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## I. PREFACE AND SUMMARY OF ARGUMENT

Pursuant to 49 C.F.R. § 1115.3, Complainant, SunBelt Chlor Alkali Partnership (“SunBelt”), respectfully submits this reply to the Petition for Reconsideration (“NS Pet.”) filed by the Respondent, Norfolk Southern Railway Company (“NS”), with the Surface Transportation Board (“Board”) on July 30, 2014, seeking reconsideration of the Board’s decision served on June 20, 2014 (“Decision”) in the above-captioned proceeding.<sup>1</sup> The NS Petition alleges 16 instances of material error in the Decision, most of which reargue points that NS made previously or misrepresent the record and the Board’s Decision. SunBelt opposes 12 of those claims in their entirety, but agrees, in whole or in part, with the other 4 issues raised by NS.

First, the Board properly rejected NS’s attempt to impose additional insurance costs upon the SunBelt Railroad (“SBRR”). SunBelt demonstrated that its 3.89% insurance ratio was commensurate with other comparable real-world railroads that also handle toxic-inhalation hazard (“TIH”) commodities. NS inaccurately claims that there is no support in the record for the Board’s conclusion that NS’s insurance coverage over the Tier Amount cannot be attributed solely to TIH commodities. NS also perpetuates the same logical fallacy from its reply evidence that the SBRR has a higher risk profile than NS itself because the SBRR handles a higher proportion of TIH traffic than NS, even though NS handles more than twice as many TIH carloads, over greater distances, on a larger network, that passes through more High Threat Urban Areas (“HTUAs”). See Part II.B.

Second, the Board properly excluded rip-rap volumes for the Lake Pontchartrain berm because NS failed to produce any responsive data in discovery but then relied on specially prepared data in reply. NS misrepresents both the breadth of SunBelt’s discovery requests and

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<sup>1</sup> Pursuant to decisions served in this docket on July 25 and August 8, 2014, the Board extended the time for filing replies to Petitions for Reconsideration until September 9, 2014 and it extended the page limit to 50 pages.

the understanding between NS and SunBelt concerning discovery. Most importantly, NS developed its rip-rap evidence from a special study that it objected to performing in response to SunBelt's discovery requests. See Part II.C.

Third, the Board properly rejected NS's equity flotation cost evidence based upon the Facebook IPO. NS invokes a non-existent "settled rule" that would require the Board to uncritically accept a party's evidence, no matter how unreasonable, if it is the only evidence of record. However, in cases where one party has not submitted evidence of a cost in reliance upon precedent, the Board has not automatically accepted the other party's evidence of such cost even though the Board has agreed that such cost is appropriate. Furthermore, contrary to NS's claim, the Facebook IPO was not a "conservative" estimate of an equity flotation fee for the SBRR for all the reasons stated in the Decision. See Part II.D.

Fourth, the Board properly rejected NS's proposed cost for transporting rail over the residual NS to SBRR railheads because the NS evidence was unsupported and could result in a double-count. The Board expressly considered the same NS arguments in the Decision and rejected them for a lack of support. See, Part II.E.

Fifth, the Board properly rejected NS's proposed lighting costs for nighttime construction as unnecessary and an impermissible barrier to entry. NS's arguments are an attack upon established precedent with respect to such nonsensical points. SunBelt's rebuttal evidence also contradicts the factual basis for NS's argument. Finally, even if NS were correct, the SBRR simply could increase the number of road crews to complete the assigned tasks without night work because, whether it takes 10 crews completing 5 miles per day or 20 crews completing 2.5 miles per day, the unit costs are the same. See Part III.F.

Sixth, the Board properly rejected NS's attempts to include a swell factor adjustment in the calculation of earthwork unit costs because there is no evidence that the ICC Engineering Reports measure earthwork quantities in Bank Cubic Yards ("BCY"). Since that is a predicate fact to NS's argument, the application of a swell factor is speculative. See Part II.G.

Seventh, NS's objections to the terminal value correction adopted by the Board are baseless. NS's claim that the Board's correction introduces inconsistent assumptions into the DCF model is wrong because the alleged inconsistencies existed even prior to the Board's terminal value correction, not as a consequence of it. Furthermore, the terminal value correction removes this inconsistency by assuming that the debt to acquire original assets and the debt used to acquire future assets will both be amortized over 20-year periods. Finally, contrary to NS's claim, the Board did not make a mathematical error by overriding scheduled interest payments, but instead reflected the use of an average value over time. See Part II.J.

Eighth, NS has not identified any material error in the Board's determination of maintenance-of-way ("MOW") derailment costs. The Board rejected NS's cost evidence because NS had presented inconsistent evidence and SunBelt's methodology was reasonable, not because of a non-existent work paper error alleged by NS. Furthermore, any inconsistency with the Board's decision in E.I. du Pont de Nemours and Company v. Norfolk Southern Ry. Co., Docket No. 42125 (served March 24, 2014), is due to differences in the evidence submitted in this case. See Part II.K.

Ninth, NS's petition as to Positive Train Control ("PTC") is a thinly-disguised attempt to get a second bite at the apple by imposing the costs of two signaling systems upon the SBRR. The Board's treatment of PTC costs properly eliminates the PTC-mandate as a barrier to entry by permitting the SBRR to build a PTC system at the outset of operations and to make appropriate

upgrades over time. Even though the Board adopted a different approach than either party had advocated, the Board had the authority to devise its own solutions to intractable differences between the parties' evidence. The Board's solution was both reasonable and consistent with constrained market pricing ("CMP") principles that prohibit barriers to entry in the Stand-Alone Cost ("SAC") analysis. If the Board were to nevertheless grant the NS Petition, it should reject NS's preferred solution, which essentially doubles the PTC costs, in favor of its alternative solution of requesting supplemental PTC evidence. See Part II.M.

Tenth, the Board correctly applied bonus depreciation to the SBRR consistent with SAC principles. NS's Petition on this issue is repetitive of its reply evidence. Although NS contends that the Decision did not identify any specific disadvantages that a stand-alone railroad ("SARR") would face as a result of its accelerated construction period, the Board clearly was referring to the numerous disadvantages presented in SunBelt's rebuttal evidence. Finally, NS's proffered correction is itself a barrier to entry because it would deny the SBRR the opportunity even to take advantage of bonus depreciation to the same extent as NS did during the SARR's construction period. See Part II.N.

Eleventh, the Board adopted the best evidence of record for failed equipment and dragging equipment detectors. Although NS claims that the Board's acceptance of SunBelt's evidence based upon 2001 AREMA standards was inappropriate because those were superseded by 2007 AREMA standards, NS has not demonstrated why SunBelt's evidence would not also comport with 2007 standards or that NS's evidence would satisfy those standards. See Part II.O.

Twelfth, the Board's rejection of NS's evidence for Operations Service and Support ("OSS") staff was reasonable and supported. NS either misrepresents or ignores the record,

which shows that the SBRR has sufficient staffing from multiple departments to cover all of the OSS functions. See Part II.P.

Finally, in four instances, SunBelt agrees with NS, in whole or in part, that the Board has erred. In Part II.A., SunBelt concurs in part with NS's description of the Board's error as to ballast transportation costs, but not with NS's correction. In Part II.H., SunBelt agrees that the Board made a technical error in its calculation of ad valorem taxes, as described by NS, but this error would become moot if the Board grants SunBelt's Petition for Reconsideration of the Board's acceptance of NS's new methodology for calculating ad valorem taxes in the first instance. In Part II.I., SunBelt agrees with NS as to the treatment of moveable bridge approach spans. In Part II.L, SunBelt agrees that the Board should not have rejected NS's evidence on the transportation cost of plates, spikes, and anchors for the same reasons that SunBelt has asked the Board to reconsider its rejection of SunBelt's weight-to-volume conversion factor for calculating ballast quantities; the Board should either grant or deny both petitions to be consistent.

## II. ARGUMENT

This section addresses each error alleged by NS in the order in which they are presented in the NS Petition.

### A. **Although the Board Erred in Determining Ballast Transportation Costs, NS Has Not Accurately Corrected That Error.**

NS is correct in its claim that its average transportation distance of 349.9 miles from the selected ballast quarries to the SBRR railheads is based on distances from the quarries to all four SBRR railheads and not just Birmingham, AL as stated by the Board in its Decision. NS Pet. at 5-6. However, NS neglects to mention that the Board restated the average distance from 349.9 miles to 329.55 miles, which represents the average of all six quarry to railhead movements in

NS's track construction spreadsheet.<sup>2</sup> The Board rejected NS's use of an average distance to Birmingham from three quarries (288.8 miles) in the development of NS's average distance from all quarries to all SBRR railheads (349.9 miles). See NS Pet. at 5. Therefore, if the Board revises its Decision based on NS's Petition, it should use 329.55 miles rather than 349.9 miles.

**B. The Board Reasonably Rejected NS's Excessive Insurance Cost Evidence.**

The Board's Decision rejected NS's attempts to impose upon the SBRR a multitude of additional costs for handling TIH commodities that are not commensurate with other comparable real-world railroads. NS seeks reconsideration of the Board's rejection of NS's inclusion of a \$5.14 million premium for catastrophic insurance coverage.<sup>3</sup> Decision at 20-21. NS has not demonstrated that the Board's determination was material error.

The fundamental issue resolved by the Board was whether SunBelt's application of a 3.89% insurance ratio for the SBRR was more reasonable than NS's proposed 6.29%. See Sun. Reb. at III-D-50. NS accepted SunBelt's 3.89% ratio for ordinary insurance costs, but also added \$5.14 million of insurance premiums for catastrophic coverage on grounds that the SBRR had "an unusually dangerous traffic profile," NS Reply at III-D-204, because it handled a higher percentage of TIH traffic relative to all other traffic on its system than even NS itself. Id. at 206. NS inaccurately and misleadingly asserted that the SBRR's higher percentage of TIH traffic "means that the SBRR will have a markedly higher risk of a catastrophic TIH release than other railroads." Id. But as SunBelt demonstrated on rebuttal, RailAmerica, with five operating

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<sup>2</sup> See STB work paper "No.2\_STB – SBRR Track Construction NS Reply.xls," tab "BALLAST REPLY COST."

<sup>3</sup> Although the NS Petition only seeks reconsideration of the Board's Decision to exclude NS's proposed catastrophic insurance premium, NS has provided two different work papers showing its proposed "correction": one corrects just the catastrophic insurance premium, but the second also includes the separate "Excess Risk" cost that the Board rejected in the Decision, at 21-23. Compare "SBRR Operating Expense NS Reply.xls" with "SBRR Operating Expense NS Reply.xls". SunBelt presumes that the latter work paper was inadvertently included since NS has not sought reconsideration of the Board's "Excess Risk" determination.

subsidiaries that handle TIH commodities, had an insurance ratio of just 3.76% in 2011, which demonstrated the reasonableness of SunBelt's evidence.

NS's Petition attempts to reprise its reply arguments on the theory that the Board's decision rests upon a "factual error" about the evidence and a "logical fallacy." NS Pet. at 7.

First, the alleged "factual error" is the Board's conclusion that "[t]here is nothing to indicate that NS's coverage over the Tier Amount is solely attributable to the release of TIH, as opposed to other catastrophic events such as accidents involving petroleum products or passenger trains." NS Pet. at 8, quoting Decision at 21. But the only evidence to which NS refers is a self-serving interrogatory response that does not contradict the Board's conclusion that NS's insurance coverage over the Tier Amount is not "solely" attributable to the release of TIH. SunBelt demonstrated that other hazardous materials also can cause, and have caused, damage in excess of the Tier Amount. Sun. Reb. at III-D-49-50. Furthermore, NS disingenuously challenges the Board's suggestion that crude oil also could account for NS's insurance costs above the Tier Amount on the grounds that NS was not hauling extensive amounts of crude oil during the period covered by its insurance discovery responses. The timing of NS's discovery responses do not preclude the Board from taking judicial notice of the indisputable and very public fact that NS is hauling substantial volumes of crude oil that far exceed its transportation of TIH commodities and that the release of crude oil can result in liability that is above the Tier Amount.

