

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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E.I. DUPONT DE NEMOURS & COMPANY

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

Docket No. NOR 42125

**NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO E.I. DU PONT DE
NEMOURS AND COMPANY'S PETITION FOR RECONSIDERATION**

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I. PREFACE AND SUMMARY OF ARGUMENT

DuPont's Petition for Reconsideration asks the Board to set aside its careful and correct application of the Stand Alone Cost ("SAC") test and find that the challenged rates are unreasonable simply because DuPont believes them to be too high.¹ According to DuPont, the SAC test must not work for cases involving large, carload-intensive Stand Alone Railroads ("SARRs"), because a SAC analysis of the SARR designed by DuPont showed that the rates it challenged were not unreasonable. But the SAC test does not presuppose that rates are unreasonable and then contort itself to justify that conclusion. Rather, the SAC test determines whether the SARR designed by the complainant is revenue adequate when accounting for the full costs of the selected traffic, including the replacement cost of needed facilities. It is no surprise that the large, carload network proposed by DuPont proved not to be revenue adequate on a replacement cost basis, because DuPont's SARR replicated the lion's share of NS's real-world large, carload network—which as a whole is not revenue adequate when measured on a replacement cost basis (as it must be for any accurate assessment of revenue adequacy).²

In an attempt to manufacture a revenue adequate SARR, DuPont relied upon a patently deficient operating plan that the Board aptly characterized as "not workable,"³ in part because it

¹ DuPont's Petition blatantly violates the Board's rules for the length and format of its petition. DuPont shrunk the 93 footnotes of its pleading to a near-illegible 9-point font, in blatant defiance of 49 C.F.R. § 1104.2(a)'s requirement that all text be in at least 12-point font. Increasing DuPont's footnotes to 12 points would add approximately three pages to the petition. And DuPont defied the letter and the spirit of the Board's 50-page limit for reconsideration petitions by granting itself an additional four pages for its unnumbered Section I. DuPont cites 49 C.F.R. § 1115.3(d) as authority for its action, but of course the Board never indicated that its 50-page limit would not apply to the entire narrative of the petition. (Moreover, DuPont's Section I exceeds § 1115.3(d)'s three-page limit for prefaces.) If the Board tolerates DuPont's open disdain for the rules, it will only be inviting more blatant violations of its rules in future cases.

² See Opening Comments of Norfolk Southern Ry. Co. at 71-74, STB Docket No. 722 (filed Sept. 5, 2014); *id.* at V.S. Cornell 13-18.

³ *E.I. du Pont de Nemours & Co. v. Norfolk So. Ry. Co.*, STB Docket No. 42125, at 36 (served Mar. 24, 2014 ("Decision")).

failed to include thousands of trains required to handle its selected traffic (including significant volumes of its own “issue traffic”) and failed to provide sufficient facilities and personnel to classify the vast amount of carload traffic it chose to be handled by its SARR. DuPont also vastly understated road property investment costs, in part because it based earthwork costs for 7,300 route miles of construction on an unrepresentative 1.3 mile line relocation project on a short line railroad. These are just a few examples of the dozens of unrealistic assumptions and breaks with established Board precedent that DuPont relied on in an effort to game the SAC result. NS explained in its Reply how these extensive evidentiary failures could be corrected—to the point of NS identifying every single “missing train” in DuPont’s operating plan. It was at that time that DuPont could have changed course. Instead, DuPont failed on Rebuttal to correct the mistakes pointed out by NS on Reply, gambling that the Board would simply overlook them.

DuPont lost its gamble, and the Board correctly found that a properly applied SAC analysis showed that the challenged rates were not unreasonable. But now, after the Board has analyzed the record and concluded that DuPont failed to carry its burden of proof on many of the most critical issues in the case, DuPont accuses the Board of having made material errors in virtually every aspect of the *Decision*, and DuPont demands the right to a “do over” so that it can try to change course in supplemental evidence.

This case is over, and DuPont has lost. Faced with the reality that its numerous evidentiary gambles have failed, it now desperately seeks to escape the consequences of its efforts to convince the Board to accept a grossly distorted SAC presentation by blaming the Board, blaming NS, and even blaming the sound and well-established economic principles underlying the SAC test. Given the enormous gap between the properly identified and calculated costs found by the Board to construct, operate, and maintain the DRR over the 10-year DCF

analysis period on the one hand, and the properly identified and calculated revenues attributable to the DRR on the other, even if all of the “material errors” claimed by DuPont—and as NS will show, many of the so-called “errors” either are not material, or in some cases are not errors at all—were “corrected,” DuPont still would not prevail. The Board should affirm its ruling that the rates at issue are not unreasonable, end DuPont’s last-ditch effort to be saved from its own litigation strategies and mistakes, and dismiss the Complaint with prejudice.

II. THE BOARD’S DECISION WAS A CORRECT APPLICATION OF THE STAND ALONE COST TEST, WHICH IS AN EFFECTIVE AND ECONOMICALLY SOUND METHOD FOR DETERMINING RATE REASONABLENESS.

DuPont begins its Petition with a lament that the SAC methodology must be flawed because DuPont lost. *See* DuPont Pet. for Reconsideration at 1 (“Pet.”). DuPont’s claims are based on blatant mischaracterizations of the *Decision* and the Board’s precedents; rigged math that the Board has recognized is worthless in assessing the reasonableness of a SAC decision; and a complete failure to acknowledge that it was DuPont’s decisions—not the Board’s decisions, NS’s decisions, or even the SAC test itself—that led the parties and the Board to expend so much time and effort on a SAC presentation that the Board rightly found failed to show that NS’s rates were unreasonable.

DuPont took a calculated risk to push the envelope with a SAC presentation that claimed the lion’s share of NS’s traffic and revenues but did not account for the full costs of serving that traffic. This was not an accident. It rather was a result of deliberate decisions not to replicate the full operations required to serve DuPont’s traffic, not to use realistic evidence of the costs of construction, and to assume that the DRR could realize two-thirds of NS’s revenue with only 18% of its workforce.⁴ DuPont gambled that the Board would overlook these distortions in an

⁴ Specifically, DuPont claimed it could operate the DRR with a total of just 4,976 employees: 3,166 train and engine employees; 591 non-train operating employees; 213 G&A employees; and

effort to give relief to a vocal and powerful shipper. Fortunately, the Board did not take this invitation and instead evenhandedly applied principles from its SAC constraint, which led to the clear conclusion that DuPont failed to demonstrate that NS's rates are unreasonably high.

DuPont's Reconsideration Petition plays meaningless math games in an attempt to show that the Decision would allow NS to charge "absurd" rates. Pet. at i. But it is DuPont that is relying on absurd assumptions. The basis of DuPont's mathematical sophistry is the fact that DuPont's issue traffic constitutes just 0.1% of the DRR's total carloads. DuPont makes the utterly absurd assumption that NS might seek to recover the entire \$6.5 billion SAC overage from DuPont alone. The Board has recognized that this is a meaningless way to assess a SAC result, for no railroad would attempt to recover the entirety of a systemwide revenue deficit from a single shipper, particularly one that accounts for only 1/1000th of its traffic base. In response to similar mathematical gimmicks used in the *Otter Tail* appeal, the Board recognized that it would be "totally unreasonable" to assume that a railroad would raise rates only on the complainant's traffic while leaving all other rates constant.⁵

DuPont's other mathematical gimmick is to claim that an "RSAM" for the DRR would be substantially higher than NS's RSAM and thus that something in the SAC analysis must be amiss. Pet. at 4. In the first place, DuPont is cherry-picking its calculated RSAM numbers, which steadily drop over the course of the SAC analysis and eventually dip well below NS's current RSAM. See Pet. Ex. 3 (showing "DRR RSAM" as low as 238% in the last year of the

1,006 maintenance of way employees. See DuPont Op. at III-D-10, 11 & 14; Ex. III-D-3 at 3. By contrast, NS averaged 28,323 employees in 2009. See AAR Railroad Facts 74 (2010 ed.).

⁵ See Joint Br. of STB and United States at 37, *Otter Tail Power Co. v. STB*, Nos. 06-1962 & 06-2412 (8th Cir. filed Sept. 8, 2006) (arguing that it would be "totally unreasonable" to assume that "in order to fully recover the \$31 million east-west part's revenue shortfall, BNSF would raise the rate only for Otter Tail's 1.9 million tons of coal while leaving the rates for the other 97% of the traffic using the segment (over 58 million tons) constant").

SARR). More importantly, comparing a “SARR RSAM” to the incumbent’s actual RSAM is a meaningless exercise, since the purpose of the SAC analysis is to recover sufficient contribution to recover the SARR’s capital costs on a replacement cost basis. RSAM, of course, is predicated on historical book values.⁶ It is to be expected that a “SARR RSAM” designed to measure the average markup necessary for the SARR to earn its cost of capital for assets valued at replacement costs would be higher than an incumbent RSAM that measures the average markup necessary for the incumbent to earn its cost of capital for assets only valued at book value.

Even more absurd than DuPont’s mathematical manipulations is its claim that “NS theoretically could increase the challenged rates immediately by ten-fold or more and DuPont would have no recourse to challenge those rates until 2020.” Pet. at 3. That is a blatant misrepresentation of Board precedent. If NS were to raise the tariff rates by any amount beyond the limited annual percentage increases incorporated in the Board’s DCF results, DuPont immediately could bring a complaint challenging those increased tariffs under any of the Board’s rate reasonableness methodologies.⁷ DuPont claims that “dicta” in a footnote from *IPA* suggests the contrary, but that is not true. The footnote in question (which DuPont tellingly does not quote) does not suggest that an unsuccessful rate complainant is barred from challenging future increases to that challenged rate. On the contrary, the Board in *IPA* only said that “dismissal with prejudice could be interpreted to mean that IPA could not bring a second challenge to these same rates for past or future movements, within the Board’s 10-year prescription period, unless it could demonstrate changed circumstances, new evidence, or material error that would justify a

⁶ See NS Opening Comments at 71-74, STB Docket No. 722 (filed Sept. 5, 2014).

⁷ See, e.g., *SunBelt Chlor Alkali P’ship v. Norfolk So. Ry. Co.*, STB Docket No. 42130, at 29 (served Jun. 20, 2014) (“*SunBelt*”) (“The Board’s rate reasonableness analysis is predicated on the tariff rate charged by SunBelt in this case. Should NS raise the rate beyond that set forth in the challenged tariff, SunBelt could challenge the reasonableness of the new rate.”).

second investigation.” *Intermountain Power Agency v. Union Pac. R.R. Co.*, STB Docket No. 42127, at 3 n.11 (served Nov. 2, 2012) (“*IPA*”). This language from *IPA* plainly applies to future challenges to the “same rates.” There is no reading of the Interstate Commerce Act that would prohibit DuPont from bringing a rate case to challenge new, increased tariff rates.⁸

Moreover, DuPont’s claim that the *Decision* “effectively deregulates carload rates in the Eastern United States” is nonsense. Pet. at 1. SAC continues to be a viable option for carload shippers, so long as the SARR that they design proves to be revenue adequate on a replacement cost basis. And if a carload shipper believes that SAC is too complex for its traffic, Simplified SAC provides a relatively simple and straightforward methodology that would eliminate the operating plan and operating expense disputes that have dominated this proceeding. Further, if Simplified SAC is also thought to be too complex, DuPont itself can attest to the viability of the Three Benchmark approach, under which it prevailed in three separate carload rate cases.⁹

Rate reasonableness methodologies do not “work” only when shippers win. Rather they work by establishing economically valid ways to determine which rates exceed a reasonable maximum and which rates do not. The very existence of effective rate reasonableness methodologies serves to constrain railroad pricing in the first instance, before cases are brought before the Board. Under established SAC rules, there is no question that NS’s rates do not exceed a reasonable maximum.

