear intent of the Board to draw the comparable traffic group from the 2002-2005 Waybill Sample, CSXT asks the Board to permit the parties to use *only* 2005 Waybill Sample data.

CSXT challenges the very notion that the Board even intended in *Simplified Standards* to permit the parties to select comparable traffic from four years of waybill data. Specifically, CSXT argues that this interpretation of *Simplified Standards* “is not consistent with the history of this rulemaking and the rest of the Decision.” CSXT Reply at 8. CSXT goes so far as to contend that “[t]here is no indication in the record of the Simplified Standards proceeding that the Board decided to release four historical years of Waybill Sample data in order to expand the universe of movements from which the parties could select their comparison group, or for any reason other than to allow the parties to verify the Boards’ RSAM and R/VC > 180 calculations.” *Id.* at 9. Ultimately, CSXT concludes that “had the Board adopted such a materially different new rule without providing notice or opportunity to comment, that rule would be arbitrary, capricious and contrary to law.” *Id.* at 9-10. CSXT is dead wrong on all counts.

Since very early in the development of small rate case procedures, comparable traffic has been drawn from multiple years of waybill data. This indisputable fact was part of the small case rules adopted in Ex Parte No. 347 (Sub-No. 2), *Rate Guidelines—Non-Coal Proceedings*, 1 STB 1004 (1996) (“*Non-Coal Guidelines*”), and was carried forward to *Simplified Standards*.

The Interstate Commerce Commission (“ICC”) originally proposed the R/VC comp benchmark in a decision in Ex Parte No. 347 (Sub-No. 2), *Rate Guidelines—Non-Coal Proceedings* (served April 8, 1987) (“*April 1987 Decision*”). That decision did not address whether to use a single year or multiple years of Waybill Sample data. However, before the ICC issued its final decision in *Non-Coal Guidelines*, it had two opportunities to apply the R/VC comp benchmark in actual rate cases. In both cases, the Board selected comparable traffic from multiple years of Waybill Sample data.

The first decision was in *McCarty Farms v. Burlington Northern Inc.*, 4 I.C.C. 2d 262 (1988). Although in a prior decision in this same case, the ICC had made tentative findings based upon comparable traffic from only a single year of waybill data, the ICC reversed itself:

We agree that one year of data should not be used to establish a standard which will have application to movements of traffic for many years. The risk that data for any one year could be non-representative of the long-term trend outweighs any benefit, in terms of simplicity in developing a rate reasonableness standard, to be derived from the use of a single year of data.

Id. at 277.¹ For the purpose of prescribing future rates, the ICC declared:

We believe that the best approach to establishing a standard that can be used to determine the reasonableness of rates for any year, including periods when data are not available, is to use an average of several years’ of data. 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.

*Id.*² The ICC used an R/VC comp figure derived from waybill data from 1979 to 1985. *Id.* at 277-78.

¹ This passage rebuts CSXT’s claims that (1) “information pertaining to the movements contained in the 2002 and 2003 Waybill Samples have little-to-no relevance to the challenged rates that were issued in 2007,” and (2) the burden on CSXT to provide “such historical information outweighs any minimal potential relevance or value of that information, particularly in simplified and expedited Three Benchmark cases.” CSXT Reply at 5.

² This passage refutes CSXT’s assertion that “Change in costs, rates, and other market conditions from 2002 to the present make comparisons with prior years (including comparisons of revenue-to-variable cost ratios very difficult

Later that same year, the ICC reached the same conclusion in *South-West R.R. Car Parts Co. v. Missouri Pac. R.R. Co.*, Docket No. 40073, 1988 ICC LEXIS 370 (Dec. 1, 1988). Quoting from its March 16, 1988 decision in that same case, the ICC described its selection of comparable traffic as follows:

[W]e use the railroad waybill samples on file with the Commission as our data source. We used the years 1981 to 1985. 1985 is the most recent year available, and we combined 5 years' of data in order to smooth out cyclical fluctuations.

Id. at *14.