Second, the alleged "logical fallacy" is that "it is inappropriate to scale insurance costs based on the percentage of TIH traffic SunBelt selected, because factors other than the total amount of TIH transported can affect the risk of a TIH release." NS Pet. at 9. This paraphrase of the Decision misrepresents the Board's holding. The Board held that "the SBRR's ratio of

TIH traffic to total traffic does not necessarily indicate that the SBRR has a higher risk of a catastrophic TIH release than other railroads.” Decision at 21. This statement was not an attack on NS’s methodology for calculating additional insurance costs; rather, it was a rejection of NS’s justification for such costs in the first instance. Although the Board did also reject the NS methodology for calculating insurance costs, it did so on the grounds that constitute the alleged “factual error” discussed in the preceding paragraph.

As part of its “logical fallacy” argument, NS also challenges the relevance of the Board’s statement that “[o]ther factors [in addition to the ratio of TIH traffic to total traffic] may contribute to a particular carrier’s risk of a catastrophic TIH release, including the landscape over which the carrier operates, the population density on the route traveled, the volume of other traffic on the line, the complexity of overall operations, and the amount of traffic and congestion in yards, among others.” NS Pet. at 9 (n. 18); Decision at 21. According to NS, the logical fallacy is that all of these other factors are constant for both NS and the SBRR, thereby rendering the ratio of TIH traffic to total traffic “[t]he only significant variance.” NS Pet. at 9. But it is the NS’s logic that is flawed.

All of these other factors are not constant for both NS and the SBRR. NS handles more than twice as many TIH carloads as the SBRR,<sup>4</sup> over much greater distances, on a much longer network, that traverses much more varied terrain, and passes through more HTUAs. All of these other factors increase the NS risk profile relative to the SBRR’s profile.<sup>5</sup> SunBelt illustrated the flaw in NS’s logic at pages III-D-56-57 of its Rebuttal Evidence, and the Board cited to that very

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<sup>4</sup> NS Reply at III-D-205 (the SBRR would carry “approximately 46% of all the carloads of TIH on the NS system.”).

<sup>5</sup> NS may be arguing that these other factors are constant for the SBRR and NS over the lines replicated by the SBRR. But if so, then NS wrongly concludes that “[t]he only significant variance is that one out of every 40 carloads on the SBRR will carry TIH, while just one of every 250 carloads on NS contains TIH,” NS Pet. at 9, because that comparison is not limited to just the lines replicated by the SBRR, but instead compares the SBRR with the entire NS system. NS cannot reject comparisons of the SBRR to the entire NS system for every factor except the one it wants to use.

illustration in support of its discussion of the “other factors” that contribute to a carrier’s risk profile. Decision at 21, n. 84.

Thus, the Board’s factual and logical conclusions challenged by NS are both sound and well-supported in the record. Furthermore, SunBelt’s evidence showed that the SBRR’s insurance costs would be commensurate with other comparable real world railroads that also handle TIH commodities, and NS’s Petition does nothing to discredit that evidence. Therefore, the Board should deny the NS petition to reconsider this issue.

**C. The Board Properly Excluded Lake Pontchartrain Rip-Rap Costs.**

The Board’s exclusion of rip-rap volumes for the Lake Pontchartrain berm was both proper and equitable. Decision at 125. NS’s objection to this exclusion misrepresents the breadth of SunBelt’s discovery requests and the understanding between NS and SunBelt concerning discovery. NS Pet. at 10-13. Moreover, NS generated its volumes by performing a special study that it objected to performing in discovery. Finally, even if the Board were to agree with the NS Petition, SunBelt presented multiple other reasons for rejecting this NS evidence.

NS’s assertion that SunBelt’s discovery request for rip-rap volumes was too narrow disregards the plain language of SunBelt Request for Production No. 113 (“RFP 113”). RFP 113 (subpart i) states:

Please produce documents sufficient to show the following with respect to grading construction activities undertaken or proposed at any time, or currently ongoing, on any portion of NS’s...system located in the SARR States:

- i. Number of cubic yards of rip rap placed for the protection of the roadway...

[emphasis added]<sup>6</sup> Because this request concerned construction projects undertaken at any time, it clearly encompassed the volume of rip-rap used when constructing the berm along Lake Pontchartrain regardless of when such construction occurred.

Furthermore, NS's contention that the parties agreed to limit the time period covered by RFP 113 to 2007-2011 is incorrect. Because NS and SunBelt agreed to the same scope of discovery responses that NS provided to DuPont in Docket No. 42125, reference is required to correspondence between counsel for NS and DuPont, who also represent the parties in this proceeding. DuPont's Request for Production No. 121 ("RFP 121") is the equivalent of SunBelt's RFP 113. The discovery agreement between NS and DuPont provided that, for DuPont RFP 121 and thus also for SunBelt RFP 113, NS would "provide quantity information to the extent it exists. In addition, NS will produce relevant AFEs that were in effect as early as 2007."<sup>7</sup> Thus, the date limitation clearly applied only to NS's production of Authorizations for Expenditure ("AFE's").

To the extent that NS may not have produced rip-rap quantities for the Lake Pontchartrain berm because such information did not exist, the Board still was justified in rejecting NS's rip-rap volumes because NS obtained them by performing a special study that NS objected to performing in response to RFP 113.<sup>8</sup> It is fundamentally unfair for NS to object to performing a special study in response to SunBelt's discovery request, but then generate that information in a special study prepared for its own evidence in the same proceeding. Decision at 125.

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<sup>6</sup> See, Ex. A (SunBelt RFP 113).

<sup>7</sup> See Ex. B, at page 5, which is a March 14, 2011 letter from J. Moreno to P. Hemmersbaugh that sets forth DuPont's understanding of the discovery agreements reached at a March 4, 2011 discovery conference between the parties. See also, Ex. C, which is a March 24, 2011 letter from M. Warren to J. Moreno that concurs in the March 14 letter except to the extent clarified by the March 24 letter. Note that there is no objection to, or clarification of, RFP 121.

<sup>8</sup> NS Pet. at 12 ("NS's evidence on this issue was a special study developed on Reply by NS's experts based on their study of the berm.")

NS is advocating that the Board undermine a reasonable discovery accommodation that SunBelt made for the benefit of NS. NS responded to RFP 113 by objecting on multiple grounds, including that the request required NS to perform a special study and was overbroad and unduly burdensome.<sup>9</sup> SunBelt acceded to a narrower scope of discovery based on the understanding that the parties could not rely upon any evidence not produced in discovery. NS, however, wants to have its cake and eat it too, by refusing to perform special studies in response to discovery requests, but still reserve the right to do so for its own evidence when NS deems such a study to be beneficial to it. If the Board accepts NS's Lake Pontchartrain rip-rap evidence, it will deter rate-case complainants from providing reasonable accommodations that reduce the "heavy burden in responding to SAC discovery requests" about which NS complains.<sup>10</sup>

Finally, even if the Board were to accept the arguments in NS's petition for reconsideration, it still should reject the NS rip-rap evidence on other grounds presented in SunBelt's rebuttal evidence that the Board did not address in the Decision because it did not need to do so. Specifically, SunBelt also argued that:

- there is no evidence that the Lake Pontchartrain berm was included in the original construction of that rail line based upon the ICC Engineering Reports;
- NS has not demonstrated that the berm is necessary for the SBRR; and
- NS has not provided evidence that the berm is solid rip rap as opposed to just a layer of rip-rap over earth.

Sun. Reb. at III-F-69. Therefore, the Board has other grounds for rejecting NS's reply evidence than just the discovery concerns addressed in the Decision.

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<sup>9</sup> Exhibit D, attached hereto, is the NS response to RFP 113.

<sup>10</sup> See NS Pet. 12.

**D. The Board Properly Rejected NS's Equity Flotation Costs.**

NS contends that it was material error for the Board to reject the 2.1% equity flotation fee added by NS to the SBRR's stand-alone costs. NS Pet. at 13-15. In support of its contention, NS makes two separate, yet equally flawed, arguments. First, NS contends that its equity flotation cost must be accepted because it was the only evidence of record on the issue of what the equity flotation fee should be. *Id.* at 14. But, the Board does not automatically accept the only evidence of record, especially when one party's evidence is a deviation from precedent, for which that party has the burden of proof, and the other party relied upon that precedent in not submitting its own evidence. Second, NS claims that the Board's rejection of NS's proposed 2.1% fee "ignores the fact that the SBRR's equity flotation costs would almost certainly be higher than 2.1%." *Id.* at 14-15. The Board, however, rationally explained why NS's evidence was insufficient and NS has not shown that explanation to be material error.

**1. There is no "settled rule" that requires the Board to uncritically accept the only evidence of record.**

In support of its first contention, NS inaccurately invokes an alleged "settled rule" that, where only one party submits evidence on an issue and the Board agrees that the issue is appropriate for inclusion in the SAC analysis, then the Board always accepts the evidence submitted by that party. *Id.* at 2 (n. 4) and 14. The Board does not uncritically accept one party's evidence just because it is the only evidence of record. The Board also considers whether that party's evidence is reasonable and adequately supported.

In AEPCO, defendants BNSF and UP included costs for undercutting during SARR construction. The complainant omitted such costs. The Board determined that undercutting was an appropriate SAC cost category, stating that "defendants have shown that some undercutting was done on portions of the lines that the ANR would replicate." Arizona Elec. Power Coop.,

Inc. v. BNSF Ry. Co. and Union Pac. R.R. Co., Docket No. NOR 42113, slip op at 85 (served Nov. 22, 2011) (“AEPCO”). Nonetheless, the Board omitted the cost because defendants’ evidence was insufficient to justify the particular dollar figure that they advocated. Id.

In Pub. Serv. Co. of Colo. d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Ry. Co., 7 S.T.B. 589 (2004) (“PSCo/Xcel I”), the complainant Xcel proposed several alternative methods for indexing SARR operating expenses to account for railroad productivity. The defendant BNSF rejected all methods of ascribing productivity to the SARR and refused to offer any such evidence even when expressly requested to do so by the Board. Id. at 619. Although the Board agreed with Xcel that it was appropriate to credit the SARR with productivity, id. it nonetheless refused to accept any of the methods proposed by Xcel, and instead applied the RCAF-U, which did not account for any productivity. Id. at 619-620; see also, Otter Tail Power Co. v. BNSY Ry. Co., Docket No. 42071, slip op. at 21-22 (served Jan. 27, 2006) (“Otter Tail”).

Multiple other examples similarly indicate that the Board does not blindly accept a single party’s evidence just because it is the only evidence of record, but also subjects such evidence to a “reasonableness” test. See, e.g., PSCo/Xcel I, 7 S.T.B. at 649 (where Xcel did not mention or address BNSF’s inclusion of certain G&A employees, the Board included them “[b]ecause BNSF’s argument is reasonable”), 656 (adopting BNSF’s evidence of travel expenses “as it appears reasonable and is the only evidence of record”); AEPCO at 34 (accepting defendant’s PTC costs, when complainant omitted such costs, “because those costs have been reasonably quantified by defendants”).<sup>11</sup>

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<sup>11</sup> Indeed, the Board sometimes selects a cost figure that neither party submitted into evidence, which also constitutes ignoring the only evidence of record. In the Otter Tail case, BNSF included per diem costs of \$75 during employee training while Otter Tail did not include any such costs. The Board found that per diem costs were appropriate. Otter Tail at C-16. Following NS’s allegedly “settled rule,” the Board should have included \$75 per day for such costs, but the Board did not do this. Instead, the Board included costs of only \$35 per day. Id.

Even if the alleged “settled rule” were to exist, such a rule could not and should not apply where the issue or cost category is a new item that deviates from precedent. Equity flotation costs were regularly rejected prior to the filing of evidence by SunBelt in this case.<sup>12</sup> In other words, SunBelt did not ignore an accepted cost category; instead, SunBelt’s omission of an equity flotation fee was in line with precedent. It was NS that sought a departure from precedent, and the burden was on NS to submit and support the new cost that it included.<sup>13</sup> The PSCo/Xcel I decision is particularly relevant to the NS Petition because, in both that case and this one, the party who presented the only evidence of record also was advocating a departure from precedent, and thus it had the burden of proof. Even though the Board agreed that a change was appropriate in both cases, it nevertheless rejected the only evidence submitted, thereby indicating that the party had not carried its burden merely by submitting the only evidence of record.