⁸ Moreover, the “phasing” constraint could operate to mitigate the impact of the type of dramatic rate increases that DuPont hypothesizes. See *Coal Rate Guidelines*, 1 I.C.C.2d 520, 546-47 (phasing constraint limits ability to collect full amount of otherwise reasonable rates whose immediate collection may cause economic dislocation).

⁹ See *E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket Nos. 42099, 42100 & 42101 (June 30, 2008).

III. DUPONT'S REQUEST FOR PERMISSION TO FILE SUPPLEMENTAL EVIDENCE IS WITHOUT MERIT.

A. DuPont Has Not Demonstrated Any Legitimate Basis For Awarding It An Opportunity To Supplement Its Operating Plan.

DuPont claims that the Board committed material error by accepting NS's operating plan as the basis for its decision in this case "rather than soliciting supplemental evidence sufficient to determine a reasonable rate based upon a credible and realistic operating plan." Pet. at 4. According to DuPont, the Board should have rejected NS's operating plan outright because "NS could have corrected the two primary deficiencies that the Board found in DuPont's operating plan without starting over from scratch." *Id.* at 6. (Those "two primary deficiencies" are DuPont's failure (1) to account for literally tens of thousands of trains required to provide complete train service to DRR customers, and (2) to address the need to classify and block general freight cars.) DuPont also contends that the Board erred by accepting NS's car classification and train service plan because NS did not provide DuPont and the Board a "fully-functional" version of the MultiRail software that it used in developing that evidence. *Id.* at 6-7, 15-18. In order to remedy the supposed errors in the Board's decision, DuPont requests that it be afforded an opportunity to file "supplemental evidence" to cure the fatal deficiencies in its operating evidence.

As an initial matter, it is worth noting that DuPont does not contest the Board's holding that DuPont's failure to account for all of the required trains, or to proffer an accurate car classification count, rendered DuPont's operating plan infeasible.¹⁰ Instead, DuPont takes the position that the Board committed material error by adopting NS's operating plan, rather than soliciting, *sua sponte*, additional evidence to address the defects in DuPont's operating evidence.

¹⁰ See, e.g., *Decision* at 36 (failure to include all required trains was "sufficient to undermine the overall workability of the DuPont operating plan"), *id.* at 39 (finding DuPont operating plan "deficient because it failed to conduct a proper car classification count").

See Pet. at 8. DuPont’s claims are contradicted by the record evidence, unsupported by the Board’s SAC precedents, and should be denied.

1. The Board Correctly Concluded That DuPont’s Operating Plan Was Fatally Deficient.

DuPont’s Petition proceeds from the faulty premise that its operating plan had only two material shortcomings. DuPont asserts that NS could have corrected “the two primary deficiencies” in DuPont’s operating plan by simply adding to DuPont’s train list the “missing trains” required to accommodate the DRR’s selected traffic, and by supplying the car classification and blocking analysis that DuPont itself neglected to provide in its Opening Evidence. Pet. at 6, 9-10. DuPont suggests that, with those two “fixes,” its operating plan would have been rendered feasible and could have been adopted by the Board. However, as the record clearly shows, virtually every element of DuPont’s operating plan suffered from fatal errors and omissions that rendered DuPont’s plan utterly infeasible. Based on the record evidence and prior precedent, the Board correctly rejected DuPont’s operating plan in its entirety.

DuPont’s suggestion that NS could have easily cured the deficiencies in DuPont’s operating plan is demonstrably incorrect. DuPont’s Opening Evidence contained no car blocking and classification plan whatsoever—indeed, DuPont never mentioned the words “blocking” or “classification” in its opening submission. *See* NS Reply at III-C-59-60.¹¹ Therefore, as the Board correctly determined, “there was nothing for NS to correct on Reply. To provide this essential part of the operating plan for a predominantly carload system, NS needed to supply its own analysis.” *Decision* at 41.

¹¹ DuPont’s characterization of this glaring omission as “unintentional” (DuPont Reb. III-C-121) is simply not credible. DuPont offered no explanation as to how witness McDonald (who DuPont touted as “an acknowledged railroad operating expert,” DuPont Reb. III-C-1) could have overlooked the fundamental need for a railroad to classify and block carload traffic at intermediate yards.

Nor could NS have salvaged DuPont's grossly deficient train service plan by simply adding trains to DuPont's "historical" train list. NS's historical trains were designed to efficiently serve NS's system-wide traffic base—not just the subset of traffic selected by DuPont for inclusion in the DRR. As NS's Reply explained (at III-C-157-62), NS utilized MultiRail to develop both a car blocking and classification plan and a train service plan for the DRR traffic group. MultiRail first organized the DRR's selected traffic into the blocks necessary to move each car from its origin (or on-SARR interchange) to its destination (or off-SARR interchange). MultiRail then assigned each block to one or more trains as required to transport that block across the DRR network. Thus, the car blocking/classification and train service plans developed by NS for the DRR were fully integrated (like those of real world railroads). DuPont does not explain how NS could have accurately integrated the traffic blocks developed in MultiRail with the list of "historical" trains that DuPont culled from NS's event data. Indeed, DuPont itself made no attempt whatsoever to identify the blocks of cars that would be transported by the DRR or otherwise to integrate the inaccurate car classification evidence that it belatedly proffered on Rebuttal with its incomplete train service plan.¹² DuPont's "operating plan" consisted of nothing more than a disjointed series of "data dumps" from NS's historical event records.

DuPont's Petition utterly ignores the fact that DuPont itself had ample opportunity to correct the deficiencies in its operating evidence. As the Board observed (and DuPont acknowledges), NS provided a complete list of the 35,699 "missing trains" that the DRR would

¹² In developing its Peak Year trains, DuPont simply increased the size of NS's historical Base Year trains by an aggregate growth factor. By contrast, NS's MultiRail analysis increased the DRR's Base Year traffic volumes based on commodity-group-specific growth factors, thereby presenting a more accurate picture of the cars and blocks that would move in each Peak Year DRR train. The Board explicitly rejected DuPont's claim that NS's MultiRail analysis was "disconnected from reality," finding that "the mix of traffic will not remain the same as in NS's real world consists because the diverse commodity groups carried by the SARR are projected to have different volume growth rates." *Decision* at 41-42.

need to operate in order to provide uninterrupted train service for its selected traffic. *See Decision* at 38; *Pet.* at 9.¹³ On Rebuttal, DuPont added only 622 of those trains—less than 2%—to its DRR train list (only correcting the three “examples” discussed in NS’s Reply narrative). *See Decision* at 38 n.59. DuPont’s Rebuttal workpapers show that it intentionally limited its computerized search of the “missing trains” data to those three specific train symbols, indicating clearly that DuPont made a conscious litigation decision not to incorporate all of the required trains.¹⁴ In other words, DuPont had a “second chance” to correct its fatally deficient train list, but intentionally chose not to do so.

DuPont likewise had an opportunity to submit an accurate car classification and blocking plan for the DRR on Rebuttal. However, the computer program that DuPont’s experts devised to develop car classification counts was flawed, and it resulted in a vast understatement of the number of cars that the DRR would, in fact, be required to classify at intermediate yards. *See NS Br.* at 23-25. Based upon its review of the record evidence, the Board correctly concluded that “DuPont’s [car classification] calculations are substantially understated.” *Decision* at 40.

In short, DuPont has already had ample opportunity to cure (what DuPont describes as) the “two primary deficiencies” in its operating plan. DuPont’s request for yet another “do over” after the Board has issued its final decision in the case must be rejected.

Moreover, DuPont’s suggestion that “missing trains” and the absence of an accurate car classification plan were the only major problems with its operating plan is flatly contradicted by the record evidence and the Board’s decision. In reality, DuPont’s evidence was riddled with flaws that invalidated virtually every element of its operating plan. For example, DuPont failed to provide any hump yards to support the DRR’s carload operations. Even on Rebuttal, DuPont

¹³ *See* NS Reply WP “DRR_TRAIN_ANALYSIS.xlsx.”

¹⁴ *See* DuPont Reb. WP “Edgemoor and McIntosh Trains.xlsx,” Tab “Sql”; NS Br. Ex. 4.

made a conscious tactical decision to adhere to its nonsensical position that hump yards were “optional.”¹⁵ DuPont belatedly attempted to remedy this fatal error in its operating plan by proposing several hump yards in an unauthorized “errata” filing, but the Board properly struck it.¹⁶ Even for the yards that it did construct, DuPont vastly understated the yard capacity that the DRR would need to handle its general freight traffic. Based on its review of the record evidence, the Board correctly concluded that “DuPont has not adequately explained how it would effectively move this increased volume of [Peak Year] traffic with fewer facilities than the current NS system.” *Decision* at 40. DuPont’s operating plan likewise failed to account for the local train services “which are important to an effective rail network.” *Id.* at 38. Based upon the numerous flaws in DuPont’s operating evidence, the Board correctly concluded that “DuPont failed to submit an operating plan for the DRR that would provide for full service from each specific origin, through the network, and to each specific destination for the selected traffic group.” *Id.* The Board’s decision to reject DuPont’s RTC analysis (and the operating statistics generated by that RTC simulation), which were based on DuPont’s infeasible operating plan, was likewise fully supported by the record. *Id.*

Finally, DuPont attempts once again to blame the fatal deficiency in its train service plan for the DRR on “flaws and deficiencies in the NS traffic data.” *Pet.* at 12. According to DuPont, NS’s failure to “inform[] DuPont of the limitations in its data . . . would have alerted DuPont to flaws in its train selection methodology or otherwise enabled DuPont to develop a proper methodology.” *Id.* This argument is specious. As noted previously, DuPont itself acknowledged that “NS provided a list in its reply evidence that identified every single one of the alleged missing trains.” *Pet.* at 9 (emphasis added). On Rebuttal, DuPont could have utilized

¹⁵ DuPont Reb. III-C-120-126.

¹⁶ See *Decision* at 33-35; NS Br. at 26-29.

that list to cure the deficiency in its train service plan, but it made an intentional tactical decision not to do so. Moreover, the data produced to DuPont in discovery contained more than sufficient information to enable it to prepare a complete train service plan. As NS demonstrated on Reply, DuPont's Opening Evidence included a workpaper (the "DuPont Car/Train Database") that listed all of the 35,699 "missing trains" as trains that handled the selected traffic on-SARR.¹⁷ Indeed, both the DuPont Car/Train Database and the original NS train and car event files from which DuPont extracted that data contain every one of the trains that DuPont failed to account for in its operating plan.¹⁸ See NS Reply at 24-31. Thus, the Board correctly concluded that DuPont's failure to account for the trains required to serve the DRR's customers was attributable to the methodologies that DuPont employed in developing its evidence, rather than any deficiency in the source data produced by NS.

2. The Board's Decision To Accept NS's Operating Plan Is Amply Supported By the Record Evidence And The Board's SAC Precedents.

DuPont contends that the Board committed material error by accepting NS's operating plan as the basis for decision. Specifically, DuPont asserts that the Board should have rejected NS's operating plan because NS submitted an entirely new plan instead of trying to "correct" the massive deficiencies in DuPont's plan, and NS did not provide a "read-write" version of the MultiRail software to the Board (and to DuPont). DuPont also claims that the Board adopted NS's operating plan "wholesale," even though it (supposedly) determined that NS's plan had "serious flaws." Pet. at 4. DuPont asks the Board to remedy these alleged errors by "soliciting [supplemental] evidence sufficient to determine a reasonable rate based upon a credible and realistic operating plan." *Id.* at 5. DuPont's claims are meritless.

¹⁷ See DuPont Opening WP "ttWaybill_Leadt_Unit_full_NS_Event."

¹⁸ See NS Reply Exhibit III-C-3 "DRR_Trains_Analysis.xlsx."

As NS demonstrated above, DuPont’s assertion that NS easily could have “corrected” DuPont’s failure to account properly for the trains and car classification necessary to serve the DRR’s traffic is incorrect. In any event, given the numerous other glaring deficiencies in DuPont’s operating plan, even correcting those two fundamental shortcomings would not have been sufficient to render that plan feasible.