When the ICC formally proposed the three benchmark approach in Ex Parte No. 347 (Sub-No. 2), *Rate Guidelines—Non-Coal Proceedings*, 1995 ICC LEXIS 301 (Nov. 22, 1995), it added the RSAM and R/VC > 180 benchmarks in response to criticisms of using the R/VC comp benchmark alone. Rather than describe the application of the R/VC comp benchmark in detail, the ICC merely referred back to both its *April 1987 Decision* and the *McCarty Farms* decision. *Id.* at *30 and note 32. Consistent with its decisions in *McCarty Farms* and *South-West Car Parts* to draw comparable traffic from multiple years of waybill data, the ICC also proposed to use a multi-year average of the RSAM and R/VC > 180 benchmarks in order “to smooth out any aberrations.” *Id.* at *28-29, *34-35.

The final rules adopted by the Board in *Non-Coal Guidelines* did not alter any of these preliminary decisions to use a multiple year average for all three benchmarks. The Board did clarify, however, that it intended to use a four year average to calculate the RSAM and R/VC >180 benchmarks. 1 STB at 1032, 1039. Thus, the multi-year precedent established in *McCarty*

and of essentially no value in assessing the reasonability of 2007 rates.” CSXT Reply at 6. Precisely because of changes and fluctuations in market conditions over time, the ICC concluded that a multi-year average of comparable rates was necessary to make the best determination of a maximum reasonable rate over the long run. Because any rate prescription will be for a 5 year period, it is important to prescribe a rate that is based neither upon the peak nor the trough of the business cycle.

Farms and *South-West Car Parts* remained in place. Moreover, since the rationale for using a four year average for the RSAM and R/VC > 180 benchmarks was identical to the rationale for using a multi-year average of comparable traffic, a similar four year average for the R/VC comp was necessary in order to ensure an apples-to-apples comparison of all three benchmarks.

The Board's initial proposal in Ex Parte No. 646 (Sub-No. 1) was to retain the Three Benchmark method adopted in *Non-Coal Guidelines*, with refinements to lessen the uncertainties of that method. *Simplified Standards for Rail Rate Cases*, Ex Parte No. 646, slip op. at 19 (served July 28, 2006). None of the proposed refinements was to restrict the selection of comparable traffic to a single year of waybill data. Thus, CSXT's claim that it was not provided with notice or opportunity to comment upon "such a materially different rule" is false and disingenuous. See CSXT Reply at 9-10. The rule proposed by the Board was the *same* Three Benchmark methodology adopted in *Non-Coal Guidelines*, which unequivocally contemplated that comparable traffic would be drawn from multiple years of waybill data. In *Simplified Standards*, the Board merely clarified the already understood fact that comparable traffic should be drawn from the same 4 years of waybill data as the RSAM and R/VC > 180 benchmarks.

Finally, the rationale stated by the Board in its earlier decisions – to use multiple years of data for the RSAM, the R/VC>180 *and* the R/VC comp figures in order to prevent the possibility that data from any one year could be "non-representative," to "balance out cyclical fluctuations and provide a better estimate of maximum reasonableness from a long run perspective" and to "smooth out cyclical fluctuations" and "aberrations" – is just as valid now as it was then. CSXT notes that it has experienced increased demand for rail services in recent years. Yet, traffic data for 51 weeks in 2007 shows that total volume for all Class I railroads was down for the year over 2 percent, and that CSXT volumes are down even more, declining 3.3% for the year compared to

2006 (see Exhibit 1). Moreover, there is widespread concern that the U.S. economy is heading into a recession, which could put further downward pressure on prices. Thus, use of a single year, as CSXT argues, could have the effect of "locking in" rates at their very peak. Moreover, it would be improper to use an "expansion ratio" (the factor resulting from dividing the RSAM by the R/VC>180) over a four-year period with a comparable group taken from just a single year.

