



ARC

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Are The Winds Changing At The STB?

DuPont has utilized the newly established simplified small rate case rules to challenge rates in 3 cases involving 7 CSXTT moves. The board has ruled in favor of DuPont in 6 of the 7 moves it challenged. The one that was lost involved a Chlorine move. The board ruled DuPont did not satisfactorily prove CSXT was market dominant in this lane of traffic. DuPont's challenge of these rates was a bold and aggressive move to make something happen that aids them and hopefully gives direction to other shippers for filing rate cases with a favorable outcome.

However, the real "question on the table" is whether this signals a change in the STB's philosophy for deciding rate cases? Or is it just STB feeling the pressure of Congress that is crafting legislation to make something happen positive for the shippers?

The Alliance for Rail Competition continues to represent captive rail shipper's interest in a host of Ex Parte proceedings including Rule Making, Cost of Capital, Small Rate Case Rules, Common Carrier Obligation, Transportation of Grain, 25 Year Review of Staggers, Access and Competition Issues, and Fuel Surcharges. All of these proceedings are important as the STB seeks to find a new balance after being accused by Congress and the shippers as having a bias towards railroads. Railroads do overtly and covertly intimidate rail customers from taking sides in these important issues. ARC has and continues to serve an important role for its

members with constructive and responsible pleadings and comments in STB proceedings to further the captive shipper's interest. Is the Board changing? In a word – yes. Is the change as much as rail customers need or want? – no. The most important statement made by the STB in these DuPont proceedings from a captive shipper standpoint was, where the Board observed that market dominance may exist even where rail rates are similar to truck rates, saying “the fact that the carrier matches prices set by alternatives with significantly higher costs, while maintaining a dominant market share, is not enough to demonstrate effective competition for the traffic at issue.”

While the new rules for small rate cases didn't turn out perfect – and they are being appealed to Appellate Court in DC by the shippers including ARC, they are rules that captive rail shippers must rely on until they are changed by the STB or the courts.

To get some feel for this, one has to recognize the magnitude of the relief given to DuPont. Under the newly established “Three Benchmark Test” that this case was decided under, the Board can award up to \$1 million per case over 5 years.

To be sure, the rates established under these new rules are extremely high. For example, in the case involving shipments of chlorine, the Board found that the mean R/VC (Revenue/Variable Cost) ratio for 28 movements in the comparison group for movements from Niagara Falls, NY to Johnsonville, TN, was 274%, and that the mean R/VC ratio for the 169 movements in the comparison group for movements from Niagara Falls to Carneys Point, NJ was 311%.

Applying its “confidence interval” (a fudge factor that favors the railroad), the Board concluded that the maximum reasonable rate for the NY to TN movement would have a 287% R/VC, and the maximum reasonable rate for the NY to NJ movements was 321% R/VC.

Therefore, the Board has ordered CSXT to charge no more than the R/VC ratios it found as maximum reasonable levels for a period of 5 years as to the DuPont shipments at issue, or until DuPont has received the \$1 million

in rate relief for each case, or whichever comes sooner. These rate levels continue in most cases. What this means is a maximum of \$3 million dollars in rate relief to DuPont. While this victory is nothing to sneeze at, in the larger scheme of things, this seems a pretty small reward to a shipper who has spent considerable time and money challenging these rates.

In summary, DuPont won its cases and charted the way for captive rail shippers in the future and we commend them for this action. It is clear that the rate levels that were judged reasonable under these new rules are excessive and do not tend to show a real change in philosophy at this STB in deciding rate challenges.

From ARC's and my personal perspective, as a transportation professional who spent over 15 years negotiating rail rates as a captive shipper, this STB ruling makes it more important than ever for shippers that are captive to urge, cajole, and indeed demand from this Congress that they pass this rail competition legislation which will empower the captive rail customers with the opportunity to deal with railroads on a more equal footing during negotiations for rates and service.

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