DuPont’s assertion that the Board somehow departed from the “required course” and violated its precedents in accepting NS’s operating plan is flatly wrong. Pet. at 7. Where, as here, the Board has determined that a complainant’s operating plan is infeasible and that the defendant carrier has presented an alternative that is feasible, the Board properly has rejected the shipper’s infeasible plan and based its decision on the defendant’s operating plan. Indeed, the Board has done precisely that in every decided Eastern SAC case, and in several Western SAC cases, in the past 25 years.¹⁹

Furthermore, DuPont’s claim that the Board adopted NS’s operating plan “wholesale” without making any adjustments is simply not true. Pet. at 4. In reality, the Board carefully evaluated the evidence submitted by both parties and adopted DuPont’s position with respect to a

¹⁹ See, e.g., *Sunbelt Chlor Alkali Partnership v Norfolk Southern Ry. Co.*, Docket No. 42130 (served June 20, 2014) at 12-19; *Duke Energy Corp. v. Norfolk So. Ry. Co.*, 7 S.T.B. 89, 117-21 (2003); *Carolina Power & Light Co. v. Norfolk So. Ry. Co.*, 7 S.T.B. 235, 254-59 (2003); *Duke Energy Corp. v. CSX Transp., Inc.*, 7 S.T.B. 402, 426-31 (2003); *Decision* at 36-41; see also *Public Serv. Co. of Colorado d/b/a Xcel Energy v. BNSF Ry. Co.*, 7 S.T.B. 589, 610-14 (2004) (“Xcel”); *Texas Mun. Power Agency v. BNSF Ry. Co.*, 6 S.T.B. 573, 606 (2003); *McCarty Farms, Inc. v. Burlington N., Inc.*, 2 S.T.B. 460, 476-78 (1997). DuPont’s further assertion that “NS was required to ‘file a separate motion bringing [the fatal deficiencies in DuPont’s operating plan] to the Board’s attention’” is nonsense. Pet. at 8. *Duke/NS* does not require a defendant railroad to file such a motion in order to present a feasible alternative to a fatally deficient operating plan. Rather, *Duke/NS* states only that a defendant railroad should file a motion where “the shipper’s evidence is so flawed as to preclude the development of appropriate reply evidence.” *Duke/NS*, 7 S.T.B. at 101 & n.20. That was not the case here where, despite the numerous flaws in DuPont’s Opening Evidence, NS was able to develop a feasible operating plan for the DRR. *Id.* at 101.

significant number of operating expense issues where the Board determined that DuPont's evidence was better supported than NS's. For example:

- While the Board adopted the SD40-2 units posited by NS for yard service, it rejected NS's proposed lease rates for SD40-2 locomotives on the grounds that the rates proffered by NS "do not reflect the 2009 market." *Decision* at 70, 73.
- The Board adopted DuPont's proposed lease rate for ES44-AC locomotives, finding that "NS's argument that the DRR must pay more than was required in *AEPCO* because NS itself pays more is not persuasive." *Id.* at 72.
- The Board "reject[ed] NS's evidence on GP38 lease rates" and adopted instead DuPont's proposed rates for those units. *Id.* at 73.
- Although the Board accepted NS's operating plan, it adopted the locomotive "peaking factor" posited by DuPont. Finding that NS had not adequately supported its proposed higher peaking factor, the Board concluded that "we will accept DuPont's peaking factor of 5.4% as the best evidence of record." *Id.* at 71.
- The Board adopted DuPont's fuel consumption rate for ES44 locomotives, finding that "NS's ES44 fuel consumption estimates are based upon mathematical calculations that NS has not shown to be based on real-world evidence of fuel consumption." *Id.* at 74.
- The Board accepted DuPont's railcar maintenance costs, on the grounds that "NS's evidence is flawed due to its failure to include the revenue that the DRR would receive for running repairs." *Id.* at 76.

As these examples illustrate, the Board's decision to accept NS's operating plan in lieu of DuPont's infeasible plan did not (as DuPont suggests) render the Board a "prisoner" of NS's evidence. Rather, the Board exercised its independent judgment with respect to each category of operating expense that the DRR would incur, and substituted DuPont's cost estimates for those posited by NS where the Board found that DuPont proffered the best evidence of record. *See Decision* at 69, Appendix A, Table A-1. In doing so, the Board amply fulfilled its obligation to protect the public interest.

DuPont's request for an opportunity to file supplemental evidence is premised on the notion that the Board simply adopted "what it considered to be the lesser of two evils" because

the operating plans submitted by DuPont's and NS were both seriously deficient. Pet. at 4. According to DuPont, "once the Board concluded that both parties' operating plans had serious flaws, it had a duty to solicit supplemental evidence sufficient to determine rate reasonableness without having to rely upon the flawed operating plan of either party." *Id.* at 6 (emphasis added). This claim is incorrect as a matter of both law and fact.

DuPont repeatedly asserts that the Board found that NS's operating evidence was "seriously flawed." Pet. at ii.²⁰ However, the Board made no such finding. While the Board observed that NS's operating plan was "not without its flaws," it stated unequivocally that those flaws "are not nearly as significant" as the fatal errors in DuPont's operating plan. *Decision* at 44-45. For example, the Board agreed with DuPont that NS's RTC simulation gave inappropriate priority to foreign trains crossing the DRR, but concluded that "the magnitude of this problem does not rise to the level of those discussed above with respect to DuPont's operating plan." *Decision* at 37, n. 53 (emphasis added). The Board rejected DuPont's argument that NS's RTC simulation was unreliable because it was based upon an average week (rather than the "peak week") in the Peak Year, finding that "the use of an average week by NS, as opposed to a peak week, actually results in lower costs." *Id.* at 37 n.53. The Board likewise rejected DuPont's assertion that NS's plan contained "systemic" routing errors because DuPont proffered only isolated examples of such routing problems. *Id.* at 45. Thus, the "flaws" in NS's evidence referenced in the decision were minor (particularly in comparison to the pervasive errors and omissions in DuPont's evidence) and, in most cases, related to DuPont's criticism of inputs to NS's RTC simulation, rather than the fundamental elements of NS's operating plan.

²⁰ See also *id.* at 4 (Board [allegedly] "acknowledge[ed] serious flaws" in NS operating plan); *id.* at 5 (Board "[made] itself the prisoner of NS's flawed operating plan"); *id.* at 12 (Board accepted NS operating plan "with all its flaws").

DuPont’s suggestion that the Board should have instructed the parties to submit additional rounds of evidence until the record contained a “flawless” operating plan is nonsense. It is well-settled that an agency’s duty is to base its decision on the “best evidence of record”—not to prolong a proceeding in search of “perfect” evidence. *See United Steelworkers v. Marshall*, 647 F.2d 1189, 1267 (D.C. Cir. 1980) (“the agency can rely on the best available evidence”); *Xcel Energy v. Burlington N. & Santa Fe Ry. Co.*, STB Docket No. 42057, at 16 (served Jan. 19, 2005) (noting that “the parties were afforded an opportunity to devise an acceptable alternative and we do not believe that it is necessary or appropriate to delay this case further in a continuing pursuit of a more perfect approach. At some point, we must be able to rely upon the best evidence of record and bring the case to a conclusion.”) (emphasis added). That point has been reached (and passed) in this case.

Finally, DuPont asserts that “the Board committed material error when it accepted the NS operating plan based upon a [MultiRail] software package that NS refused to submit into evidence or to serve upon DuPont.” Pet. at 16. According to DuPont, “without access to MultiRail itself, the Board had no ability at all to modify the NS operating plan, which is why the Board’s only other option was to accept the NS plan in its entirety.” *Id.* In a similar vein, DuPont alleges that, without access to a “read-write” version of MultiRail (at NS’s expense), “DuPont could not fully test the software’s methods or divine flaws in NS’s analysis.” *Id.* at 15. DuPont’s claims regarding MultiRail are without merit, and provide no basis for reconsideration of the Board’s decision.

DuPont’s assertion that NS “refused to submit [MultiRail] into evidence” is patently false. Pet. at 16. As an initial matter, commercial software programs cannot simply be filed with an agency (or served on other litigants) without violating software license agreements—all a

party can do is offer to purchase a license for the agency and the opposing party. That is what NS did in this case. NS offered to arrange for a “read-write” copy of MultiRail for the Board’s use in connection with this proceeding, but the Board declined to accept NS’s offer.²¹ NS also provided a “read only” version of MultiRail to DuPont (at NS’s expense), and DuPont utilized it in preparing its Rebuttal Evidence. Thus, NS clearly did not “refuse” to make MultiRail available to the Board or to DuPont.

The central thesis of DuPont’s MultiRail argument appears to be that, without access to MultiRail, the Board “had no ability at all to modify the NS operating plan,” leaving it no choice but to “accept the NS plan in its entirety.” Pet. at 16. In support of that proposition, DuPont cites the following excerpt from the decision: “Even assuming *arguendo* that modification of NS’s operating plan to address the rerouting concerns raised by DuPont is appropriate, we would be unable to do so given the evidence of record.” *Id.* (citing *Decision* at 45-46). DuPont disingenuously failed to quote the sentence that immediately followed the cited passage: “DuPont provided no evidence on rebuttal that would enable us to identify each specific instance of a reroute and replace it with a specific leapfrog segment.” *Decision* at 45 (emphasis added). As the latter sentence makes clear, the statement upon which DuPont relies referred to the Board’s discussion of routings that NS posited in response to DuPont’s use of “leapfrog” traffic segments—not the validity of the car classification and train service plans developed by NS with MultiRail.²² Moreover, read in proper context, the excerpt attributes the Board’s inability to make routing adjustments to DuPont’s failure to proffer sufficient proof on Rebuttal—not the Board’s lack of access to MultiRail.

²¹ See *E.I. du Pont de Nemours & Co. v. Norfolk So. Ry. Co.*, Docket No 42125 (served Mar. 27, 2013) at 2 (noting that the Board declined NSR’s offer to receive access to the full read-write version of MultiRail) (“*Mar. 2013 Decision*”).

²² The Board’s analysis of DuPont’s MultiRail claims appears at pages 41-43 of the *Decision*.

In dismissing NS's Petition for Clarification as moot, the Board made clear that it did not need the MultiRail program to evaluate the parties' respective operating plans:

The Board relies on each party to make its own case and critique the other party's case. Should the Board decide to rely on a certain type of evidence . . . the fact that the Board does not have a particular software program does not mean we would be unable to evaluate that evidence.

Mar. 2013 Decision at 3. More recently, in *SunBelt* (at 18), the Board explained that:

While the Board does not have the MultiRail software, we are able to analyze its inputs and outputs just as we would if the blocking and train service plans were developed by operating experts without the use of software.

Contrary to DuPont's assertions, the Board's decision not to accept the MultiRail software that NS offered to provide did not hamstring the Board's ability to evaluate the operating evidence submitted by the parties, and to base its conclusions on the best evidence of record.

DuPont's claim that, without a "read-write" version of MultiRail paid for by NS, DuPont was deprived of an opportunity to "fully test the software's methods or divine flaws in NS's analysis" is likewise meritless. *Pet.* at 15. As an initial matter, DuPont's suggestion that NS's failure to place a "read-write" version of MultiRail into evidence warrants rejection of NS's operating plan is ironic in light of the fact that DuPont did not provide either the Board or NS with the proprietary code that witnesses Fapp and Humphrey used to compile DuPont's train list from NS's historical train event data. Unlike MultiRail, which is available for purchase from Oliver Wyman, the Fapp/Humphrey code is not otherwise accessible.