CSXT's request of the Board to declare that the parties in this case may select comparable traffic from only the 2005 Waybill Sample is merely another improper attempt to persuade the Board to deviate from the procedures and standards it adopted in *Simplified Standards*. This is no different from CSXT's earlier request in these cases that the Board exclude hazardous materials rates from consideration under *Simplified Standards*. In rejecting CSXT's request, the Board noted that:

Simplified rate review procedures have applied to shipments of hazardous materials since 1996 and CSXT has had numerous opportunities to comment on the adequacy of the simplified procedures. Indeed, we recently completed a lengthy review of our simplified procedures. In that rulemaking, CSXT was aware that hazardous materials traffic could be subject to simplified rate complaint procedures, but never asked the Board to exempt such traffic from the Simplified Standards.

E.I. du Pont de Nemours and Company v. CSX Transp. Inc., STB Docket Nos. 42099, 42100 and 42101, slip op. at 6 (served Dec. 20, 2007). As to the selection of comparable traffic, the Board consistently has permitted, indeed favored, selection from multiple years of waybill data since at least 1988, and CSXT had numerous opportunities to comment on the adequacy of that process, including the recently concluded rulemaking in *Simplified Standards*. Moreover, if, as CSXT claims, it was not aware that the Board would permit the parties to select comparable traffic from multiple years of waybill data, such ignorance is entirely CSXT's own fault, since Board precedent was absolutely clear on this subject.

WHEREFORE, DuPont urges the Board to reject CSXT's "clarification" request.

Respectfully submitted,

Handwritten signatures of Nicholas J. DiMichael and Jeffrey O. Moreno. The signature of Nicholas J. DiMichael is on the left, and the signature of Jeffrey O. Moreno is on the right. Both signatures are in black ink and are written in a cursive style.

Nicholas J. DiMichael

Jeffrey O. Moreno

Karyn A. Booth

Thompson Hine LLP

1920 N Street, N.W., Suite 800

Washington, D.C. 20036

(202) 331-8800

January 2, 2008

Exhibit 1

DiMichael, Nicholas

From: William.Greene@morganstanley.com
Sent: Thursday, December 27, 2007 8:44 AM
To: William.Greene@morganstanley.com
Subject: Week 51 Railroad Traffic
Attachments: YoYChange.XLS; CLS1TOTAL.XLS; ByRailroad.XLS; 2007RailPM.xls; Carloads vs. Cars Online.xls

Attached are five Excel files containing railroad traffic and service metrics data for Week 51 (week-ended December 22, 2007).

Regards,
Bill

FOR BLACKBERRY USERS:

ALL CLASS I RAILROADS
CARLOADS ORIGINATED

TOTAL COMMODITY CARLOADS

% of Total Traffic: 73.7%

4 WK TREND: -0.2%

WEEK 51: -3.6%

4QTD: 0.5%

YTD: -2.2%

TOTAL INTERMODAL

% of Total Traffic: 26.3%

4 WK TREND: -0.5%

WEEK 51: -1.8%

4QTD: -2.3%

YTD: -2.0%

TOTAL VOLUME

4 WK TREND: -0.4%

WEEK 51: -2.9%

4QTD: -0.7%

YTD: -2.1%

BURLINGTON NORTHERN SANTA FE
CARLOADS ORIGINATED & RECEIVED

TOTAL BNSF COMMODITY CARLOADS

% of Total Traffic: 67.3%

4 WK TREND: 3.0%

WEEK 51: 1.2%

1/2/2008

4QTD: 3.6%
YTD: 0.7%

TOTAL BNSF INTERMODAL
% of Total Traffic: 32.7%
4 WK TREND: -6.2%
WEEK 51: -8.2%
4QTD: -8.7%
YTD: -6.5%

TOTAL BNSF VOLUME
4 WK TREND: -1.6%
WEEK 51: -3.4%
4QTD: -2.8%
YTD: -3.0%

CANADIAN NATIONAL
CARLOADS ORIGINATED & RECEIVED

TOTAL CN COMMODITY CARLOADS
% of Total Traffic: 84.0%
4 WK TREND: 6.5%
WEEK 51: 7.6%
4QTD: 6.5%
YTD: -1.6%

TOTAL CN INTERMODAL
% of Total Traffic: 16.0%
4 WK TREND: 3.6%
WEEK 51: 4.6%
4QTD: 4.1%
YTD: 0.1%