**2. NS’s evidence of an equity flotation fee was not conservative.**

The second reason asserted by NS in support of its equity flotation cost is that the Board’s rejection of the 2.1% fee advanced by NS “ignores the fact that the SBRR’s equity flotation costs would almost certainly be higher than 2.1%.” NS Pet. at 14-15. NS’s position is baseless because the Board rationally explained why NS’s evidence was insufficient.

The Decision made clear that NS did not adequately show why the Facebook example was a proper benchmark for the SBRR. Decision at 184-185. The only evidence of similarity in NS’s Reply was that the Facebook offering was “recent” and of similar “magnitude.” NS Reply

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<sup>12</sup> See, AEPCO at 138 (there is a “longstanding precedent” of rejecting equity flotation costs). The lone exception is a case where both parties agreed to include an equity flotation fee. Id. at 137 (“In AEP Texas II – the only case to date in which the Board accepted equity flotation costs – both parties had agreed that an equity-flotation fee should be included”).

<sup>13</sup> See, e.g., AEPCO at 33 (“Where...a complainant has followed established agency precedent, defendants carry the burden to justify a departure from that methodology.”); PSCo/Xcel I at 671 (“It is incumbent upon the proponent of a new cost to demonstrate that such a cost would need to be incurred by a SARR.”); Western Fuels Assoc., Inc. v. BNSF Ry. Co., Docket No. 42088, slip op. at 68-69 (served Sept. 10, 2007) (“WFA/Basin I”); Otter Tail at 4.

at III-G-3. The Decision made clear that the Board was looking for better evidence of similarity, such as another transportation company, or at least an effort to address credit ratings, risk profiles, or the capital-intensive nature of the railroad business. Decision at 185. NS did not provide such evidence.

NS nevertheless claims that its 2.1% fee is a conservative estimate of the gross spread on the SBRR's equity issuance, and that the STB ignored the fact that the SBRR's equity flotation costs would be higher than 2.1% in the real world. As support for its claim, NS states that equity flotation costs usually range between 2 and 7 percent of the amount raised, and that the most recent railroad common equity issuance equaled 3.9%. Based on these few data points, NS concludes that its 2.1% fee is a conservative estimate. There are several problems with NS's presumptive conclusion. First, NS's support for higher flotation costs is dated and more current research shows that equity flotation costs are falling. Second, prior railroad equity flotation costs are inappropriate benchmarks for the SBRR because of dramatic differences in the sizes of the equity issues. Third, the recent Facebook IPO is also an improper cost benchmark because of significant fundamental differences between a technology IPO and a railroad IPO.

To start, NS's claim that gross spreads on equity issuances usually range between 2 and 7 percent relies upon outdated data.<sup>14</sup> The academic paper NS heavily relied upon for these figures was published nearly twenty years ago, and the data included in the paper are even older, with dates ranging from 1990 to 1994.<sup>15</sup> More recent academic research has found that equity flotation costs have fallen since NS's supporting work paper was issued in 1996. For example, in their 2008 paper "Competition in IPO Underwriting: Time Series Evidence," Bajaj, Chen and

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<sup>14</sup> "Gross spread" is the difference between the offering price of public offered securities and the proceeds paid the issuer of the securities by the underwriter. The securities underwriters and selling group earn the gross spread as compensation and to cover expenses.

<sup>15</sup> See NS Reply work paper "III-G Cost of Raising Capital.pdf," at page 59.

Mazumdar found that average gross spreads have fallen over time while keeping issuance size constant.<sup>16</sup> Additionally, Loughran and Ritter found evidence in their 2004 research that investment banking firms were lowering gross spreads over time to increase profits in other parts of the banker's business.<sup>17</sup> NS has not shown that the gross spreads included in its two supporting work papers are still indicative of the equity flotation costs that would be incurred in the 2009 to 2011 time period.

Next, NS states that the most recent railroad common stock issuance, Burlington Northern Inc.'s ("BN") 1991 common stock issue, incurred flotation costs of 3.9%, and thus a 2.1% flotation cost is extremely conservative for the SBRR. There are several flaws in NS's argument. First, NS does not take into consideration the relative size differences between BN's 1991 common stock issue and the SBRR's common equity requirement. Security and Exchange Commission ("SEC") data indicate that BN issued 10.35 million shares of common equity at a principle amount of \$345 million.<sup>18</sup> In contrast, the STB's work papers indicate that the SBRR would issue approximately \$2 billion in common equity, taking into consideration initial construction investments and interest during construction.<sup>19</sup> In other words, the SBRR's common equity issuance would be nearly six-times the size of the BN's 1991 issuance. NS has acknowledged that gross spreads are based, in part, on the amount of the common stock issued. However, NS has provided no evidence that an issuance that is six-times the size of the BN would incur only a 180 basis point difference in flotation costs.

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<sup>16</sup> See Mukesh Bajaj, Andrew H. Chen and Sumon C. Mazumdar, "Competition in IPO Underwriting: Time Series Evidence," *Research in Finance*, Volume 24, 2008, pages 1 -25 at page 12.

<sup>17</sup> See Tim Laughran and Jay Ritter, "Why Has IPO Underpricing Changed Over Time?", *Financial Management*, Autumn 2004, pages 5 – 37.

<sup>18</sup> See "SEC News Digest," Issue 91-190, October 1, 1991 at page 6.

<sup>19</sup> See STB e- work paper "D42130 Exhibit III-H-1 STB No3.xls," worksheet "Interest."

Second, BN did not pay 3.9% in banker's fees and costs in its issuance as NS claims, but rather a 3% gross spread and banking fees. The 3.9% figure cited by NS reflects the total costs to BN, including a 0.9% stock dilution impact.<sup>20</sup> Since the SBRR would not have any shares to dilute, the appropriate flotation costs for the comparison is the 3.0% BN paid for the flotation costs and not the 3.9% including flotation costs and equity dilution. This fact shows that NS's claim that a 2.1% flotation fee is a conservative estimate is wildly off-base. If equity flotation costs decline as the size of the offering increases as NS contends, the SBRR should have paid significantly less than what BN paid. This is supported by one of the dated academic papers NS relies upon to support high equity floatation costs, which shows that the cost difference in equity flotation costs and fees between an equity offering raising \$19.9 million and an offering raising \$499.9 million was approximately 510 basis points, or 5.1%.<sup>21</sup> In other words, a \$480 million difference in the amount of common equity issued reflected a 5.1% difference in flotation costs. Yet NS asserts that a \$1.6 billion difference between BN's 1991 equity issuance and the SBRR's issuance would only see a 90 basis point, or 0.9%, difference in equity flotation fees when the true cost of BN's 1991 issuance is measured.<sup>22</sup> If there are truly economies of scale in equity flotation, as NS believes, the costs to issue SBRR equity would be significantly lower than the 2.1% advocated by NS for the SBRR.

NS attempts to support its claim that the 2.1% flotation fee is conservative by also pointing towards the relatively recent Facebook IPO. NS acknowledges that the Facebook IPO would be different from the SBRR's capital raising activities and that they operate in different

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<sup>20</sup> See *Railroad Cost of Capital – 1991*, 8 I.C.C. 2d 402, 404, 415 (n. 14) (1992).

<sup>21</sup> See NS Reply work paper "III-G Cost of Raising Capital.pdf," at page 62. The costs for an offering between \$10 million and \$19.9 million was 11.63 percent and \$200 million and \$499.9 million was 6.53 percent.

<sup>22</sup> BN's 1991 equity flotation fees, excluding the stock dilution costs, was 3.0 percent. Subtracting NS's proposed SBRR equity flotation costs of 2.1 percent leaves a 0.9 percent difference.

industries with different economics, but contends that the only relevant differences are ones that would lead to lower equity flotation costs for Facebook than would be faced by the SBRR. These other factors include high demand for Facebook stock which led to investment bankers lowering their fees for the business, and the idea that Facebook, being an established firm, would face lower fees than a “greenfield” stand-alone railroad. NS grossly oversimplifies the IPO pricing picture, and fails to take into consideration the numerous factors that dictate IPO pricing, besides expected demand for the common stock and the size of the issuance. These factors include, but are not limited to, issuing company risk, issuing company industry, litigation risk, underwriter reputation, venture capital backing, estimated proceeds from the issue, firm age, and estimated return volatility to name just a few.<sup>23</sup> To assert that Facebook would pay a lower spread simply because it is an established firm with a popular name ignores the considerable research that shows equity pricing takes into consideration many relevant factors.

Given the clear lack of an acceptable and viable way to calculate the equity flotation costs for the issue size and nature of the SBRR, the only course of action for the Board was to exclude those costs from the SAC evidence.

**E. The Board Properly Rejected NS’s Cost Evidence For Transportation Over The Residual NS As Unsupported And A Double-Count.**

The Board rejected NS’s proposed cost for transporting rail over the residual NS to the SBRR railheads because the NS reply evidence was unsupported and could result in a double-count. Decision at 134. NS’s petition for reconsideration engages in a revisionist characterization of the evidence without addressing the fundamental flaw in its evidence identified by the Board. NS Pet. at 15-18.

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<sup>23</sup> See Grace Qing Hao, “Securities Litigation, Withdrawal Risk and Initial Public Offerings,” *Journal of Corporate Finance*, V. 17 (2011), 438-456 at page 451. The author in the article summarizes results from other peer-reviewed studies that examined the various determinants in gross-spreads in IPO literature, and notes that these other researchers found numerous statistically significant issues that impact pricing and fees.

NS wrongly asserts that it offered the only evidence of record that accounted for transportation over the residual NS. Id. at 17. As the Board recognized in the Decision, SunBelt's unit cost (which NS accepted) was based on the price in NS's 2010 R-1 Report, which includes the cost of transportation over foreign railroads. Because the residual NS would be a foreign railroad as to the SBRR, SunBelt relied upon the inclusion of foreign rail transportation costs as representative of the cost that the SBRR would incur over the residual NS. Thus, SunBelt did offer separate evidence to account for this cost.

On Reply, NS argued that its R-1 costs cannot be a fair representation of the SBRR's foreign rail transportation costs over the residual NS because NS "obtains substantial amounts of rail from suppliers located on and near its lines," and thus does not incur significant foreign railroad transportation costs. NS Reply at III-F-141. The Board expressly considered this NS argument and rejected it because NS did not provide any support for its statement. Decision at 134.<sup>24</sup>

Based upon the evidence of record, the Board reasonably concluded that NS's addition of foreign line transportation costs to the unit costs based upon NS's R-1 report could result in a possible double count, and therefore rejected the NS evidence. Id. NS's inaccurate contention that its evidence is the only evidence of record misrepresents the record in an attempt to force the Board into accepting NS's evidence. Thus, the Board should deny the NS Petition.

**F. The Board Properly Rejected NS's Lighting Costs for Construction.**

The Board rejected NS's attempt to impose lighting costs upon the SBRR for night construction as an impermissible barrier to entry. Decision at 126-27. The Board's Decision

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<sup>24</sup> What little support NS did offer was in the form of impermissible new evidence in its Final Brief, at 34-35, which the Board properly discounted.

was correct. Furthermore, NS's evidence is contradicted by evidence that SunBelt submitted in rebuttal.

The Board correctly concluded that the lighting cost NS imposes upon the SBRR is an impermissible barrier to entry. The "compressed time schedule" referenced by NS has existed in all previous SAC proceedings and is based on the time needed to construct the most difficult project on the SARR.<sup>25</sup> To construct the other components of the SARR during this time period, complainants, defendants and the STB alike have assumed unlimited resources. Flouting this precedent, NS now argues that the SBRR should be charged with "costs necessary to complete construction on the schedule that SunBelt specified." NS Pet. 19. But the Board rejected a near-identical argument in Arizona Public Service Co. v. Atchison, Topeka & Santa Fe Ry., 2 S.T.B. 367, 385-386 (1997) ("APS"), stating, "[u]nder that approach, there would be essentially no barriers to entry into the railroad industry...."<sup>26</sup> Of particular similarity to NS's argument, the defendant in that case argued that preliminary engineering costs would be greater for the SARR because of the increased effort necessary to meet the tight schedule assumed for construction. The Board rejected that argument because there was no evidence that the defendant also incurred additional costs of this nature. Id. at 386-87. Underlying the prohibition on barriers to entry is the notion that the incumbent should not benefit from entering the market in a piecemeal process over an extended period during which it earned income over the operating portions of its system. APS, 2 S.T.B. at 385; Coal Trading, 6 I.C.C.2d at 413. Thus, the proper question when assessing a potential barrier to entry is whether it involves "sunk costs that were not incurred by the

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<sup>25</sup> West Tex. Utilities Co. v. Burlington Northern R.R. Co., 1 S.T.B. 638, 674 (1996) ("WTU").