Any complaint by DuPont regarding its access to MultiRail at this late stage of the proceeding should be rejected. As the Board knows, in response to NS's Petition for Clarification requesting a Board determination as to whether NS was obligated to underwrite the cost of such a MultiRail license for DuPont's benefit, DuPont withdrew its demand that NS provide it a "read-write" MultiRail license. DuPont stated that it was seeking only whatever

version of MultiRail NS provided to the Board itself.²³ Based on that representation, the Board dismissed NS’s Petition as moot. *Mar. 2013 Decision* at 3. Having previously withdrawn its demand that NS provide it a full “read/write” MultiRail license, DuPont is estopped from claiming now that NS’s failure to do so provides a basis for rejecting NS’s operating plan. Indeed, by purchasing a “read-only” MultiRail license for DuPont, NS went above and beyond what it was legally required to do²⁴—and what DuPont itself stated it was requesting that NS do. In any event, DuPont’s Rebuttal recites a litany of supposed errors that NS made in conducting its MultiRail analysis (DuPont Reb. III-C-65-108), thoroughly refuting DuPont’s assertion that it was denied the ability to analyze NS’s evidence. In summary, DuPont’s claim that NS’s operating plan should be rejected because NS utilized the MultiRail software in preparing it is meritless.

B. The Board Did Not Materially Err by Applying Alternative ATC to Allocate Cross-over Traffic Revenues.

The Board should reject DuPont’s belated request for a “do-over” of its entire SARR traffic selection based on the application of the “Alternative ATC” cross-over traffic revenue allocation methodology, because that methodology did not materially affect either DuPont’s selection of traffic or the allocation of cross-over revenues in this case. Moreover, as explained below, DuPont is estopped from making this argument by its prior position that: (i) the Board should not hold this case in abeyance during the pendency of the rulemaking that established the

²³ Complainants’ Joint Response to Defendant’s Motion for Leave to File a Reply to Complainants’ Joint Reply to Defendant’s Petition for Clarification, STB Docket No. 42125, at 5 (filed Feb. 27, 2013) (“NS misapprehends Complainants to be seeking a specific level of MultiRail functionality Complainants do not seek specific functionality; they only seek the same functionality as NS provides the Board.”) (emphasis added). *See also* Pet. at 16 n.28 (“DuPont sought access to the same version of MultiRail provided to the Board”).

²⁴ *See, e.g., Caddo Antoine et al. – Feeder Line Acquisition – Arkansas Midland R.R.*, 4 S.T.B. 610, 630-31 (2000) (holding that Board does not award litigation costs like “professional fees” or “associated . . . expenses”); *see also* Defendant’s Petition for Clarification, STB Docket No. 42125, at 8-11 (filed Jan. 25, 2013) (citing additional authorities).

ATC rule that the Board applied in this case; and (ii) any impact of applying Alternative ATC in “this proceeding will be minimal.” *See infra* at 22.

DuPont’s claim that it would have selected different traffic had it known the Board were going to apply Alternative ATC is belied by its own evidence. DuPont’s traffic selection sought to maximize traffic density on the lines replicated by the DRR, without regard to revenue-to-variable cost ratios generated by the selected traffic or the ATC revenue allocation it would receive. Nowhere in its traffic selection programming did DuPont filter its traffic based on the level of revenues allocated by ATC. To the contrary, the evidence indicates that DuPont’s selection methodology was unaffected by revenue allocation: DuPont simply selected all—or very nearly all—the available traffic on the NS lines replicated by the DRR. Indeed, more than one-quarter of the traffic that DuPont selected for the DRR had an R/VC ratio below 100%, meaning that under any version of ATC that traffic would generate no contribution to fixed costs. *See* DuPont Reb. WP “DRR_2010_TRAFFIC_ATC_REBUTTAL_v3.xlsx.” Because this traffic generates no revenue in excess of its variable costs, inclusion of that traffic in the DRR traffic group graphically demonstrates that revenue allocation played little-to-no role in DuPont’s traffic selection. The Board should reject this unsupported and untimely *post hoc* claim.

Furthermore, even if DuPont had been able to show that its traffic selection would have been different had it known Alternative ATC would apply in this case, it would be estopped by its inconsistent prior positions and actions in this case. First, DuPont opposed NS’s motion to hold the case in abeyance while the Board completed a rulemaking addressing the cross-over revenue allocation rules. *See* DuPont Reply to NS Motion to Hold Case in Abeyance Pending Completion of Rulemaking, *DuPont v. NS*, Docket No. 42125 (filed Aug. 27, 2012) (“DuPont Abeyance Reply”). Noting that the Board’s revenue allocation rules were in a state of flux, NS

argued that the Board should hold the case in abeyance pending adoption of final rules addressing the ATC revenue allocation methodology in the *Rate Regulation Reforms* rulemaking proceeding. DuPont disagreed. Acknowledging DuPont’s arguments in opposition, the Board denied NS’s motion:

The parties should have been, and continue to be, on notice that use and application of . . . ATC revenue allocation methodologies are potential issues in . . . individual cases, and that parties are entitled to raise and respond to substantive arguments regarding those methodologies within those proceedings. . . . The Board will address any arguments related to cross-over traffic and cost allocation raised in the pending adjudications, even as it completes its consideration of those issues more broadly in *Rate Regulation Reforms*.

DuPont v. NS, STB Docket No. 42125, at 5 (served Nov. 29, 2012). The Board further found that the “question of which revenue allocation methodology should be applied within a particular rate case is a substantive question that is more appropriately addressed within the individual proceeding[.]” *Id.* at 8. The Decision concluded by emphasizing that because “the parties are free to address appropriate methods for costing and allocating revenues within the context of the individual SARRs presented in those [individual rate cases],” the Board had decided to allow the case to go forward during the pendency of *Rate Regulation Reforms*. *Id.* at 8. DuPont did not seek reconsideration of the Board’s decision that it would determine what ATC methodologies it would apply in the context of this specific case. Having successfully argued two years ago that the case should move forward despite the Board’s ongoing consideration of revenue allocation methodologies—and having received clear direction that the Board would determine in this case which method it would apply—DuPont may not now complain that the Board did exactly what it said it would do by selecting and applying the method it found most appropriate.

Second, DuPont expressly represented to the Board that regardless of which ATC method the Board applied in this case, “the impact on this proceeding will be minimal.” DuPont

Abeyance Reply at 30. In opposing NS’s motion to hold the case in abeyance, DuPont contended that there was no reason to stay the case because of the *de minimis* effect the selection of an ATC revenue allocation methodology would have on the results of the case. *See id.* at 30; *id.* V.S. Crowley at 16 (“Regardless which ATC methodology is applied to the DRR cross-over traffic, it does not affect the ultimate case outcome.”).²⁵ Having made that argument and claim to the Board, DuPont is estopped from doing an about-face to claim the opposite now that it has lost the case.

IV. DUPONT’S REMAINING ARGUMENTS FOR RECONSIDERATION ARE MERITLESS.

A. The Board’s Rejection of DuPont’s “Trestle Hollow” Argument For Reducing SBRR Excavation Costs Was Not a Material Error.

DuPont asks the Board to abandon its longstanding, consistent precedent of using R.S. Means construction cost data (drawn from hundreds of construction projects throughout the nation) to estimate SARR excavation costs and instead rely on one atypical 7000-foot line relocation project (the “Trestle Hollow Project”) that is not even on the DRR route as the basis for estimating excavation costs for the 7300-mile DRR system. *See* Pet. at 20. The Board has already rejected this very same argument at least twice this year. *See SunBelt* at 107; *Decision* at 148-49. For several reasons, the Board again should deny this recycled argument.

First, DuPont fails to present any argument or evidence to show that the challenged ruling was materially erroneous. As the *Decision* explained, “the size, scope, and geographic and topographic diversity of the DRR make the use of Means more appropriate than the extrapolation of costs from a single project.” *Decision* at 149. However, despite quoting the Board’s dispositive finding that DuPont had failed to show that “the costs realized on a 1.3-mile rail line

²⁵ *See* V.S. Crowley Table 1 (showing DuPont’s calculation of DRR revenue differences under three different ATC methods, and indicating that difference between Original ATC and Alternative ATC revenue allocations was less than 1% in every year of the SAC analysis period).

relocation project in Tennessee were representative of the costs the DRR would incur in constructing a 7,300 mile, multi-state railroad,” DuPont’s Petition makes no attempt to argue that Trestle Hollow costs *are* representative of the costs the DRR would incur.²⁶ *See* Pet. at 20-23.

DuPont’s Petition concedes that Trestle Hollow Project costs were not representative of the costs that would be incurred in constructing the DRR. *See* Pet. at 21. But DuPont now claims that the Trestle Hollow Project costs constitute a “conservative” estimate of DRR construction costs because the Trestle Hollow project was “atypically complex.” *Id.* at 21. This new assertion is utterly unsupported. DuPont presented no evidence of other projects having lower excavation costs than the Trestle Hollow Project. Rather, all of the other record evidence (including the Means-based costs that DuPont itself developed but declined to use) shows the opposite—the Trestle Hollow Project costs proffered by DuPont were extraordinarily low outliers, far lower than the costs supported by multiple other sources. *See* NS Reply III-F-41-44.

NS presented substantial evidence demonstrating both that the Trestle Hollow Project enjoyed extraordinary economies and productivity advantages that would be unavailable to the DRR and that typical real world rail project costs far exceed those purportedly incurred in the Trestle Hollow Project. *See, e.g.*, NS Reply at III-F-41–44. As NS demonstrated, the unit costs presented by DuPont for the Trestle Hollow Project were a function of very high concentrations of excavation material in a small geographic area under near-ideal conditions. For example, the

²⁶ DuPont’s claim regarding NS’s request for additional documentation related to the Trestle Hollow project is incomplete and misleading. *See* Pet. at 21, n.40. To set the record straight, when preparing its reply evidence NS asked DuPont for, among other things, drawings, design plans, and invoices, which DuPont did not provide. Instead, DuPont asserted that NS’s “requests are in the nature of discovery requests, not work paper requests, and DuPont believes that it has provided all of the workpapers... [t]herefore, it is not clear why NS needs or is entitled to all of the information.” *See* NS Reply WP “Email to DuPont Re Trestle Hollow Project.pdf.” Then in Rebuttal DuPont submitted—as new workpapers—project invoices of the exact same type that NS had requested. *See* DuPont Reb. at III-F-21 and DuPont Reb. WP “Trestle Hollow Project Invoice 001 Approval May 2007.pdf.”

contractors for the Trestle Hollow Project, conducted in a small, concentrated area, benefited from excavation quantities that averaged nearly 600,000 cubic yards per mile and from the ability to distribute excavated spoil materials directly along the right-of-way. *See* NS Reply at III-F-41. In contrast, the long and narrow DRR would average only 45,000 cubic yards of common excavation per mile, and would be required to haul spoil materials much longer distances from the point of excavation. *See id.* As a result, the excavating productivity of manpower and equipment on the Trestle Hollow Project was far greater than that which the DRR could achieve.

Second, DuPont’s complaint that there are no other “real-world rail construction projects” that could be used as benchmarks for DRR construction costs is refuted by the evidence. Pet. at 23. NS produced in discovery, and presented in its Reply, cost data from real world rail construction projects on the NS system. That data showed that excavation costs for actual projects on the NS system are significantly higher than the Means costs adopted by the Board, and much higher than the purported costs of the Trestle Hollow Project presented by DuPont. *See* NS Reply at III-F-46-50. For example, NS produced evidence showing the construction costs of its 16-mile Keystone project completed in 2006 in Pennsylvania, which included 5.3 miles of new rail line construction. That evidence showed NS’s earthwork costs per cubic yard for the Keystone project were more than six times greater than the Trestle Hollow costs proffered by DuPont. *See id.* at III-F-48-49.²⁷

²⁷DuPont conspicuously fails to mention the evidence of costs of numerous “real-world” rail construction projects that NS produced in this case, for the obvious reason that their average earthwork costs were substantially higher than the Means costs adopted by the Board. *See* NS Reply at III-F-41-45. In light of the evidence of “contemporaneous real world rail construction project” costs on the NS system—including the 5.3-mile greenfield construction on the Keystone project—use of representative rail project costs (instead of Means data) advocated by DuPont on reconsideration would have resulted in substantially *higher* DRR excavation costs.