TOTAL CN VOLUME
4 WK TREND: 5.7%
WEEK 51: 6.8%
4QTD: 5.8%
YTD: -1.1%

CANADIAN PACIFIC
CARLOADS ORIGINATED & RECEIVED

TOTAL CP COMMODITY CARLOADS
% of Total Traffic: 70.2%
4 WK TREND: 1.0%
WEEK 51: -0.5%
4QTD: -0.1%
YTD: -0.2%

TOTAL CP INTERMODAL

% of Total Traffic: 29.8%

4 WK TREND: 6.3%

WEEK 51: -0.4%

4QTD: 7.2%

YTD: 6.8%

TOTAL CP VOLUME

4 WK TREND: 3.4%

WEEK 51: -0.4%

4QTD: 3.1%

YTD: 2.9%

CSXT

CARLOADS ORIGINATED & RECEIVED

TOTAL CSXT COMMODITY CARLOADS

% of Total Traffic: 70.8%

4 WK TREND: -1.7%

WEEK 51: -5.9%

4QTD: -2.3%

YTD: -3.3%

TOTAL CSXI INTERMODAL

% of Total Traffic: 29.2%

4 WK TREND: -0.9%

WEEK 51: -4.9%

4QTD: -3.8%

YTD: -3.3%

TOTAL CSX VOLUME

4 WK TREND: -1.5%

WEEK 51: -5.6%

4QTD: -2.7%

YTD: -3.3%

KANSAS CITY SOUTHERN

CARLOADS ORIGINATED & RECEIVED

TOTAL KCS COMMODITY CARLOADS

% of Total Traffic: 85.7%

4 WK TREND: 4.4%

WEEK 51: 0.1%

4QTD: 1.7%

YTD: 0.8%

TOTAL KCS INTERMODAL

% of Total Traffic: 14.3%

4 WK TREND: -46.8%

WEEK 51: -51.6%
4QTD: -32.8%
YTD: -18.3%

TOTAL KCS VOLUME
4 WK TREND: -11.1%
WEEK 51: -15.9%
4QTD: -8.8%
YTD: -4.7%

NORFOLK SOUTHERN
CARLOADS ORIGINATED & RECEIVED

TOTAL NS COMMODITY CARLOADS
% of Total Traffic: 74.1%
4 WK TREND: -3.7%
WEEK 51: -3.4%
4QTD: -1.9%
YTD: -3.7%

TOTAL NS INTERMODAL
% of Total Traffic: 25.9%
4 WK TREND: -1.4%
WEEK 51: -1.2%
4QTD: -4.1%
YTD: -4.2%

TOTAL NS VOLUME
4 WK TREND: -2.7%
WEEK 51: -2.5%
4QTD: -2.9%
YTD: -3.9%

KANSAS CITY SOUTHERN DE MEXICO (FORMERLY
TFM)
CARLOADS ORIGINATED & RECEIVED

TOTAL KCSM COMMODITY CARLOADS
% of Total Traffic: 82.3%
4 WK TREND: -6.9%
WEEK 51: -14.4%
4QTD: -5.9%
YTD: -4.4%

TOTAL KCSM INTERMODAL
% of Total Traffic: 17.7%
4 WK TREND: 13.1%
WEEK 51: -7.8%
4QTD: 15.7%

YTD: 14.3%

TOTAL KCSM VOLUME

4 WK TREND: -1.4%

WEEK 51: -12.7%

4QTD: 0.1%

YTD: 0.6%

UNION PACIFIC

CARLOADS ORIGINATED & RECEIVED

TOTAL UP COMMODITY CARLOADS

% of Total Traffic: 75.9%

4 WK TREND: -0.4%

WEEK 51: -6.9%

4QTD: 1.2%

YTD: -2.3%

TOTAL UP INTERMODAL

% of Total Traffic: 24.1%

4 WK TREND: -0.1%

WEEK 51: -2.7%

4QTD: -0.4%

YTD: 0.6%

TOTAL UP VOLUME

4 WK TREND: -0.3%

WEEK 51: -5.3%

4QTD: 0.6%

YTD: -1.2%

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