<sup>26</sup> See also, Coal Trading Corp. v. Balt. & Ohio R.R., 6 I.C.C.2d 361, 413 (1990) ("Defendants' argument that they too would face these costs if they entered the market today is irrelevant to the question of whether entry barriers exist for this market.") ("Coal Trading").

incumbent.” APS at 386. Here, NS has not shown that it incurred the lighting expenses that it assigns to the SBRR.

SunBelt’s rebuttal evidence also undermines the assumptions upon which NS’s calculations are based. NS assumed only 10 hours of daylight every single day of the year and only 25 working days per month.<sup>27</sup> On rebuttal, SunBelt presented evidence that, on the shortest days of the year, the time between the beginning and end of civil twilight (where the sun illuminates brightly enough for outdoor activities without the aid of lighting) was nearly 11 hours. Sun. Reb. at III-F-71-72. That time period would be even longer throughout the rest of the year. Furthermore, to the extent that there would be only 25 working days per month due to factors such as weather, the Board properly determined that the costs for nighttime work would be covered by the contingency factor. Decision at 127.

Finally, NS’s position seems to be that the allotted number of crews cannot complete the assigned tasks without working into the night. If the SBRR determines that this is the case, the SBRR simply increases the number of crews. Because roadbed preparation costs are based on units, and not the number of personnel, increasing the number of crews does not increase the costs. Stated differently, whether it takes 10 crews completing 5 miles per day or 20 crews completing 2.5 miles per day, the costs are the same because they are based on units, e.g., cubic yards. NS ignores this basic fact.

**G. The Board Properly Rejected NS’s Swell Factor Adjustment.**

The Board properly rejected NS’s attempts to include a swell factor adjustment in the calculation of earthwork unit cost. Decision at 116. NS presents a convoluted and factually incorrect argument for reconsidering that decision. NS Pet. at 20-21.

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<sup>27</sup> NS Reply at III-F-118. Although NS referenced 25 days in its reply evidence, it did not allege only 10 hours of daylight until its Final Brief. See NS Br. at 38 (n. 50)

In its evidence, NS claimed that a swell conversion factor is necessary because earthwork quantities are measured in Bank Cubic Yards (“BCY”) by the ICC Engineering Reports,<sup>28</sup> while R.S. Means expresses hauling costs in Loose Cubic Yards (“LCY”).<sup>29</sup> The Board, however, rejected NS’s claim that the ICC Engineering Reports state earthwork quantities in BCY, noting that NS had not presented any support for this assertion, nor was the assertion self-evident. Decision at 116. Since the Engineering Reports do not specify bank cubic yards, loose cubic yards, or any other type of cubic yards, any application of a swell factor is speculative.

NS’s Petition now backs away from NS’s own evidence, claiming that the unit of measure in the Engineering Reports is not directly relevant to this issue. NS Pet. at 20 (n. 35). But it has everything to do with this issue because, according to NS’s own evidence, a conversion factor is required precisely because of this alleged difference in units.

Moreover, the specific error that NS contends the Board made does not appear anywhere in the Decision. NS claims that, “[i]n rejecting NS’s evidence, the Board erroneously relied on an unsupported, broad-brush claim presented by SunBelt for the first time in rebuttal that some unidentified contractors take additional hauling due to swell into account when they make bids for excavation.” NS Pet. at 21, citing Sun. Reb. at III-F-50. But, nowhere in the Board’s discussion of this issue does it mention this SunBelt rebuttal evidence, much less cite to that page of SunBelt’s rebuttal. See Decision at 116. Thus, the specific error alleged by NS doesn’t even exist because the Board did not rely upon the cited SunBelt evidence. Therefore, the Board should deny NS’s Petition as to this issue.

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<sup>28</sup> NS Reply at III-F-84; NS Final Br. at 24.

<sup>29</sup> NS Reply at III-F-85; NS Final Br. at 24.

**H. Ad Valorem Taxes.**

SunBelt does not contest the presence of the error identified by NS in the Board's calculation of ad valorem taxes. However, because SunBelt has sought reconsideration of the Board's adoption of NS's new methodology for calculating ad valorem taxes (see Sun. Pet. at 15-17), this error would become moot if the Board grants SunBelt's Petition.

**I. Moveable Bridge Approach Spans.**

SunBelt does not contest the error identified by NS.

**J. The Board's Terminal Value Correction Is Not Flawed.**

The Board accepted SunBelt's evidence that the Discounted Cash Flow ("DCF") model contained an internal inconsistency between its cost of capital assumption that the SBRR's capital structure would remain constant into perpetuity, and its terminal value calculation that assumed the SARR would be 100 percent equity financed during the period after year 20 and before the first assets are replaced in the replacement level of the model. Decision at 192-94. To remedy this inconsistency, the Board accepted SunBelt's adjustment to the DCF model's terminal value calculation to reflect the cost of capital assumption that the SARR's level of debt would remain constant into perpetuity, and that interest tax shields, consistent with this constant level of debt, are accounted for in the cash flow calculation.

NS objects to the terminal value adjustment accepted by the Board stating that it contains two flaws. First, NS claims the Board made a conceptual error by introducing a new inconsistency into the DCF model by applying different financial assumptions between debt used for assets acquired during the construction period and debt used to acquire replacement assets. NS Pet. at 25-26. Second, NS asserts the STB made a mathematical error by overriding the interest payments in years 11 to 20 of the DCF model and instead using the average interest payments. Id. at 26. Both of NS's assertions are incorrect and should be ignored.

As to the alleged conceptual error, NS claims that, before the correction to the terminal value calculation, the DCF model was configured to assume that both debt used to acquire assets during the initial construction period and debt used to acquire replacement assets would be amortized over 20-years. *Id.* at 25. NS claims that, after the terminal value correction, the debt amortization assumptions are now different. Specifically, NS alleges that debt used to acquire the original assets is still amortized over 20 years, but there will be no amortization of debt used for the acquisition of assets in subsequent replacement cycles. *Id.* at 25.

NS's claim that the terminal value adjustment introduces inconsistent assumptions is wrong for two primary reasons. First, contrary to NS's statement, the Board's DCF model did not assume both debt associated with original assets and debt used for replacement assets would have a 20-year amortization period, but instead the DCF model assumed debt associated with replacement assets would be amortized over the lesser of the service life of the asset, or 20-years.<sup>30</sup> In the case of Public Improvement assets, debt used to acquire replacement assets would be amortized over 13-years, not 20-years as alleged by NS. This means that the conflicting assumption identified by NS in the DCF model, regarding debt associated with original and replacement assets, existed even prior to the terminal value correction accepted by the Board, not as a consequence of that correction.

Second, the terminal value correction will account for amortization of debt used to acquire future assets in the same manner as original SBRR debt. NS states that there will be no amortization of debt for assets in subsequent asset replacement cycles. This ignores the fact that the debt reflected in the terminal value calculation is there to perpetually replace future assets (as well as to account for other corporate needs as debt is used by real world railroads). Stated

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<sup>30</sup> See STB electronic work paper "D42130 Exhibit III-H-1 STB No3.xlsx," worksheet "Replacement," cell V19.

differently, the correction assumes that the debt to acquire the original assets and the debt used to acquire future assets will both be amortized over 20-year periods. If anything, the terminal value correction adopted by the Board removes an inconsistency that was already present in the DCF model.

In addition to asserting that the Board made a conceptual error, NS also claims that the Board made a mathematical error by overstating the amount of interest the SBRR would pay in years 11 through 20. NS Pet. at 26. NS claims that, because interest payments are lower than average in the later years of the amortization period, the use of average interest payments over this period overstates the interest expense. *Id.* at 26. However, NS's claim fails to consider that, while the interest payments in the second half of the 20-year amortization period are lower than the average interest payment, the interest payments in the first half of the amortization period are higher. In other words, the use of an average interest payment within the perpetuity calculation already takes into consideration the lower interest payments that occur in the second half of the amortization period just as it takes into consideration the higher interest payments in the first half of the period.

Neither of NS's claims about the terminal value correction warrants reconsideration of the Board's Decision. Far from introducing another inconsistency to the DCF model, the correction made by the Board removes a current inconsistency in how debt issued for original investments and future investments was amortized. The Board's correction also does not lead to a mathematical error by overriding scheduled interest payments, but instead simply reflects the use of an average value over time. The Board should reject NS's petition and retain the terminal value approach applied in the Decision.

**K. NS Has Not Identified Any Material Error In The Board's Determination Of MOW Derailment Costs.**

NS's claim that the Board erred by rejecting NS's proposed derailment and clearing cost evidence because of a minor work paper error has no basis. NS Pet. at 27-29. This is pure supposition upon the part of NS because the Board did not cite any such work paper error as its reason for accepting SunBelt's evidence. The Board properly rejected NS's cost evidence because "SunBelt's methodology is not unreasonable, and NS has presented inconsistent evidence supporting its proposed methodology," not because of NS's alleged work paper error. Decision at 94.

NS proposed annual derailment and clearing costs of \$1,697,839 in its narrative, but NS's work papers proposed annual costs of \$1,437,379. NS claims this discrepancy arises because its narrative claims to use ton-miles to scale NS's own derailment costs to the SBRR, but its work papers incorrectly used route-miles. NS Pet. at 28. But that is not true. The NS work papers also used ton-miles to scale derailment costs, not route miles as NS claims.<sup>31</sup> Without any means of reconciling NS's inconsistent evidence, the Board was fully justified in relying upon SunBelt's evidence, which has been accepted in prior SAC cases. Decision at 94.

NS's real objection is that the Board reached a different result in this case than it did in the DuPont decision. Although NS attempts to characterize this as an acceptance of "inferior evidence based on a workpaper mistake," that characterization is untrue, as demonstrated above. NS Pet. at 28. The NS evidence was inferior in this case because it was inconsistent and unsupported. Moreover, the evidence presented by DuPont and SunBelt was not identical. For example, SunBelt offered rebuttal evidence in response to NS's claim that the newly-constructed SBRR might incur more derailments than the older, real-world NS track, whereas DuPont

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<sup>31</sup> See NS workpaper "Reply SBRR Derailment and Clearing Wrecks."

claimed only that NS's argument was meaningless, without attempting to rebut the substance of that argument.<sup>32</sup> This issue was the only one specifically enumerated by the Board for rejecting DuPont's evidence in favor of NS's evidence. Decision at 129. Therefore, the additional rebuttal provided by SunBelt justified the different result.<sup>33</sup>

**L. Transportation Costs of Plates, Spikes, and Anchors.**

SunBelt agrees that the Board's rejection of NS's evidence on the transportation cost of plates, spikes, and anchors was material error for the same reasons that SunBelt has sought reconsideration of the Board's rejection of SunBelt's weight-to-volume conversion factor used to calculate ballast quantities. In both instances, the Board arbitrarily selected the parties' narrative evidence over inconsistent figures in their work papers. Compare NS Pet. at 29-31 with Sun. Pet. at 20-21. Just as SunBelt shows that NS did not rely on the inconsistency in SunBelt's evidence, NS claims that SunBelt did not rely upon the inconsistency in NS's evidence. NS Pet. at 30. However the Board resolves these issues, it must reach the same conclusion either to sustain or reconsider its decision.

**M. The Board's Treatment of PTC Costs Properly Eliminates the PTC-Mandate As A Barrier To Market Entry.**

The Board agreed with SunBelt that the SBRR could implement PTC in 2011, but it agreed with NS that the SBRR would need to incur additional costs to upgrade that initial system to be RSIA-compliant<sup>34</sup> between 2011 and 2015. Decision at 145. NS contends that the Board's hybrid resolution of this issue is arbitrary because the parties' evidence does not allow for such an approach. NS Pet. at 31-34. The NS Petition, however, is principally an attempt at another

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<sup>32</sup> Compare Sun. Reb. Ex. III-D-2 at 55 with Dup. Reb. Ex. III-D-2 at 50.