Third, DuPont’s claim that R.S. Means costs do not take into account economies of scale that would be available to the DRR is demonstrably false. DuPont is correct that Means collects nationwide data from construction contractors for a variety of different sizes of projects. What DuPont fails to acknowledge, however, is that Means accounts for economies of scale by providing costs for a wide variety of different sizes and types of equipment, including large equipment packages with higher productivity and efficiency that are used in large projects. By selecting from Means the most productive equipment feasible for a given project and conditions, a construction company (such as the builder of the DRR) may tailor its equipment and manpower to take advantage of all available economies of scale.²⁸

DuPont also claims in a footnote that Means is not representative of costs of a large-scale project like the construction of the DRR. *See* Pet. at 21 n.42. This belated assertion is both wrong and utterly unsupported by evidence. DuPont presented no evidence whatsoever to support the notion that no large projects are included among the hundreds used by Means to compile its construction cost data.²⁹ Nor did DuPont make any attempt to show that the 1.3 mile Trestle Hollow project was larger than projects in the nationwide Means survey. Finally, DuPont

²⁸ As discussed below, the relevant “economies of scale” in the segmented simultaneous construction approach followed by DuPont (using 365 separate construction contracts and packages) are those available through equipment, manpower, and technique selection. Under the theory of unconstrained resources, the DRR could deploy as many equipment and manpower packages (subject to feasibility limitations including size of equipment) as it wished along the DRR right-of-way. *See, e.g.*, DuPont Reb. at III-F-69 (arguing against inclusion of costs for lighting for night construction work, DuPont contended that “more personnel, equipment, and material” could be deployed rather than working at night).

²⁹ The only “evidence” DuPont offered were a few unsupported, conclusory statements of one of its witnesses to the effect that he believed Means costs for roadbed preparation were “conservative.” *See* Pet. at 21. Unsupported assertions of a witness not qualified to opine on Means data have little-to-no probative value. Moreover, these arguments miss the Board’s primary point that DuPont did not show that the Trestle Hollow project – which DuPont itself characterizes as “atypical”—are more representative of DRR roadbed preparation costs than Means cost data.

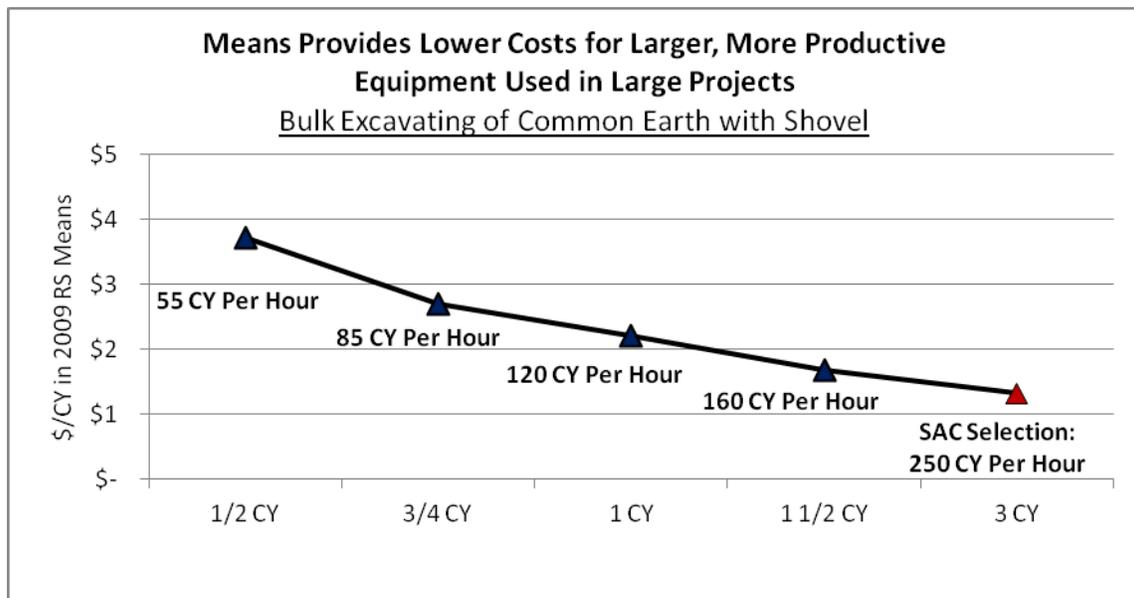
made no attempt to identify what additional economies it contends are available to larger projects, or how any such purported economies would be measured.

Moreover, DuPont's premise that it is "not the size of the equipment used on the projects but rather the sizes of the projects themselves that derive the economies of scale," is without merit. DuPont claims that Means does not include projects "of the immense size and scope of the proposed SARR" and therefore concludes that "Means costs do not reflect a SARR's large economies of scale." Pet. at 21 n.42. These contentions are both incorrect and misleading. In the first instance, DuPont's attempt to characterize roadbed preparation for the entire DRR as a single, unitary massive construction project is contrary to DuPont's own evidence and the construction plan on which it is founded. Under DuPont's construction schedule, DRR roadbed preparation was divided into 365 separate contract packages, each comprised of approximately 20 route-mile segments. *See* DuPont Opening at III-F-51.³⁰ This means that rather than the notional single massive construction project suggested by DuPont's argument, the DRR earthwork construction would be split into at least 365 small projects that could achieve economies of scale reflected in Means data.³¹

³⁰ 7300 DRR route miles/365 grading construction packages and segments = approximately 20 miles average length of segment for each grading contract. These separate component construction packages and segments are essential to achieving DuPont's aggressive construction schedule— if DRR construction were conducted as a single large continuous construction project rather than 365 simultaneous smaller projects, that construction would take far longer and substantially increase capital investment and carrying costs. Thus, an essential predicate for DuPont's road property investment presentation is that earthwork and roadbed preparation for the DRR would be conducted in hundreds of discrete segments.

³¹ In response to NS's argument that the DRR construction would require night work and lighting to achieve its aggressive earthwork construction scheduled, DuPont argued on rebuttal that "[u]nder the theory of unconstrained resources, the DRR could accelerate all of the construction processes identified by NS as affected by winter (earthwork, bridges . . .) in the non-winter months through the deployment of more personnel and equipment." DuPont Reb. III-F-146. This suggests that, under DuPont's theory, the DRR construction would require more than the 365 contract packages hypothesized in DuPont's case-in-chief.

Means costs that DuPont included in its evidence show how Means captures economies of scale. For example, Means provides costs for a variety of sizes of excavating “shovel” equipment, each having different productivity rates. See DuPont Op. WP “Means Handbook pages.pdf” at 9. From the Means list of shovels available for excavating bulk bank material, DuPont selected the largest and most efficient shovel available, a three cubic yard (“CY”) shovel. As the following graph—illustrating cost and productivity data included in SBRR’s evidence—shows, the large 3 CY shovel (while actually impractical for railroad roadbed construction) allows the DRR to take advantage of higher productivity and lower costs allowed by the size and scope of the project, *i.e.*, economies of scale.



Source: DuPont Op. WP “Means Handbook pages.pdf” at 9.

Thus, Dupont's own evidence shows that Means data and costs—which the Board has long relied upon as its primary source for roadbed preparation unit costs in SAC cases³²—do account for economies of scale.

DuPont's attempt on reconsideration to distinguish between economies derived from project size and economies based on equipment size ignores that the two factors necessarily are integrally related. Economies of size and scale can be achieved when larger project sizes allow the mobilization and use of larger, more productive equipment. As demonstrated, Means fully measures and accounts for the use of more productive equipment and manpower packages.

In sum, DuPont's arguments provide no basis for the Board to depart from its established precedent of using Means data to estimate excavation costs in SAC cases. The Board properly rejected Trestle Hollow Project costs as unrepresentative of the excavation costs that would be incurred by a 7,300-mile rail system traversing 20 different states encompassing diverse terrain and topography. DuPont has not shown that the Board materially erred in finding DuPont failed to support the proposition that the small, atypical Trestle Hollow Project was representative of excavation and grading costs that would be incurred by the DRR.

B. The Board Did Not Materially Err By Rejecting DuPont's Land Valuation Because of The Distortions Created By DuPont's Date Manipulations.

DuPont's land valuation evidence was based on a blatant and indefensible distortion of the timing of real estate purchases. While the DRR would need to purchase its right of way in the robust real estate market of 2007, DuPont instructed its real estate experts to value that right of way as of 2009, the low point of the economic recession. DuPont claimed that this date choice was acceptable because the 2009 valuation was indexed back to 2007 in its DCF model,

³² See, e.g., *Duke v. NS*, 7 S.T.B. 89, 171 (2003); *PPL Montana v. BNSF*, 6 S.T.B. 286, 305 (2002); *FMC Wyoming Corp. v. Union Pac. R.R. Co.*, 4 S.T.B. 699, 800 (2000); see also NS Reply at III-F-34 (citing cases where Board adopted Means costs).

but NS showed that DuPont’s chosen index only made matters worse, by assuming nonsensically that in 2007 the DRR could acquire its real estate for even less than it could in 2009. *See* NS Br. at 103-04. The Board therefore held that DuPont’s methodology “did not account for anomalous real estate costs associated with its proposed purchases during a market downturn that did not take place until two years after the DRR would make its land acquisitions” and that NS’s approach “results in a better (*i.e.*, less skewed) estimation of representative real estate costs.” *Decision* at 146.

DuPont first claims that the Board’s decision was a material error because 2007 was atypical and not 2009. But it was DuPont that proposed that real estate would be purchased in 2007. *See* DuPont Opening WP “Complete Construction Schedule.xls.” The Board was not faced with the question of which year contained the most “typical” real estate values—it was charged with determining the best estimate of real estate costs in 2007, because that was the date DuPont chose. DuPont is not allowed to develop a construction schedule based on 2007 land purchases and then cherry-pick a different year to value that land.³³

Second, DuPont argues that the Board was wrong to hold that the distortions caused by DuPont’s date of valuation outweighed the other methodological disputes between the parties. On the contrary, it was perfectly reasonable for the Board to hold that DuPont’s blatantly result-oriented valuation date decision was the most critical issue, and that the Board did not need to reach more technical disputes about averaging techniques. Moreover, DuPont’s assumption that its “corrections” to the averaging in NS’s Reply were appropriate is wrong. NS presented extensive evidence that illustrated that DuPont’s “weighted average” approach as applied in this

³³ In any event, the unsponsored charts that DuPont submits in an effort to support its “typicality” argument only illustrate the dramatic drop in real estate values during the 2008-09 recession and the unreasonableness of DuPont using values at the bottom of that drop as evidence of what real estate would have cost before the recession.

case over-weights the effect of large-scale transactions, and that it would be more appropriate to adopt an approach that gave equal weight to all transactions. *See* NS Br. at 105-07.

C. The Board Did Not Materially Err By Accepting NS’s Correction of DuPont’s ATC Allocation Errors.

The Board properly rejected DuPont’s impermissible attempt to change its case-in-chief on rebuttal by adopting a new—but still fatally flawed—cross-over traffic revenue allocation methodology for re-routed shipments. DuPont seeks to divert attention from its impermissible rebuttal tactic by focusing on its adjustment of a separate “technical error,” and ignoring the fact that its introduction of a separate new methodology on rebuttal was impermissible. As the Board held, “the amended methodology that DuPont used to arrive at its lower figure is improper rebuttal.” *Decision* at 269; *see* NS Br. at 93-97.

In addition, DuPont’s attempt to relitigate the correction of its SQL error is both unnecessary and immaterial, because the results of the parties’ correction of that error are very similar. NS explained on Reply that DuPont’s Opening evidence substantially understated off-SARR miles used to calculate variable costs, resulting in a significant overstatement of SARR revenues. *See Decision* at 266. NS corrected this understatement in its Reply evidence and DuPont incorporated a similar adjustment on Rebuttal, which resulted in SARR revenue allocations that were close to NS’s for most cross-over traffic—except for re-routed shipments.³⁴ Thus, after DuPont’s corrections on Rebuttal, the “ATC-SQL coding error” that produced significantly overstated SARR revenues on Opening was no longer a source of significant difference between the parties. Given the similarity in the evidence, it is incorrect to characterize the Board’s choice of one over the other as material error.

³⁴ *See* NS Br. at 93 (“Despite all of DuPont’s bluster and misdirection on Rebuttal, the parties’ final variable cost calculations for non-rerouted cross-over traffic are quite similar”).

The remaining dispute concerns DuPont's new treatment of re-routed shipments on Rebuttal. DuPont's Rebuttal introduced a new methodology for accounting for off-SARR segments of re-routed cross-over traffic. As the Board found, that new DuPont methodology was both untimely and substantively erroneous. *See Decision* at 269.

DuPont's opening methodology assumed that the DRR would receive all of NS's revenues for all re-routed shipments. The result is that DuPont allocated *no revenue* to residual incumbent NS for any cross-over traffic that was re-routed. Stated differently, on Opening DuPont had no methodology for allocating cross-over revenues for re-routed movements. It simply credited the DRR with all revenue for such movements, despite the fact that the residual NS indisputably was entitled to some revenue allocation for the portion of those movements it conducted on its system. On Reply, NS corrected this obvious methodological flaw by first identifying those re-routed shipments that would travel both on- and off-SARR (*i.e.* cross-over traffic). NS then allocated a portion of the revenues to the SARR by calculating average total costs separately for specific on-SARR segments—including re-routed segments³⁵—and for specific off-SARR segments. *See NS Reply* at III-A-82-83.

On Rebuttal, DuPont introduced a different methodology that rejected the calculation of ATC costs for on-SARR and off-SARR segments, and instead simply used a mileage pro-rate of costs to allocate revenues for re-routed cross-over traffic. Because the off-SARR costs that DuPont's new mileage-proration method shifted to the DRR were generally higher than on-

³⁵ DuPont suggests that it was erroneous for NS's methodology to use the mileages for the re-routed segment, and not the route actually traversed in the real world. NS acknowledges that it used the re-routed distance for two DRR segments. However the resulting distances were only 0.2 and 4.3 miles longer, or 0.1% and 3.4% respectively, than the actual route. The use of those two re-routed mileages would have only a slight impact on ATC allocations. And, because the resulting on-SARR mileages are longer than the actual NS route, those slight overstatements actually *over*-allocate variable costs (and hence revenue divisions) to the DRR, thereby working to DuPont's advantage.

SARR costs, shifting those costs based on relative miles covered by the segments distorted the ATC revenue allocation, and thereby substantially overstated DRR revenues. *See* NS Br. at 97.³⁶

On Reconsideration, DuPont claims that its Rebuttal used the “same methodology” that it used on Opening. *See* Pet. at 27. At best, this statement is disingenuous. As described above, DuPont’s Opening evidence had no methodology for allocating revenues for re-routed cross-over shipments—it simply assumed the DRR would garner all—100%—of the revenue generated by such shipments. Then, in the methodology it introduced for the first time on Rebuttal, DuPont used an inaccurate and distorting mileage-prorate approach, and applied it to twice the number of shipments it had identified as re-routed on Opening. As the Board correctly found, not only is DuPont’s new mileage pro-rate methodology improper rebuttal, it violates “Board precedent which requires that [costs of] each segment of cross-over traffic be determined using URCS.” *Decision* at 269. Regardless of whether DuPont’s new rebuttal methodology is rejected as impermissible rebuttal, a violation of Board rules and precedent, or both, the Board’s rejection of DuPont’s rebuttal evidence was plainly correct and appropriate.

D. The Board Did Not Materially Err By Not Allowing DuPont to Claim TCS/TDIS Revenues Without Accounting for Necessary Operating and Capital Expenses.

The Board correctly rejected DuPont’s attempt to credit the DRR with Triple Crown Services (“TCS”) and Thoroughbred Direct Intermodal Services (“TDIS”) revenues without accounting for the corresponding costs and capital investments necessary to generate those

³⁶ Review of DuPont’s workpapers uncovers further evidence that its Rebuttal treatment of re-routed shipments is unacceptable. On Opening, DuPont identified that the SARR would re-route 382,000 shipments. *See* DuPont Opening WP “DRR_2010_TRAFFIC_ATC_OPENING_v1_041412.xlsx.” On Rebuttal, DuPont more than doubled the amount of re-routed traffic, to 806,000 carloads. *See* DuPont Rebuttal WP “DRR_2010_TRAFFIC_ATC_REBUTTAL_v3.xlsx.” It is particularly notable that this significant change was not presented with any explanation, but simply unearthed from a column buried in DuPont’s workpapers.

revenues. DuPont's approach would violate fundamental SAC principles, Board precedent, and basic economic principles. The Board did not materially err by rejecting that fundamentally flawed approach.

On Opening, DuPont included intermodal revenues earned by TCS/TDIS as DRR revenues without requiring the DRR to make the capital investments and pay the operating costs for facilities, infrastructure, personnel, and other costs necessary to provide those intermodal services. *See, e.g., Decision* at 54. NS pointed out this deficiency on Reply, and provided illustrative examples of some of the necessary capital investments and costs of intermodal service that DuPont had excluded from DRR costs. *See NS Reply III-A-62-65*. On Rebuttal, DuPont deducted some additional operating costs from TCS/TDIS revenues, but continued to ignore other significant operating costs. *See NS Br.* at 59-60, 89-90. For example, DuPont's rebuttal included no TCS operating personnel costs whatsoever. Similarly, while DuPont proposed to add some operating costs for intermodal equipment, the investment costs (and related operating expenses) it included were grossly understated. *See id.* at 59-60.

The result of DuPont's attributing to the DRR all TCS/TDIS intermodal revenues while accounting for only a small fraction of the costs necessary to provide intermodal services is a gross overstatement of the contribution and net revenues generated by those services. *See id.* at 89-90. In addition, as NS demonstrated, DuPont's deficient approach would create an impermissible cross-subsidy by attributing to the DRR revenues for activities that do not share facilities with the issue traffic. *See, e.g., NS Reply* at III-A-64-65; *NS Br.* at 89.

E. The Board's Rejection of DuPont's "Interest Only" Approach to Debt Payments Was Not a Material Error.

The Board rightly rejected DuPont's attempt to break with longstanding agency precedent and allow the SBRR to make interest-only coupon payments on its debt rather than amortized

principal-and-debt payments. *See Decision* at 281-82. DuPont’s argument that the DRR would never pay down the principal on its debt allowed it to artificially inflate the DRR’s net present value by assuming that it would benefit from never-decreasing interest write-offs in every year of the SAC analysis. The Board rejected this manipulation, holding that such a “debt financing approach would abandon the fundamental structure of the SAC test” by effectively allowing a SARR to operate without ever paying for its assets. *Id.* at 281.

DuPont does not contest the Board’s basic holding that the SAC test requires that the SBRR pay down its debt over time. Instead, DuPont argues that it has found a material error in the Board’s analysis “because repayment of any principal amounts borrowed is accounted for in the levelized stream of capital recovery payments.” *Pet.* at 34. DuPont suggests that the Board must have not realized this fact and claims that it shows that the Board was wrong to say that an interest-only approach is inconsistent with the need for a SARR to repay its debt. *Id.* at 34-35.

DuPont’s argument is meritless. The Board was well aware of how capital carrying charges function in the “Investment SAC” portion of the DCF model, and it certainly understood that the “purpose of the debt amortization calculation is to develop the expected interest payments for use in estimating state and Federal taxes.” *Pet.* at 35. The issue is whether the debt amortization calculations used in the DCF analysis should reflect a SARR that is paying down its debt or a SARR that is only making payments on the interest. The Board’s DCF model assumes that the initial SARR investment—both the portion assumed to be acquired with equity and the portion assumed to be acquired with debt—will be amortized over the projected life of each SARR asset and that a new investment will be incurred at the end of each asset’s life.³⁷ As such, the Board did not err by holding that interest related expenditures on the unamortized investment

³⁷ *See* STB WP “D42125 Exhibit III-H-1 STB No3 Corrected STB.xlsm,” Tabs “Replacement” & “Investment SAC.”

acquired with debt should decline, consistent with the DCF assumption that the principal on that debt be paid down. If anything, the fact that the SARR's quarterly capital carrying charges are assumed to account for principal repayment is confirmation that the interest calculations should reflect gradual principal repayment. Failing to do so would create a significant mismatch between the Investment SAC level of the DCF and the Interest Payments schedule. The Board plainly did not materially err by rejecting DuPont's "interest-only" coupon approach.

F. The Board Did Not Materially Err In its Treatment of PTC Costs.

DuPont claims that the Board's calculation and allocation of PTC costs between the initial installation in 2009 and the upgrade to achieve RSIA compliance between 2010 and 2015, is erroneous because the Board should have simply created the fiction that the DRR could install a complete RSIA-compliant PTC system (including interoperability with other carriers) in 2009, despite the demonstrated infeasibility of such an assumption. *See* Pet. at 38. While NS agrees that the Board's development and allocation of costs between the two periods was erroneous, it strongly disagrees with DuPont's suggested "solution," which would simply wish away real world technical barriers and substitute an infeasible fantasy assumption, including the fact that much of that system did not even exist in 2009. The Board should reject DuPont's proposal to reverse the *Decision's* conclusion that the DRR would be required to upgrade any PTC system it installed in 2009 in order to bring it into compliance with RSIA standards by the end of 2015.

DuPont's new claim on reconsideration that requiring the DRR to incur the same PTC hardware and development costs that NS has and will incur is a "barrier to entry" is wrong for at least two reasons and should be rejected.³⁸ First, the Board's decision is consistent with the SAC

³⁸ A party may not raise new arguments for the first time in a reconsideration petition, and this new claim should be rejected on that basis alone. Reconsideration may be granted only upon a showing that the Board's action will be affected materially because of new evidence (DuPont does not rely on this ground) or that the Board's action "involves material error." 49 C.F.R.

principle that the SARR must incur the costs that NS has incurred.³⁹ The Board effectively assumed that DuPont would incur all PTC costs only once, by incurring all hardware costs in 2009 and then incurring only development costs for the necessary interoperability upgrade in the 2010-2015 period. *See, e.g., Decision* at 229-30; *Corrected Decision*, STB Docket No. 42125, at 5 (served Oct. 3, 2014). Thus, contrary to DuPont’s claim, the DRR would not be required to incur “two sets” of the same signals costs. Rather, under the approach followed by the *Decision* and implementing workpapers, the DRR would incur one full set of costs, spread among two time periods. The *Decision* imposes no impermissible “barrier to entry” because it requires only that the DRR make expenditures necessary to meet the RSIA PTC mandate, the same requirement imposed on incumbent NS.⁴⁰

Second, the Board’s application of the actual requirements of the law to find that the DRR would not be entitled to bonus depreciation for PTC investments in 2012-13 was entirely appropriate and does not impose an impermissible barrier to entry. As the Board correctly explained, bonus depreciation is available in a particular year only for assets placed in service in that year. *See Corrected Decision* at 5. It also concluded correctly that although the costs for the

1115.3(b)(2). New arguments raised for the first time on reconsideration do not constitute “material error,” and the Board need not—and should not—consider such new arguments at this very late date. *See, e.g., TMPA v. BNSF*, 7 S.T.B. 803, 804 (2004) (“[T]he Board generally does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages of the proceeding.”)

³⁹ NS contends in its reconsideration petition that that the Board should adjust DRR PTC costs to reflect the fact that the DRR would have to incur many costs twice—once to develop, install, and test the initial PTC system and then again to upgrade the hardware and software components of the system to RSIA requirements by the end of 2015. *See* NS Pet. for Reconsideration at 23-24 (filed Nov. 12, 2014). For purposes of this discussion only, NS assumes that the Board will decide not to change the calculation and leave PTC costs understated.