<sup>33</sup> In the SunBelt Decision, the Board also has found another aspect of its DuPont decision to be in error and declined to follow that conclusion. Decision at 133 (n. 652). Because the DuPont decision is not yet final, the Board presumably will correct that and other possible errors in a "corrected" decision in the near future.

<sup>34</sup> Rail Safety Improvement Act of 2008 § 104, Public Law 110-432, 122 Stat. 4854 (Oct. 16, 2008), codified at 49 U.S.C. § 20157.

chance to pile more costs upon the SBRR by re-arguing NS's position that PTC could not be installed by the SBRR in 2011. While NS seemingly accepts the Board's holding that the SBRR could install a PTC system in 2011, NS still would duplicate nearly every cost component in 2015 to install an RSIA-compliant system.<sup>35</sup> In other words, NS is claiming that, even if the SBRR does not have to build a CTC system in 2011 followed by a PTC system in 2015, it still must build two PTC systems, one in 2011 followed by a different PTC system in 2015. But this was not the Board's conclusion and it would defeat the purpose of installing a PTC system from the outset of the SBRR's operations.

The Board has authority to devise its own solutions to intractable differences between the parties' evidence. PSCo/Xcel I at 33 (holding that the Board "has broad discretion to apply any appropriate analytical tool to the evidence, on its own motion or otherwise."). In PSCo/Xcel I, the Board exercised its discretion in a significant way that departed from the evidence presented by either party. The parties had submitted operating plans based upon different traffic volumes. The Board, however, selected the complainant's volumes but the defendant's operating plan, which was based on the defendant's volumes. Because "reopening the record for supplemental evidence would be neither simple nor desirable," the Board itself "developed an approach for addressing this issue." Id. at 29. The Board has taken a similar practical approach with PTC in this proceeding.

The Board, faced with an evidentiary dilemma, devised a reasonable solution under the circumstances. The SBRR would face the same Congressional mandate as the real-world NS to implement PTC by 2015. But because PTC is not an off-the-shelf product and many implementation issues have not been fully resolved even today, the actual timing and costs of

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<sup>35</sup> See NS Pet. at 33 (n. 64) ("NS believes that only the antennas and towers installed in 2011 would likely not require replacement in order to upgrade the initial PTC system to RSIA 2015 standards.").

installing a fully RSIA-compliant PTC system is uncertain. Indeed, the Association of American Railroads recently reported that most of the industry, including NS, will not be able to meet the 2015 deadline, and may not be able to fully do so until 2020.<sup>36</sup> Yet, for purposes of the SAC analysis, the Board must develop and apply costs based upon the best evidence available and consistent with contestable market theory. This dilemma exists regardless of whether the SBRR first installs CTC and then PTC, or it installs PTC from the outset. The Board reasonably addressed its dilemma by accepting that the SBRR may install PTC in 2011, but still would incur certain interoperability and upgrade costs between 2011 and 2015. This approach is far more reasonable than the approaches advocated by NS in either its reply evidence or its petition for reconsideration.

In order to implement its decision, the Board first determined which party's cost evidence to accept for the various PTC system components. It then identified certain costs that the SBRR would incur in the Base Year to initiate service with a basic PTC system. The Board also identified interoperability and upgrade costs that the SBRR would incur between 2011 and 2015 and spread those costs over this time period. NS's Petition essentially challenges those cost allocations by attempting to assign all of the costs to 2011 and then duplicate most of those costs again between 2011 and 2015. Clearly that is not what the Board intended.

Moreover, to go down that road, as the NS Petition urges, would be to create an impermissible barrier to entry. NS did not have to enter the market in the state of uncertainty caused by the PTC mandate and almost certainly would not have done so, and neither would a new entrant. Although NS has had decades to recover its CTC investment, the SBRR would

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<sup>36</sup> Association of American Railroads, "PTC Implementation: The Railroad Industry Cannot Install PTC on the Entire Nationwide Network by the 2015 Deadline," March 2014 Update, p. 3. See also, U.S. Government Accountability Office, "Positive Train Control: Additional Authorities Could Benefit Implementation," pp. 17 & 25 (August 2013) (Publication No. GAO-13-720).

have only a few years to recover its CTC (or initial PTC) costs before NS would impose the costs of an entirely new PTC system upon it. Because the imposition of two sets of signaling costs upon the SBRR would disadvantage it relative to NS, that would violate contestable market theory. The SAC analysis must model “the performance perfect contestability can be expected to produce.”<sup>37</sup> Contestable market theory requires that the advantage that an incumbent obtains from having entered the market through a piecemeal process of expansion over an extended period of time cannot be used to create a barrier to entry. See Coal Trading Corp. v. B & O R.R. Co., 6 I.C.C.2d 361, 413-14 (1990) (a market is not contestable when the costs faced by the incumbent and the SARR are different). As a result of its piecemeal entry, NS has had many decades to recover, in whole or in major part, the costs associated with its CTC system.<sup>38</sup> The SBRR, in contrast, would have less than 5 years to do so before that system would become obsolete, all the while incurring costs for a replacement PTC system.<sup>39</sup> Since requiring the SBRR to invest in two redundant signaling systems over a very short 5-year period would impose a risk upon its investors that was not faced by NS’s investors, that requirement would be an impermissible barrier to entry under contestable market theory.<sup>40</sup>

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<sup>37</sup> Id., quoting Baumol, Panzar and Willing, “Contestable Markets and the Theory of Industry Structure,” Harcourt Brace and Jovanovich, 1982, at 479 (“Contestable Markets”)

<sup>38</sup> CTC systems were first introduced in the late 1920’s and were in standard use by most railroads by the 1940s. By the 1970’s and 1980’s electromechanical control and display systems were replaced with computer operated displays.

<sup>39</sup> The Board indicated in Nevada Power that, in simulating a contestable market in a SAC analysis, it does not eliminate sunk costs but assumes that the costs that are sunk for the incumbent railroad are also sunk for the SARR. Nevada Power, 10 I.C.C.2d at 267. But as is implied in Contestable Markets, the opposite is not necessarily true; the costs that are sunk for the new entrant are not necessarily sunk for the incumbent. The Board defines sunk cost as costs that cannot be eliminated or recouped, even by total cessation of operations. Id. at 266. In the case of its CTC investment, because NS has had the opportunity to recoup its investment for over six decades, it continues to enjoy the value of the marginal product of that system, and its costs are not completely sunk. See Martin, “The Theory of Contestable Markets,” Urdue University, 2000 at 15. In direct contrast, the SBRR would not be able to recover its CTC investment prior to incurring its PTC investment, and, therefore, its CTC costs are completely sunk. Because NS has had the opportunity to recoup most or all of its CTC investment, but the SBRR will not, the SBRR would be at a distinct disadvantage to the NS, which would constitute a barrier to entry of the type envisioned in Contestable Markets.

<sup>40</sup> See PPL Montana, LLC v. The Burlington Northern and Santa Fe Railway Company, 5 S.T.B. 1105, 1111-12 (2001) (holding that “a SARR should not be assumed to bear costs that are not faced by the defendant railroad [including]...costs associated with risks not faced by the defendant railroad’s investors.”).

A rational way to address this barrier to entry, under the unique circumstance of the PTC mandate, is for the Board to assume that any SBRR built during the transitional implementation period could and would construct an RSIA-compliant system as its sole signaling system from the outset of its operations, thereby removing that barrier to entry created by costs that are sunk for the SBRR but not for NS. SunBelt did this by accounting for the costs necessary to implement the more expensive PTC system in 2011, which includes the expected costs needed to make its PTC system interoperable with other Class I railroads by 2015. NS's attempt to impose the costs of two signaling systems upon the SBRR, whether it be CTC followed by PTC or duplicate sets of PTC costs in 2011 and 2015, would require the SBRR to simultaneously recover the investment costs for two redundant systems, which is a cost that the real-world NS will not incur. The SBRR, therefore, should not be required to incur all of the redundant costs that NS would impose by virtue of the SBRR entering the market during an uncertain transitional period from CTC to PTC, because those costs would be a barrier to entry. Rather, in order to avoid this bias, the Board should require only that the SBRR incur the costs associated with building an RSIA-compliant PTC system, regardless of whether such a system could have been constructed in 2011. This effectively is what the Board's Decision has done, and thus NS's Petition should be denied.

Finally, NS's Petition sets up a trap that would violate SAC principles by not adopting the least-cost feasible evidence. NS offers two alternative solutions to the problem that it perceives with the Decision. The first proposal, which NS advocates, essentially would impose the same PTC costs upon the SBRR twice. NS Pet. at 32-33. The second proposal would re-open this proceeding for the submission of supplemental PTC evidence. Although SunBelt opposes both proposals, if the Board grants the NS Petition, it should do so by requesting

supplemental evidence under the second proposal. The Board, however, should not automatically bind itself to the results produced by either NS proposal. If those results would impose greater costs upon the SBRR than NS's reply evidence, which was based on installing a CTC system first followed by a PTC system, the Board should adopt the NS reply evidence, consistent with a least-cost, optimally efficient SARR.

**N. The Board Correctly Applied Bonus Depreciation to the SBRR Consistent With SAC Principles.**

NS asserts that the Board erred in permitting the SBRR to rely on bonus depreciation available to it under laws that applied at the time of construction. NS Pet. at 34-36. NS contends that bonus depreciation "would place the SBRR at a distinct and unfair financial advantage over the real-world NS." *Id.* at 34. The advantage would be unfair, according to NS, because it exists "solely as a byproduct of the artificially short construction period assumption," and thus acts as a "reverse barrier to entry" because it confers "a large benefit on the SARR that was not available to the incumbent." *Id.* at 34-35. These arguments, which merely rehash the same arguments that NS made in its reply evidence, fail to demonstrate any material error in the Board's rejection of those arguments.

The Board rejected NS's arguments against bonus depreciation because "NS's approach would require the SARR to bear any disadvantages of its construction timing while denying it the tax advantages available during that timing. The fact that the SARR's construction is assumed to occur during a limited time frame, which may result in efficiencies unavailable to the incumbent, does not make it a reverse barrier to entry as NS argues." Decision at 188 [emphasis added]. NS challenges the Board's logic on grounds that the Board did not identify any disadvantages that a SARR would face as a result of construction timing and suggests that is because there are no such disadvantages. NS Pet. at 35 (n. 65). NS is incorrect.

A SARR is exposed to numerous disadvantages from the short construction time frame. The SARR must pay current market prices for land, materials and labor, regardless of what the incumbent may have paid (unless the incumbent paid nothing, in which case the SARR also pays nothing). These prices could be elevated during the brief period of SARR construction, thus forcing the SARR to expend far more than under normal conditions. The viability of a SARR can also be negatively impacted by prevailing debt interest rates. The cost of capital utilized by the Board in the DCF model includes both an equity component and a debt component.<sup>41</sup> The debt component is based upon the average railroad industry cost of debt during the SARR construction period.<sup>42</sup> If the SARR construction period coincides with a period of high interest rates for debt, the SARR would be saddled with extra debt costs as a direct consequence of the “artificially short construction period assumption.” NS Pet. at 35. Compared to the SARR, the defendant would have incurred moderate levels of debt over many decades of financing, thus smoothing out any period of high interest rates.

Conceptually, NS’s proffered solution also is faulty. NS concedes that the SBRR is entitled to some bonus depreciation, but only to the same extent that NS itself took advantage of bonus depreciation during the SBRR construction period. NS Pet. at 35-36.<sup>43</sup> However, this gives an unfair advantage to NS in at least two different ways.

First, because NS was not constructing brand new rail lines, it did not have as many construction projects as the SBRR during the SARR construction period. Thus, even absent the assumption of unconstrained resources, the SBRR would and could have taken greater advantage of bonus depreciation than NS itself was able to do. Yet, NS not only would restrict the SBRR

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<sup>41</sup> See, e.g., Railroad Cost of Capital - 2013, STB Ex Parte No. 558 (Sub-No. 17) (served July 31, 2014).

<sup>42</sup> See, e.g., AEP Tex. North Co. v. BNSF Ry. Co., Docket No. 41191 (Sub-No. 1), slip op. at 107 (served Sept 10, 2007).

<sup>43</sup> See also, NS Reply at III-H-6 (filed Jan. 7, 2013).

to NS's real-world bonus depreciation levels but it would further restrict the SBRR to a mileage prorated subset of NS's actual bonus depreciation. NS Reply at III-H-6. The Board properly rejected this blatant attempt to impose a barrier to entry upon the SBRR.