⁴⁰ The fact that the DRR may not incur PTC costs at “precisely the same time period” as incumbent NS (Pet. at 37) is a direct result of DuPont’s decision to assume that the DRR would implement PTC immediately (to the extent such a system was available and feasible by 2009), rather than follow the course of real world carriers and install CTC at the outset and upgrade to PTC, as NS proposed on Reply.

PTC interoperability may be assumed to be incurred in equal annual increments, the assets themselves would not be used until 2015. *Id.* Because the DRR would not be placing upgraded PTC assets into service in the 2010-2013 time period, it would not be entitled to any bonus depreciation for installation of such assets during that period.⁴¹

Despite DuPont's unsupported claim, it provides no evidence that NS took bonus depreciation on PTC assets "placed into service" from 2010 through 2013. *See* Pet. at 38. Nothing in the record or materials produced in discovery shows that NS claimed bonus depreciation for PTC assets placed in service between 2010 and 2013. There is thus no evidence to support DuPont's conclusory assertion that "NS itself has benefitted from bonus depreciation for its PTC costs incurred during those years [2010-2013]." *Id.* at 39. DuPont therefore has no basis to claim that the DRR would be denied bonus depreciation that NS obtained for PTC assets placed in service from 2010 through 2013. The *Decision* and *Corrected Decision* do not impose an impermissible barrier to entry with respect to PTC costs and the Board should deny DuPont's Petition with respect to PTC implementation and associated investments and costs.

G. The Board Correctly Determined that the Weighted Average Cost of Equity Should Be Measured From the Construction Starting Date for the DRR.

The Board agreed with NS's position that the equity component of the cost of capital for the DRR should be measured from the starting date for construction of the railroad. *See Decision* at 272-73. The Board correctly noted that its precedent focused on the "underlying point...that the cost of equity should reflect the construction start date, and all available subsequent data." *Id.* at 273. Therefore, because construction of the DRR was assumed to start

⁴¹ Bonus depreciation provisions expired at the end of 2013 and as of this writing have not been renewed by Congress. Regardless, any additional assets required for a DRR PTC upgrade would not be installed until the end of 2015 at the earliest.

in December 2006, the Board used only one month's worth of the 2006 cost of equity (*i.e.*, 1/12 of the full-year value) in its cost of equity calculations.

Regrettably, DuPont's response is to accuse the Board of having "misrepresented" the holding of *AEP Texas* by not using the full-year 2006 cost of equity in the cost of capital calculations. Pet. at 39. But the Board clearly explained that the "underlying point" of its *AEP Texas* reasoning was that "the cost of equity should reflect the construction start date, and all available subsequent data." *Decision* at 273. Only NS's evidence met that standard. DuPont's argument that "more data is better" amounts to nothing more than a disagreement with the selection of the December 2006 construction start date as the beginning of the measuring period for determining the DRR's cost of capital. There is no basis upon which the Board should reconsider this ruling.

DuPont also notes correctly that the Decision uses the railroad industry cost of capital from all of 2006 to 2011 in its calculations of the average cost of capital used to develop the DRR replacement costs. Pet. at 39-40. Should the Board choose to undertake any action on this issue, it should recalculate the average railroad industry cost of capital used in the development of DRR replacement costs to coincide with the DRR commencement of construction in December of 2006.

H. The Board's Acceptance of NS's Ad Valorem Tax Evidence Was Not a Material Error.

DuPont next claims that the Board erred by rejecting DuPont's estimate of ad valorem taxation, which the Board found "used a methodology that ignored how most of the states calculate Ad Valorem Taxes for railroads." *Decision* at 136-37. The Board's acceptance of NS's ad valorem tax evidence was predicated on the indisputable facts that "most states tax railroad property as a function of a railroad's total profitability as an enterprise" and thus that "a

SARR that is more profitable than the incumbent railroad would pay more taxes as a result.” *Decision* at 136. Only NS’s ad valorem tax evidence accounted for these facts; DuPont simply “ignored” them. *Id.* at 137. As a result, the Board found that NS’s assessment of the DRR’s ad valorem tax liability was “more accurate” than DuPont’s. *Id.*

DuPont’s Petition contains neither a response to the Board’s reasoning or a defense of DuPont’s proffered methodology, which is one that the Board has found to have “incurable” and “fundamental” flaws. *SunBelt* at 67 n.307 (commenting on ad valorem tax approach identical to DuPont’s).⁴² Instead, DuPont repackages a minor quibble it raised on Rebuttal with how NS’s unit value model accounted for the effect of taxes. *See* Pet. at 40-41. In the first place, this minor technical dispute pales in comparison to the plain error in DuPont’s approach that ignored the way that states actually calculate ad valorem taxes.⁴³ Moreover, the treatment of taxes in a unit value calculation is a complete red herring, for the DRR would pay no income taxes in the Base Year (which is the year used to calculate ad valorem tax liability). *See* STB WP “D42125 Exhibit III-H-I STB No3.xls” at “Federal Taxes” and “State Taxes” Tabs. Indeed, the DRR pays no income taxes until 2015—Year 6 of the SARR. *See id.* While DuPont hypothesizes that the DRR might incur some taxes in later years, it provided no evidence of the amount of that alleged tax liability or the effect that it might have on the unit value calculations. Without such evidence, DuPont cannot legitimately contest the Board’s judgment that the impact of DuPont’s

⁴² The only halfhearted defense DuPont offers for its methodology is the misleading claim that it was “historically” used by railroads in SAC cases. Pet. at 40. In fact, however, railroads have argued that the Board should account for unit valuation in the last six SAC cases, including *Seminole*, *AEPCO*, *IPA*, *DuPont*, *SunBelt*, and *TPI*.

⁴³ *See SunBelt* at 67 n.307 (holding that similar technical criticisms raised by SunBelt paled in comparison to SunBelt’s failure to account for unit value: “Although SunBelt has presented criticisms of NS’s methodology, neither criticism, if true, renders NS’s proposal infeasible. By contrast, NS details fundamental flaws in SunBelt’s position that are incurable.”).

income tax criticism on the accuracy of NS's ad valorem tax calculations outweighed the "fundamental" and "incurable" flaws in DuPont's own approach. *SunBelt* at 67 n.307.

If anything, NS's ad valorem tax methodology is conservative, because it does not account for the increasing profitability of the SARR in the later years of the SAC analysis. As the DRR becomes more profitable over the course of the SAC analysis period, its ad valorem tax obligations would increase faster than other operating expenses, particularly because ad valorem taxes are not escalated by volume growth in the DCF. But the Board escalated ad valorem tax expenses (and all other operating expenses) only for inflation. The understatement of taxes from this conservative escalation likely would significantly outstrip any overstatement resulting from any additional tax effects.⁴⁴

I. The Board Rightly Rejected DuPont's Improper Rebuttal Evidence of Triple Crown Car Costs.

DuPont next objects to the Board's decision to reject a DuPont estimate of car costs for Triple Crown shipments as improper Rebuttal. Pet. at 43. DuPont asserts that this Rebuttal evidence was proper because its only aim "was to correct a likely unintentional mistake by NS," but that characterization cannot be squared with the record. DuPont's Rebuttal submitted a new estimate of Triple Crown car costs that was based on a source that DuPont could have used on Opening and that had the effect of cutting car costs for these shipments to 1% of DuPont's Opening estimate—less than \$0.20 per shipment. See NS Br. at 59-60. The Board rightly concluded that this new evidence was improper rebuttal. Moreover, the Board rejected DuPont's

⁴⁴ In one of its miniaturized footnotes DuPont argues that a similar profitability analysis submitted in *SunBelt* was "flawed" because it supposedly did not consider "any deferred tax expense calculations." Pet. at 42 n.86. But DuPont has no response to the fundamental point that the SARR would be increasingly profitable over time and thus would have significantly higher ad valorem taxes in later years than would be suggested by an ordinary cost escalation.

evidence on the merits, finding that it “understates . . . the cost of intermodal equipment.”

Decision at 76. DuPont does not provide any reason why this substantive ruling was incorrect.

J. The Board Did Not Materially Err By Accepting NS’s Fringe Benefit Ratio.

Fringe benefits are yet another area where DuPont quibbles with alleged minor errors in NS’s methodology while ignoring the gaping flaws in its own methodology that caused the Board to accept NS’s evidence as the best evidence of record. On Opening, DuPont proposed a fringe benefit ratio of just 37.5%; NS’s Reply showed that this percentage appeared to be based on a miscalculation and that it was far lower than the reported fringe benefit ratios of Eastern carriers. *See* NS Reply at III-D-42–45. NS’s evidence calculated a fringe benefit ratio by taking a three-year average of ratios of the Class I railroads operating in the DRR’s territory (NS and CSXT). *See id.* at III-D-45–46. Rather than correct its error, DuPont stood by the 37.5% figure on Rebuttal, alleging that using a multi-year average would somehow double-count expenses and arguing that NS should not have included CSXT in its average. *See* DuPont Reb. at III-D-28. The Board chose to accept NS’s evidence, finding both that it appropriately used a “real-world three-year average” that did not create a double-count and that it was “logical” to use an average of NS and CSXT fringe benefit ratios because “the likely pool of employees from which the DRR would hire would be from railroads in the area, including particularly those employees from NS and CSXT.” *Decision* at 79.

DuPont’s reconsideration petition contains no defense of its proffered ratio, which NS proved was based on a plain mathematical error. Instead, DuPont repeats the arguments the Board rejected. It first complains that the Board should not have chosen an NS-CSXT average ratio because it was higher than NS’s own fringe benefit ratio. But the Board’s holding that it was “logical” to calculate a fringe benefit ratio based on the average of other railroads operating in the SARR States was consistent with both Board precedent and with DuPont’s own purported

desire on Opening to base fringe benefits on the average ratio in the states where the DRR operates. *See* NS Brief at 76-77; *Western Fuel Ass'n & Basin Elec. Power Coop. v. BNSF Ry. Co.*, STB Docket No. 42088, at 66 (served Sept. 10, 2007); DuPont Opening III-D-11.

DuPont next repeats its argument that a multi-year average of fringe benefit ratios creates a double-count of expenses. But DuPont does nothing to quantify the impact of any alleged double-count from averaging ratios from different years—likely because (even if DuPont were right) the impact would be trivial compared to the gap between DuPont's unsupported 37.5% underestimate and the actual average of NS and CSXT fringe benefits, which was at least 46.8% in every year. The Board did not materially err by finding that a multi-year average of percentages was a reasonable way to establish total fringe benefits in the base year. And even if DuPont's criticisms of NS's methodology had merit (and they do not), they pale in comparison to the significant and incurable flaws in DuPont's estimate. NS's evidence on this issue was undoubtedly the best evidence of record, and the Board did not materially err by accepting it.

K. The Board Did Not Materially Err By Accepting NS's ES44AC Locomotive Count.

DuPont next complains that the Board should not have accepted NS's ES44AC locomotive counts. DuPont's Rebuttal pointed out that NS's ES44AC road locomotive counts were calculated in part by dividing a 29 day study period by 24 analysis days; DuPont argued that this constituted a "mathematical error." NS's brief acknowledged the error, and explained that the divisor should have been 25 days rather than 24 days because of the need for a two-day warm-up period and two-day cool-down period within the 29-day study period. NS Br. at 57-58.

DuPont's Petition first claims that the Board should not have accepted NS's argument because it was "impermissible new evidence in its Brief." Pet. at 45. On the contrary, acknowledging and explaining how the Board could correct a calculation error is an eminently

appropriate element of a final brief. And if DuPont thought this constituted impermissible new evidence, it should have filed a motion to strike. DuPont next argues that NS's answer was "nonresponsive" to its criticism, but that is not true. The need to account for warm-up and cool-down procedures is the reason why the analysis days need to be four days shorter than the total study period. The Board did not commit material error by accepting this evidence.