Second, because NS constructed its real-world rail lines over the course of the past century, it had multiple opportunities to take advantage of tax advantageous programs like bonus depreciation in other time periods that are not available to the SBRR. These include, but are not limited to:

- The Revenue Act of 1962 that enacted an investment tax credit ("ITC") equal to 7 percent of qualified investment property;
- The Tax Reform Act of 1969 that established rapid depreciation of railroad rolling stock;
- The Revenue Reform Act of 1971 which updated the ITC and allowed a 3-year carryback and 7-year carry forward of the credits which could not be used in current years because of tax liability limitations;
- The Tax Reduction Act of 1975 that increased the ITC to 10 percent for all taxpayers and increased the tax liability limitations for railroad companies;
- The Tax Reform Act of 1976 that extended the 10 percent ITC through December 31, 1980;
- The Revenue Act of 1978 which permanently increased the ITC to 10 percent instead of reverting to a 7 percent ITC beginning in 1981, and extended the ITC to certain qualified rehabilitation expenditures;
- The Economic Recovery Act of 1981 which allowed for more generous ITC amounts, the enactment of safe-harbor leasing laws and increases in the credits available for qualified rehabilitation projects;
- The Job Creation and Worker Assistance Act of 2002 which enacted a 30 percent bonus depreciation rate for the years 2002 to 2004; and
- The Jobs Growth and Tax Reconciliation Act of 2003 that increased the bonus depreciation to 50 percent and extended its use to 2005.

Because these investment incentives were not available to the SBRR during its short construction period, NS's claim of unfairness works both ways. The Board properly applied existing law to the SBRR just as NS and its predecessors made use of existing law during development of the rail lines replicated by the SBRR.

NS also makes the claim that, since the Board has previously decided in its WTU decision that a SARR is a replacement, and not a competitor, for the segment of the incumbent's rail system the SARR would serve, the SARR should not be able to enjoy any benefits not fully available to the incumbent railroad. NS Pet. at 36. NS therefore argues that, since it was unable to enjoy the full benefits of the limited-time bonus depreciation, the SARR's bonus depreciation should be similarly restricted. The logical extension of NS's argument, however, is that the SARR must be constructed and operated in the same manner as the incumbent if the SARR is stepping into the incumbent's shoes. But, the STB consistently has rejected this line of logic and stated that the SARR need not be constructed or operated in the same manner as the incumbent. The stand-alone replacement, in actuality, does not even need to be another railroad.<sup>44</sup> Furthermore, the WTU decision recognized the trade-off in benefits between the SARR and the incumbent. The STB stated that, while a SARR may find benefits accruing from the fact that it has a shorter construction period than the incumbent, the incumbent benefited from building its system in a sequential manner, allowing it to earn returns on individual line segments before the incumbent's entire system was complete.<sup>45</sup> Therefore, while the SARR may benefit in some way from its compressed construction schedule, any benefits are counterbalanced by the benefits the incumbent received from generating returns in its network while still under construction.

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<sup>44</sup> See Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 543 (1985). See also, Western Fuels Assoc., Inc. v. BNSF Ry. Co., Docket No. 42088, slip op. at 14 (served Feb. 18, 2009) ("Finally, using the densities of the hypothetical SARR makes no sense, as under SAC the hypothetical competitor to BNSF does not even need to be a railroad at all.")

<sup>45</sup> See WTU at 671-72.

NS's claim that the SBRR's application of bonus depreciation under available tax law creates a reverse barrier to entry is a red herring. NS significantly benefited from the same bonus depreciation that the SBRR seeks to use, while simultaneously benefiting from prior year tax laws and regulations to obtain tax benefits not available to the SBRR. In addition, NS's claim that, as a replacement carrier, the SBRR cannot achieve benefits above and beyond those received by the NS is contrary to Board precedent and ignores the point that the SBRR must pay current market prices for its investment and lose the benefits of building its network in a sequential manner as NS built its network. Finally, NS's proffered alternative would be a clear barrier to entry by denying the SBRR even the ability to take advantage of bonus depreciation to the same extent as NS did during the SBRR's construction period. Given the limitations placed upon the SBRR, the STB must continue to allow the SBRR to claim the bonus depreciation allowed under applicable tax law.

**O. The Board Adopted the Best Evidence of Record for Failed Equipment and Dragging Equipment Detectors.**

NS's claim that SunBelt's quantities of Failed Equipment Detectors ("FEDs") and Dragging Equipment Detectors ("DEDs") do not meet current AREMA standards is disingenuous. NS asserts that, because the 2007 AREMA Manual supersedes the detector spacing guidelines in the 2001 AREMA Manual, which SunBelt used to derive its FED and DED quantities, SunBelt's detector quantities are inconsistent with current industry standards. NS Pet. at 36-37. NS's assertion proceeds from the illogical assumption that detector spacing based on the 2001 AREMA Manual cannot satisfy the 2007 standards. But NS has not explained how SunBelt's spacing conflicts with the 2007 AREMA Manual.

NS has not demonstrated that the 2001 standard is inconsistent with the 2007 standard. Rather, NS baldly claims that its current spacing of 15 miles is based on the 2007 AREMA

standard and thus represents the best evidence. But NS has not attempted to apply the multitude of 2007 AREMA factors either to justify its detector spacing or to criticize SunBelt's spacing. Because SunBelt's evidence is based upon an objective and supported industry measure, whereas NS's evidence is based upon the unsupported assertion that the SBRR must do what NS does, the Board rationally accepted SunBelt's evidence.

**P. The Board's Decision On Operations Support Staff Was Reasonable And Supported.**

NS objects to the Board's exclusion of the Operations Service and Support ("OSS") staff specified by NS in its Reply. NS Pet. at 37-39. NS contends that the Board erred by not requiring the SBRR "to have sufficient staff to support all of the customer interfacing and coordination necessary on a dynamic carload network." *Id.* at 37. The Board should deny the requested reconsideration because NS is "merely restat[ing] the arguments it [previously] made...and argu[ing] that the Board should have agreed with its arguments."<sup>46</sup>

On Reply, NS proposed an OSS staff of 10, which consisted of five Analysts who would be responsible for one 24/7 position that "handle[d] issues that arise with crews working the systems, with interchange, etc."<sup>47</sup> NS claims the OSS would also need one OSS Manager, two full-time Analysts, one M-Crew Manager, and one M-Crew staff member. Due to the addition of the OSS, NS determined it reasonable to reduce SunBelt's Opening Customer Service staff from five employees to three, as well as no longer staffing Customer Service 24/7.

On Reconsideration, NS claims "SunBelt proposed that a single person at the single Customer Service Agent/Car Distributor desk would be responsible for responding to 100% of

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<sup>46</sup> Canadian Pacific Railway Company, et al. – Control – Dakota, Minnesota & Eastern Railroad Corp., et al., STB Docket No. 35081, slip op. at 4 (served May 7, 2009).

<sup>47</sup> See NS Reply Ex. III-D-1 at 12.

all customer service requests,”<sup>48</sup> and that “SunBelt’s expectation that one person at one desk could juggle all these responsibilities at once before passing the baton to the next individual is not ‘consistent with the underlying realities of real-world railroading.’”<sup>49</sup> NS continues to assert that SunBelt has put all of these responsibilities on the Customer Service Agent/Car Distributor, even though SunBelt has made it very clear that Customer Service would be supported by other SBRR personnel. In addition to the Customer Service department, dispatchers and the IT department will be responsible for making sure things run smoothly and assisting with any problems that may arise.<sup>50</sup> So while both SunBelt and NS proposed that one desk be manned by five employees 24/7, NS believes that there also is a need for five extra OSS employees, as well as three Customer Service employees. As stated in SunBelt’s Rebuttal and accepted in the Board’s decision, the additional employees proposed by NS are redundant, because SunBelt has dispatchers and IT employees who will assist Customer Service.

NS also claims that SunBelt “provided no staff support for other critical functions associated with the first and last mile of a car’s movement, such as coordinating equipment orders, setouts, and car placements; working with customers on issues like equipment problems and overloaded cars; and handling matters like demurrage billing and miscellaneous switching fees.”<sup>51</sup> NS’s claims have no merit, as the Customer Service staff proposed by SunBelt “is responsible for monitoring train locations, maintaining contact with connecting carriers and destination facilities, answering customers’ questions concerning the location of specific trains and cars, and responding to customers’ requests for diversion of trains/cars to different origins or destinations. This position is also responsible for interacting with customers and field personnel

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<sup>48</sup> See NS Pet. at 37.

<sup>49</sup> See NS Pet. at 39.

<sup>50</sup> See Sun. Reb. at III-D-34.

<sup>51</sup> See NS Pet. at 38.

to ensure equipment needs are met on a real time basis.”<sup>52</sup> SunBelt’s Customer Service staff for the SBRR can meet all of the customer, car, and equipment needs that NS claims they will not be able to handle.

NS complains that the Board failed to recognize that the duties of the OSS are “distinct” from those of the Customer Service department. NS Pet. at 38. However, the SBRR need not be organized in exactly the same fashion as NS or other railroads. See, e.g., McCarty Farms, 2 S.T.B. at 468; AEPCO, slip op. at 10. NS also criticizes the Decision for failing to be “consistent with the underlying realities of real-world railroading.” NS Pet. at 39 (citation omitted). However, NS has “produced no benchmark analysis or other comparable data”<sup>53</sup> to suggest that its inclusion of eight extra employees is necessary for the SBRR. Without any evidentiary support, NS’s arguments about the OSS are simply a disagreement with the result reached by the Board. Such a disagreement does not warrant reconsideration of the Decision.

### III. **CONCLUSION.**

For all of the foregoing reasons, SunBelt requests that the Board deny the NS Petition for Reconsideration of the Decision served on June 20, 2014, except to the extent that SunBelt has concurred with NS on specific matters.

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<sup>52</sup> See Sun. Op. Exhibit III-D-1 at 4.

<sup>53</sup> AEPCO at 58.

Respectfully submitted,



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*Attorneys for Complainant SunBelt Chlor  
Alkali Partnership*

September 9, 2014

**CERTIFICATE OF SERVICE**

I hereby certify that this 9th day of September 2014, I served a copy of the foregoing via e-mail and first class mail upon:

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Paul Hemmersbaugh  
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[pmoates@sidley.com](mailto:pmoates@sidley.com)  
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*Counsel for Norfolk Southern Railway Company*

  
\_\_\_\_\_  
Jeffrey O. Moreno

# Exhibit A

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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SUNBELT CHLOR ALKALI PARTNERSHIP	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. NOR 42130
	)	
NORFOLK SOUTHERN RAILWAY COMPANY	)	
	)	
and	)	
	)	
UNION PACIFIC RAILROAD COMPANY	)	
	)	
	)	
Defendants.	)	

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COMPLAINANT'S FIRST SET OF DISCOVERY REQUESTS  
TO DEFENDANTS

Complainant SunBelt Chlor Alkali Partnership ("SunBelt"), pursuant to 49 U.S.C. §§ 10701, 10704, 10707, 11701 and 11704, and 49 C.F.R. Part 1114.30, hereby submits its First Set of Discovery Requests to Defendants, Norfolk Southern Railway Company ("NS") and Union Pacific Railroad Company ("UP"), collectively referred to as "Defendants". Both Defendants should respond to each Discovery Request, except as follows:

1. Interrogatory Nos. 24-26 apply only to NS.
2. Request for Production Nos. 145-63 apply only to NS.
3. Request for Production Nos. 164-67 apply only to UP.

REQUEST FOR PRODUCTION NO. 112

Please produce all of NS' and/or UP's price list books governing prices for construction and maintenance materials (including but not limited to weights of rail from 115 lb to 141 lb, turnouts, ties, fasteners, lubricators, plant and field welds, fencing, roadway signs, track geometry cars, hot bearing and dragging equipment detectors, and related tools), or other documents utilized by NS' and/or UP's engineering personnel for estimating costs of maintenance and construction projects for each year or partial year 2008 to the present. To the extent that the charges for transportation and delivery of materials are not included in the prices shown, please produce documents sufficient to show such charges for all materials.

REQUEST FOR PRODUCTION NO. 113

Please produce documents sufficient to show the following with respect to grading construction activities undertaken or proposed at any time, or currently ongoing, on any portion of NS' and/or UP's system located in SARR States:

- a. Number of cubic yards of excavation of:
  - i. Common earth;
  - ii. Loose rock;
  - iii. Solid rock; and
  - iv. Unclassified material;
  
- b. Number of cubic yards of embankment of:
  - i. Common earth;
  - ii. Loose rock;
  - iii. Solid rock; and
  - iv. Unclassified material;
  
- c. Number of cubic yards of borrow of:
  - i. Common earth;

- ii. Loose rock;
  - iii. Solid rock; and
  - iv. Unclassified material;
- d. Grading construction data for each construction specification measured by NS and/or UP including without limitation, roadbed width, side slope ratio, track center distance, presence of access roads, impact of grading activities on right-of-way width, use of geotextiles, use of water, soil stabilization, and width and depth of side ditches;
- e. Number of route miles, separated between single track main, double track main, triple track main, etc., corresponding to the cubic yard information described in paragraphs (i) through (iv) of Subparts (a), (b) and (c) of this Request;
- f. Number of track-miles corresponding to the cubic yards in paragraphs (i) through (iv) of Subparts (a), (b) and (c) of this Request;
- g. All of the different types of equipment (and the associated tasks) used to:
- i. Excavate common earth;
  - ii. Excavate loose rock;
  - iii. Excavate solid rock;
  - iv. Excavate unclassified material; and
  - v. Obtain borrow material;
- h. Linear feet of pipe installed for lateral drainage;
- i. Number of cubic yards of rip rap placed for the protection of the roadway;
- j. Location, type and quantity of retaining walls;
- k. Construction method, including but not limited to the number of cubic yards of masonry or other similar material, used for retaining walls;
- l. Number of acres cleared;
- m. Number of acres grubbed; and
- n. Number of acres seeded.

# Exhibit B

March 14, 2011

Paul Hemmersbaugh  
Sidley Austin LLP  
1501 K Street, N.W.  
Washington, D.C. 20005

Re: STB Docket NOR 42125, E.I. du Pont de Nemours and Company v. Norfolk Southern  
Railway Company

Dear Paul:

This letter reflects the understanding of E.I. du Pont de Nemours and Company ("DuPont") regarding the substance of our discovery conference with Norfolk Southern Railway Company ("NS") on March 4, 2011. During the conference, the parties resolved multiple issues with respect to NS's responses to DuPont's discovery requests and agreed upon procedures for addressing follow-up matters as information is produced by NS.<sup>1</sup> Please respond within 10 days of receipt of this letter if anything in this letter conflicts with your understanding of any of the issues that we discussed. DuPont will deem any failure to respond as concurrence with the accuracy of this letter.

**A. General Matters**

With respect to general matters, we have agreed to the following:

- **Instruction 3**: PDF is an acceptable computer readable format only where it is a native format. If NS is unable to export responsive data from proprietary software, NS will notify DuPont of the scope of responsive data that it cannot produce. If NS withholds the production of any software or computer programs based upon licensing agreements or intellectual property laws, NS will identify such programs and produce the pertinent licensing agreements.
- **Sensitive Security Information ("SSI")**: NS will produce documents with SSI redacted where feasible. If redaction is insufficient to remove the SSI character of a document, NS will withhold the entire document. At this time, NS is withholding all TIH routing information and other responsive information, including traffic tapes, as SSI. The parties have presented the SSI issue to the Surface Transportation Board ("Board"), which is seeking concurrence from the agencies that regulate the SSI. Upon receipt of the approval and concurrence, NS will not use SSI as a defense for withholding or redacting

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<sup>1</sup> As noted at various points throughout this letter, some of the agreements also pertain to NS discovery of DuPont.

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any documents. DuPont reserves its right to object to the withholding of SSI and the delay caused by seeking agency input on the SSI classification.

- **TCS/TDIS**: NS will not withhold or redact documents based on its objections to the production of information regarding Triple Crown Services (“TCS”) and Thoroughbred Direct Intermodal Services (“TDIS”). NS reserves its right to raise a relevance objection to the use of these documents.
- **Date Restrictions**: NS and DuPont have mutually agreed that their responses to requests for market dominance information will include information from 2006 to the present, unless a discovery request is explicitly restricted to a shorter time period (e.g., 2008-2010). For stand-alone cost (“SAC”) discovery requests, NS will produce responsive AFEs back to 2007 where DuPont has requested information from 2007 to the present. Where DuPont has requested information prior to 2007 or without a date restriction, NS will produce responsive AFEs that were in effect as far back as 2007, except where noted otherwise in this letter. If after reviewing this AFE production DuPont believes that information from additional years is necessary, NS will consider such requests from DuPont, and if NS refuses, NS shall not object to a DuPont motion to compel as untimely.
- **Motions to Compel**: Where a determination of the need to file motions to compel cannot be made until after a party has received and had sufficient time to review responsive information, a motion to compel may be timely filed within 20 days after the producing party has informed the requesting party that its production as to a specific discovery request is complete. The parties agree to grant reasonable requests for extension of this period if more time is necessary to review the items produced. The parties shall endeavor to complete their production so that motions to compel can be filed by the close of discovery on June 30, 2011. Either party may make a motion to compel after the close of discovery only with respect to items it received after discovery closed or less than 20 days before closing.

**B. Specific Discovery Requests**

In order to minimize duplication of the general categories addressed in Part A., above, this part does not attempt to identify every individual discovery request that may be encompassed by one of those categories. Therefore, failure to identify a specific discovery request in this part should not be construed to exclude such request from any otherwise applicable category in Part A.

- **Interrogatory 10**: NS has confirmed that it is not withholding information based on its date objection.
-

March 14, 2011

Page 3

- **Interrogatory 20**: NS will provide a narrative response.
  - **Interrogatory 25**: NS will respond within 10 days of the discovery conference.
  - **Requests for Production 9-11**: NS will respond in accordance with the clarification provide by DuPont in the February 26th e-mail attachment from Jeff Moreno to Paul Hemmersbaugh.
  - **Request for Production 17(e)**: To the extent that NS possesses such information, it will produce historical track charts in PDF for foreign railroads that were once part of the NS system. NS does not guarantee the accuracy of these charts.
  - **Request for Production 22**: NS will produce responsive documents and data in the format in which they exist. NS will not withhold responsive documents and data that are not available in a computer readable format. To the extent that dispatcher sheets are not kept electronically, NS will make them available for inspection.
  - **Request for Production 27**: NS does not believe that a mileage matrix exists but NS will produce mileage information. DuPont counsel and consultants have requested an access ID and password to use the mileage information on NS's website. NS counsel will consult with NS and respond.
  - **Request for Production 29**: In the absence of historical tariffs, NS will advise whether DuPont may rely upon current tariff terms — except rate terms — for prior years.
  - **Request for Production 31**: NS has confirmed that it is not withholding information based upon its vague and ambiguous objection.
  - **Requests for Production 34-36**: NS has confirmed that it will not withhold responsive information that is not available in a computer readable format.
  - **Request for Production 43**: NS has represented that the RTC Model was purchased in late 2002 and materials being produced go back to 2004 which is the whole universe of data responsive to this request.
  - **Request for Production 45**: NS agrees that if the requested cycle times exist, NS will produce them. If they do not exist, NS will produce the components of the requested cycle times.
  - **Request for Production 50**: NS will produce the outputs of the requested computer programs and models. The outputs will be limited to those produced from 2008 to 2010.
-

March 14, 2011

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- **Requests for Production 51 & 52:** NS will produce responsive documents in its possession, custody or control that contain information on foreign carriers' locomotives to the extent they exist.
  - **Request for Production 53:** NS will not withhold confidential agreements that are responsive. NS will produce responsive billing data to the extent it exists.
  - **Requests for Production 60-64:** NS will provide responsive documents subject to its general objection 23. If DuPont needs additional documents, NS will consider DuPont's request, and shall not object to a DuPont motion to compel as untimely.
  - **Requests for Production 73 & 75:** NS will not withhold responsive confidential agreements.
  - **Request for Production 84-86:** NS has confirmed that it is providing responsive agreements that were in effect from 2008 to the present, not just agreements that NS entered into during that time.
  - **Requests for Production 95-96:** NS will provide spreadsheets of amounts billed and paid. The spreadsheets will be organized by service and vendor.
  - **Request for Production 106:** NS has confirmed that it will not withhold responsive documents based on its objections.
  - **Request for Production 108:** NS states that the data doesn't exist in the format requested but that NS will provide responsive data that exists regardless of date. NS will attempt to determine whether it has original cost data for any of its facilities and produce such information.
  - **Request for Production 114:** NS will consider producing responsive information back to 2000 and including commuter rail. The parties agree that NS does not need to provide responsive documents relating solely to AMTRAK.
  - **Request for Production 118:** NS will waive its date objection.
  - **Request for Production 119:** NS will produce documents in response to subpart a, to the extent they exist. If construction standards do not exist, NS will provide references to the appropriate standard, if available.
  - **Request for Production 120:** NS will not withhold documents based on its date objection. NS's counsel does not believe that NS maintains "price list books," but to the
-

March 14, 2011

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extent that NS has such information it is not withholding documents based on the objection to this term.

- **Request for Production 121- 124**: NS will provide quantity information to the extent it exists. In addition, NS will produce relevant AFEs that were in effect as early as 2007. NS agrees that DuPont may seek older AFEs if it considers the NS production to be insufficient, and NS shall not object to a DuPont motion to compel as untimely.
- **Request for Production 128**: NS will not withhold responsive information based upon its date objection.
- **Request for Production 130 – 131, 133**: NS agrees that DuPont may request more information from NS within the scope of these discovery request after reviewing all AFEs that NS produces, and that NS shall not object to a DuPont motion to compel as untimely.
- **Request for Production 134**: NS will provide information on installation dates of assets to the extent they exist.
- **Request for Production 146**: NS will produce just the bonus depreciation schedules from its federal tax returns.

This letter contains DuPont's best recollection of the numerous agreements and understandings reached during our March 4th discovery meeting. As I requested at the beginning of this letter, please respond within 10 days if anything in this letter conflicts with your understanding of any of the issues we discussed. DuPont appreciates NS efforts to work with us to minimize discovery disputes.

Best regards,



Jeffrey O. Moreno

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# Exhibit C



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SINGAPORE  
SYDNEY  
TOKYO  
WASHINGTON, D.C.

FOUNDED 1866

March 24, 2011

**By First Class Mail and Email**

Jeffrey O. Moreno  
Thompson Hine LLP  
1920 N St N.W., Suite 800  
Washington, D.C. 20036

Re: E.I. du Pont de Nemours & Co. v. Norfolk Southern Railway Co., STB Docket  
NOR 42125

Dear Jeffrey:

We are writing to respond to your March 14, 2011 letter outlining E.I. du Pont de Nemours & Co.'s ("DuPont's") understanding of the agreements made at the March 4, 2011 discovery conference in the above-referenced proceeding. While Norfolk Southern Railway Co. ("NS") concurs with the majority of the understandings outlined in your letter, there are a few areas in which our understanding of the respective agreements differs from those stated by you. Those differences are detailed below. This letter also details NS's understanding of the parties' agreements regarding DuPont's responses to NS's discovery requests. Please contact us within 10 days of receipt of this letter if any statements in this letter conflict with your understanding of the parties' agreements. If you do not respond, we will assume that you accept the accuracy of the statements made in this letter.

**I. NS's Responses to DuPont's Discovery Requests**

Except as noted in the bullet points below, NS confirms that DuPont's March 14 letter presents a generally accurate summary of the parties' agreements as to NS's responses to DuPont's discovery requests. NS makes the following corrections and additions to the summary of agreements in DuPont's letter:

- **Motions to Compel:** The "Motions to Compel" paragraph on page 2 of your letter is largely accurate, but it does not completely accord with NS's understanding of the parties' agreement. Specifically, NS agreed that, where a determination of the need to file a motion to compel cannot be made until after the party has reviewed responsive information, a motion to compel may be timely filed within 20 days of the production of that information. NS did not agree to provide notice that production has been completed

Jeffrey O. Moreno

March 24, 2011

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or that the time for filing motions to compel would not begin to run until such notice was provided.<sup>1</sup>

- **Interrogatories 20 and 21:** In its summary of the parties' agreements as to "Instruction 3," DuPont states that NS has agreed to produce any licensing agreements for software programs that it is withholding as a result of licensing agreements. This does not reflect NS's understanding of how the parties agreed to resolve DuPont Interrogatory 21 and RFP 28, which ask NS to describe and produce seventeen separate software programs. NS's objection to these requests is not based solely on licensing agreements, but rather on the fact that production of "working copies" of seventeen software programs is not necessary for DuPont to prepare SAC evidence and that therefore these requests are overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. That said, NS has agreed to provide descriptions of these programs in response to Interrogatory 21. If, after reviewing those descriptions, DuPont determines that it has a legitimate, reasonable need for NS to produce a "working copy" of one or more of these programs, and DuPont provides NS with an explanation of the grounds for such need, NS will consider DuPont's request at that time.
- **Date Restrictions:** NS agrees with the bulk of the "Date Restrictions" paragraph in the March 14 letter. However, NS wishes to clarify the meaning of the final clause of the last statement which states that "NS shall not object to a DuPont motion to compel as untimely." In the event that NS refuses a future request from DuPont to produce documents from a broader time period, NS will not object to the timeliness of a motion to compel filed within 20 days after NS informs DuPont of its refusal to produce.
- **Request for Production 45:** NS advises that cycle times can be derived from the traffic files that NS will be producing in response to DuPont's other discovery requests. These documents will be sufficient to show cycle times.
- **Requests for Production 51 and 52:** NS will produce responsive documents in its possession, custody, or control, including traffic files and train movement records. NS will also be producing locomotive equalization reports in response to DuPont's Second Set of Discovery Requests.
- **Request for Production 60-64:** The paragraph in DuPont's letter titled "Request for Production 60-64" appears to contain a typographical error in that it includes RFP 60. RFP 60 does not present the time period issues presented by RFPs 61-64. NS assumes that this paragraph of DuPont's letter is meant to apply only to RFPs 61-64.

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<sup>1</sup> The parties' agreements as to motions to compel apply equally to motions filed by either DuPont or NS.

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- **Request for Production 95-96:** The paragraph in DuPont's letter titled "Request for Production 95-96" erroneously includes RFP 96. The parties' agreement that NS will produce spreadsheets of amounts billed and paid was made in regards to RFP 95. NS's response to RFP 96 was not raised in DuPont's pre-discovery conference letter and was not discussed at the March 4 conference.
- **Request for Production 108:** NS agrees with this bullet point, but clarifies that NS will attempt to determine whether it has original cost data for facilities identified in RFP 108, not for all facilities in the NS system.
- **Request for Production 114:** NS has investigated the extent of responsive information it possesses for this request and has determined that it has substantial responsive information for the period from 2008-10. If after reviewing this information DuPont believes that information from an earlier time period should be produced, and DuPont provides an explanation why that is the case, NS will consider a request for earlier data.
- **Request for Production 119:** NS will investigate and determine whether older construction standards exist, but made no commitment to "provide references to the appropriate standard." If construction standards applicable to the time of construction do not exist, the current standards should be ascertainable from the AFEs.
- **Request for Production 147:** DuPont agrees that NS will produce one set of GIS data for both the DuPont and SMEPA rate complaint cases given the extraordinary amount of data that will be produced in response to these requests. NS agrees to provide DuPont with a written waiver of relevant provisions of the protective order concerning this specific, narrow and unique exception. DuPont additionally agrees to return the hard drives used for production of this data at the conclusion of these matters and not to retain copies of their contents.

## **II. DuPont's Responses to NS's Discovery Requests**

The following section describes NS's understanding of the parties' agreements as to DuPont's responses to NS's discovery requests.

- **General Objection 10:** DuPont agrees to investigate the feasibility of producing "less than truckload" event data for Issue Shipments and to inform NS about the feasibility of such a production and whether DuPont will produce "less than truckload" event data for Issue Shipments.

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- **Definition 7:** DuPont agrees to search for and produce documents in the possession, custody or control of its affiliates or related entities to the extent that those affiliates are likely to have responsive information.
- **Definitions 13 & 15:** DuPont is not withholding information on the basis of its objections to the definitions of Issue Origins and Issue Destinations. DuPont states that the information it provides will be responsive to NS's requests.
- **Interrogatories 1-4:** DuPont agrees to produce documents and information responsive to these interrogatories. DuPont states that it is not withholding documents on the basis of its objections to these interrogatories.
- **Interrogatories 6-8:** DuPont agrees to produce information regarding any transportation modes or options actually used in the past for the issue commodities. As to potential transportation options, DuPont agrees to produce information pertaining to any transportation options it considered but did not use for Issue Movements. To the extent that DuPont finds responsive information for non-Issue Movements during its search for documents and information responsive to NS's discovery requests, it will not withhold that information pursuant to its objection to these interrogatories.
- **Interrogatory 13:** DuPont will not withhold any responsive information pursuant to its objection to this interrogatory.
- **Interrogatories 17 & 18:** DuPont indicated at the discovery conference that it does not plan to file a petition seeking injunctive relief. NS will not insist upon answers to Interrogatories 17 and 18 if DuPont confirms (1) that it will not file any petition seeking to enjoin the challenged rail rates before the Board makes a final determination as to the reasonableness of those rates and (2) that DuPont will not argue in this proceeding that the challenged rates materially affect the profitability of any DuPont Facility or may cause the closure of any DuPont Facility. If DuPont does not agree to these conditions, please inform us within ten days. NS reserves its rights to reissue Interrogatories 17 or 18 and to propound any other discovery if any of DuPont's filings, submissions, or evidence in this proceeding claim or suggest that the NS rail rates at issue will cause DuPont to reduce production, close a plant, or suffer any other adverse consequences.
- **Interrogatory 21:** DuPont states that it is not withholding information requested, but that it will limit its search for information responsive to subparts (g)-(l) to Issue Commodities and that no responsive information exists as to subpart (m).

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- **Interrogatory 27:** DuPont states that it will produce forecasts, which it believes will provide satisfactory responses to this interrogatory. NS agrees to review the information as it is produced by DuPont, but reserves its right to revisit this request if necessary.
- **Interrogatories 20, 31 & 32:** With regard to issue facilities, DuPont agrees to identify both inbound and outbound shipments of any commodity including the modes of transportation used to ship said commodities. With regard to non-issue facilities, DuPont will identify issue commodities shipped to an issue destination from a non-issue facility and the modes of transportation used. NS reserves the right to revisit this request upon reviewing the documents produced by DuPont.
- **Interrogatory 33:** DuPont will determine the feasibility of producing responsive information including any transportation infrastructure at an issue facility for any commodity, as opposed to simply an issue commodity. NS reserves the right to review the data produced and revisit this request if necessary.
- **Request for Production 5 & 6:** DuPont's counsel will discuss with DuPont the possibility of producing contracts that are or were in effect at any time from January 1, 2008. If DuPont refuses to produce contracts that are or were in effect since January 1, 2008 based on a time period objection, NS may timely file a motion to compel production of such contracts within 20 days of DuPont informing NS of such a refusal.
- **Request for Production 8:** NS agrees to serve a revised discovery request in light of DuPont's objection regarding interchange points.
- **Request for Production 20:** DuPont states that it has searched and has no documents responsive to this request in its custody or possession. DuPont agrees to confer with the outside counsel that represented it in the identified matter to determine whether that counsel has in its custody, possession, or control documents responsive to this request.

Please let us know if anything in this letter conflicts with your understanding of the issues we discussed, and please respond within 10 days if DuPont has a different understanding of any of these issues. If you have any questions or would like to discuss any of these issues, please contact Paul Hemmersbaugh or me.



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Sincerely,

A handwritten signature in black ink, appearing to read "M. J. Warren". The signature is fluid and cursive, with a prominent initial "M" and a long, sweeping underline.

Matthew J. Warren

# Exhibit D

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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SUNBELT CHLOR ALKALI PARTNERSHIP

Complainant

v.

NORFOLK SOUTHERN RAILWAY COMPANY

and

UNION PACIFIC RAILROAD COMPANY

Defendants

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Docket No. NOR 42130

**DEFENDANT NORFOLK SOUTHERN RAILWAY COMPANY'S RESPONSES AND  
OBJECTIONS TO COMPLAINANT'S FIRST SET OF DISCOVERY REQUESTS**

Pursuant to 49 C.F.R. Part 1114 and other applicable rules and authority, Norfolk Southern Railway Company ("NS"), through undersigned counsel, responds as follows to Complainant SunBelt Chlor Alkali Partnership's ("SunBelt's") First Set of Discovery Requests (the "Discovery Requests").

While many of the Discovery Requests were directed to both NS and Union Pacific Railroad Company ("UP"), these Responses and Objections only represent NS's responses to any such Requests – not UP's responses. For any requests that were directed to both NS and UP, NS will only produce responsive information that is within NS's possession, custody, or control. Moreover, NS is not responding to the four SunBelt Requests for Production that apply only to UP – namely, SunBelt Requests for Production 164, 165, 166, and 167.

or the General Objections, NS responds that it will produce responsive documents in its possession, to the extent that they exist and can be located in a reasonable search.

REQUEST FOR PRODUCTION NO. 113

Please produce documents sufficient to show the following with respect to grading construction activities undertaken or proposed at any time, or currently ongoing, on any portion of NS' and/or UP's system located in SARR States:

- a. Number of cubic yards of excavation of:
  - i. Common earth;
  - ii. Loose rock;
  - iii. Solid rock; and
  - iv. Unclassified material;
- b. Number of cubic yards of embankment of:
  - i. Common earth;
  - ii. Loose rock;
  - iii. Solid rock; and
  - iv. Unclassified material;
- c. Number of cubic yards of borrow of:
  - i. Common earth;
  - ii. Loose rock;
  - iii. Solid rock; and
  - iv. Unclassified material;
- d. Grading construction data for each construction specification measured by NS and/or UP including without limitation, roadbed width, side slope ratio, track center distance, presence of access roads, impact of grading activities on right-of-way width, use of geo-textiles, use of water, soil stabilization, and width and depth of side ditches;
- e. Number of route miles, separated between single track main, double track main, triple track main, etc., corresponding to the cubic yard information described in paragraphs (i) through (iv) of Subparts (a), (b) and (c) of this Request;
- f. Number of track-miles corresponding to the cubic yards in paragraphs (i) through (iv) of Subparts (a), (b) and (c) of this Request;
- g. All of the different types of equipment (and the associated tasks) used to:
  - i. Excavate common earth;
  - ii. Excavate loose rock;
  - iii. Excavate solid rock;
  - iv. Excavate unclassified material; and
  - v. Obtain borrow material;
- h. Linear feet of pipe installed for lateral drainage;
- i. Number of cubic yards of rip rap placed for the protection of the roadway;
- j. Location, type and quantity of retaining walls;

- k. Construction method, including but not limited to the number of cubic yards of masonry or other similar material, used for retaining walls;
- l. Number of acres cleared;
- m. Number of acres grubbed; and
- n. Number of acres seeded.

**Response:**

NS specifically objects to this Request to the extent that it requires NS to perform a special study by compiling or organizing data and documents in a manner different from how those data and documents are kept in the ordinary course of business. NS further objects to this Request as overbroad and unduly burdensome in that it seeks documents related to any grading construction activities “undertaken or proposed” at “any time” on “any portion of NS’ and/or UP’s system.” Subject to and without waiving these specific objections or the General Objections, NS responds that it will produce a list of AFEs from which SunBelt can select a reasonable number for production or inspection at NS offices.

**REQUEST FOR PRODUCTION NO. 114**

Please produce documents sufficient to show the costs NS and/or UP incurred during each year 2008 to the present for the following:

- a. Cost per cubic yard of excavation for:
  - i. Common earth;
  - ii. Loose rock;
  - iii. Solid rock; and
  - iv. Unclassified material;
- b. Cost per cubic yard of embankment for:
  - i. Common earth;
  - ii. Loose rock;
  - iii. Solid rock; and
  - iv. Unclassified material;
- c. Cost per cubic yard of borrow for:
  - i. Common earth;
  - ii. Loose rock;
  - iii. Solid rock; and
  - iv. Unclassified material;
- d. Cost per cubic yard of rip rap (installed), separated between material and labor;