L. DuPont's Argument That Certain Intermodal and Bulk Transfer Facilities Should Be Excluded from the SARR's Road Property Investment Is Correct For Two Facilities and Incorrect For The Others.

DuPont next argues that the Board erred by including road property investment costs for two intermodal and three bulk transfer facilities that DuPont claims "are not located on the DRR network." Pet. at 46. NS agrees with DuPont that the Elizabeth intermodal yard and the Baltimore bulk transfer facility should be removed from the SARR's road property investment. However, both the Cincinnati and the Charlotte bulk transfer facilities are properly included in the DRR because DuPont has claimed the revenue for traffic handled at those facilities. *See* NS Reply at III-C-67-68. Similarly, DuPont has claimed the revenue for traffic handled at the Conrail Morrisville, PA intermodal yard. As with other Conrail assets, 58% of the road property investment costs for this partially owned facility should be attributed to the SARR, for the reasons set forth in Section II.A. of NS's Petition for Reconsideration.

M. The Board Did Not Materially Err By Accepting NS's Clearing and Grubbing Costs, Which Were the Best Evidence of Record.

After correctly rejecting DuPont's Trestle-Hollow-based clearing and grubbing cost evidence, the Board appropriately adopted NS's Means-based clearing and grubbing costs as the best evidence of record. DuPont's case-in-chief relied upon a combined clearing and grubbing cost derived from the discredited Trestle Hollow project. *See* DuPont Open. at III-F-8-9. On Reply, NS submitted separate costs for clearing, for grubbing, and for clearing and grubbing, based upon Means costs that DuPont developed and submitted in its workpapers. *See Decision*

at 150. Because the Board appropriately rejected DuPont's Trestle Hollow unit costs, the best (and only) evidence of record regarding DRR clearing and grubbing unit costs were the Means-based costs presented by NS.⁴⁵ The Board properly adopted the best evidence of record.

N. The Board Did Not Materially Err In Its Calculations of Railcar Dwell Time.

DuPont claims that the Board's rejection of DuPont's railcar dwell times in yards was erroneous; however, its attempts to give legitimacy to its late-filed analysis at this even later juncture should be dismissed out of hand. DuPont failed entirely to account for dwell time at intermediate yards on Opening, an omission that NS remedied by including an estimate benchmarked to NS's actual experience and conservatively reduced in recognition of the SARR's operational efficiencies, as the Board noted in its Decision. *See Decision* at 75. DuPont acknowledged the need to account for such dwell for the first time on Rebuttal. In an attempt to include some evidence on this issue, DuPont explained that it "examined all general freight carloads in private cars by movement type" and "assigned" yard dwell to those cars, DuPont Reb. at III-D-15-16, but it pointed to no basis for its "assignment" of yard dwell. Now, for the first time, DuPont purports to have "accepted the NS evidence but applied it with greater precision." Pet. at 47. No such suggestion appears in DuPont's Rebuttal evidence. DuPont cannot attempt to resurrect its assignment of dwell time at this late hour. Even if the Board were to consider DuPont's argument in this Petition—which it should not—DuPont's attempt to adjust NS's analysis was premised on two fatal flaws that render its evidence unacceptable.

⁴⁵ Here again, DuPont fails to recognize that even if its marginal rebuttal criticisms of NS's clearing and grubbing evidence were valid, the Board would still have acted appropriately by adopting NS's evidence as the best evidence of record. DuPont made a conclusory criticism of NS's Means-based unit costs as not "ha[ving] any merit," but did not explain its unsupported criticism or provide alternative Means-based calculations. Thus, the costs presented by NS on Reply were the best evidence of record, and the Board properly adopted them.

First, in using “the characteristics of each individual movement,” DuPont erroneously limited its calculations to loaded movements. *Id.* While DuPont applied dwell time for each origination, termination, and interchange event for loaded railcars, it failed to account for the time those cars would spend dwelling in yards upon return as empties. For example, for a movement that was terminated on-SARR, DuPont assumed the car would dwell for 20 hours between the arrival of the road train and departure of the local train for delivery as a load. DuPont failed to account for the reverse movement: that same car would return from the destination to the serving yard on a local train as an empty, and dwell for another 20 hours awaiting subsequent departure on the outbound road train. DuPont’s “greater precision” in fact failed to account for half of the dwell time that would occur.

Second, by assuming dwell time is incurred only for events that occur at the shipment’s origination, termination, or interchange with foreign railroads, DuPont failed to account for time that cars spend at yards when switched between two road trains. On a merchandise network such as the DRR, millions of cars do not move directly from origin serving yard to destination serving yard on a single road train, but are handled by multiple trains and are classified and switched en route at hump yards or flat yards. This fact is confirmed by both DuPont’s and NS’s evidence. DuPont’s assumptions result in an average yard dwell time of 25 hours per every round-trip by DRR merchandise traffic in system equipment, which equates to only slightly more than a single dwell event on NS in the real world.⁴⁶ DuPont’s failure to consider these events results in significantly understated dwell times.

⁴⁶ See DuPont Reb. WP “ATC_TRAFFIC_REBUTTAL.xlsx;” NS Reply at III-D-29–30.

Not only was NS's evidence the only supported evidence put in the record, it is the only evidence that accurately calculates railcar dwell time in yards. The Board should reject DuPont's attempt to resurrect its unsupported and flawed analysis at this late hour.

O. The Board's Calculations of Set Out Tracks and Electric Locks Were Not a Material Error.

DuPont incorrectly argues that because the Board accepted the number of Failed Equipment Detectors proposed by DuPont it must also accept DuPont's set-out tracks evidence. The Board accepted NS's SARR operating plan and configuration and with them NS's evidence regarding the necessary miles of set-out tracks. *See, e.g., Decision* at 46.⁴⁷ The Board did not commit material error by accepting NS's track configuration, while declining to include additional FEDs proposed by NS.

While set out tracks are indeed often "associated with" FEDs, the fact that the Board rejected NS's FED count does not require it to accept the miles of set-out track that DuPont offered. Contrary to DuPont's suggestion, the number of FEDs alone does not necessarily determine the total miles of set-out tracks. As DuPont itself concedes, set out tracks near FED locations are "used primarily for temporary storage of bad-order cars detected by the FEDs, as well as for temporary storage of work equipment." DuPont Op. III-B-9 (emphasis added). DuPont's reconsideration request does not explain where MOW work equipment that would have been stored on bad-order set-out tracks would be stored if such set-out tracks were removed.

The Board did not commit material error by accepting NS's set-out track mileage, which was part of the NS SARR configuration adopted by the Board. This reconsideration request should be rejected.

⁴⁷ The Board accepted NS's operating plan and SARR configuration, the vast majority of its maintenance of way plan, and NS's determination of set-out track miles. *See id.* at 46, 101.

P. The Board Did Not Err When Applying the Land Inflation Index.

DuPont argues that the Board erred by not using the calculated quarterly index values of DuPont's land inflation index; the Board instead assumed that land inflation would equal DuPont's calculated annual inflation rate of 5.61%, averaging a constant 1.4% per quarter. *See* Pet. at 48. On the contrary, the Board's decision on this point was a reasonable application of its decisions to reject DuPont's real estate valuation while accepting its general approach to land inflation. DuPont fails to mention that the quarterly values in its land inflation index are derived directly from its rejected 2009 real estate valuation. *See* NS Reply at III-H-2. The Board's approach struck a reasonable balance between the parties' positions by accepting DuPont's calculation of the overall average growth rate while rejecting the actual quarterly values that were derived directly from its "skewed" real estate appraisal. *Decision* at 146.

Q. The Board Correctly Determined that the DRR Would Incur Flotation Costs In Connection With Its Raising \$17.2 Billion in Equity Capital.

DuPont cannot and does not contest the fact that the DRR would incur very significant costs associated with raising the enormous amount of \$17.2 billion in equity capital needed to finance its construction and operation. Rather DuPont argues that the entirety of this very real and very significant cost should be disallowed because that there is no evidence that NS incurred them and they would therefore constitute an impermissible "barrier to entry."⁴⁸ Pet. at 49.

That argument fails for the common sense reason that NS and its predecessors did not and could not have raised the large amounts of capital needed to build and operate the real-world NS system without incurring substantial fees from investment bankers and lawyers. Given the

⁴⁸ Because the Board declined to include any amount for equity flotation costs on the grounds that NS had not presented an acceptable percentage level in its Reply Evidence, the Board need not even entertain DuPont's request for reconsideration of this point. DuPont is literally asking that the Board "reconsider" a finding of zero dollars added to SAC—in other words, this issue can have no impact, let alone a material impact, on the outcome of the case.

amount of time that has elapsed since NS' predecessor railroads were established and financed their systems, it is not surprising that records of the transaction costs associated with such financings are not available. But it would impose an impossible evidentiary burden on NS and other railroad defendants in SAC cases to require a "showing that it actually incurred such costs when acquiring any of the DRR right-of-way." *Id.* The "barrier to entry" concept has to be tempered by reality, and not invoked as an excuse for a Complainant to avoid costs that by definition had to have been borne by the incumbent railroad—especially where such costs are widely recognized as both real and significant.⁴⁹ For example, mobilization costs are not recorded anywhere on NS's books, and yet the Board found that they amounted to 2.7%. *See Decision* at 251. The Board should not alter its correct conclusion that equity flotation costs are real, legitimate costs that the DRR would incur when it sought to finance itself.⁵⁰

R. The Board Did Not Err By Including Real Estate Acquisition Costs.

DuPont closes its petition with a short paragraph claiming that the Board should not have charged the DRR with the transaction costs of acquiring its real estate. DuPont does not dispute

⁴⁹ Equity flotation costs are well-recognized in financial literature. *See, e.g.,* Arzac and Marcus, *Flotation Cost Allowance in Rate of Return Regulation: A Note*, THE JOURNAL OF FINANCE, Vol. XXXVI, No. 5 (Dec. 1981) ("The cost of external equity capital is higher than the investor-required rate of return because of flotation costs (underwriting expenses and underpricing). Recognizing this, regulatory agencies have generally included an allowance for flotation costs in the authorized cost of capital."); Investopedia, "Complete Guide to Corporate Finance: Cost of Equity," available at <http://www.investopedia.com/walkthrough/corporate-finance/5/cost-capital/cost-equity.aspx> ("It is important to note that the cost of newly issued stock is higher than the company's cost of retained earnings. This is due to the flotation costs."); Cogito, "Correct Treatment of Flotation Costs," available at <http://qmarks.wordpress.com/2010/04/03/correct-treatment-of-flotation-costs/> ("Flotation costs are the fees charged by investment bankers when a company raises external equity capital and they can be often amount [sic] to between 2% and 7% of the total amount of equity capital raised, depending on the type of offering.").

⁵⁰ It should also be noted that although the Board found the DRR would have to raise \$17.2 billion in equity capital, that figure was based on DuPont's opening evidence estimate of RPI costs. But based on the Board's Decision as to the correct level of such costs, the actual amount of needed equity capital would be \$26.1 Billion (\$33.6 Billion x a weighted average equity amount of 77.85%).

that the DRR (like any other property buyer) would incur transaction costs when purchasing real estate over and above the value of the real estate. *See* NS Reply III-F-286. Nor does DuPont challenge NS’s calculation of those costs, which was based on conservative assumptions and real-world costs. *Id.* at III-F-287-89. Instead, DuPont claims that these costs are a barrier to entry because “NS has not made any showing that it actually incurred such costs.” Pet. at 49. On the contrary, NS has shown that documents provided to DuPont in discovery and included in its Opening workpapers showed “that NS and its predecessors devoted substantial resources to negotiating and entering agreements with landowners, securing title, surveying property, and recording land interests.” NS Br. at 158 (citing documents in DuPont Opening WP folder “Deed Documents,” which include individualized contracts and evidence of recordation fees and title work⁵¹). DuPont’s “barrier to entry” claim is thus utterly meritless.

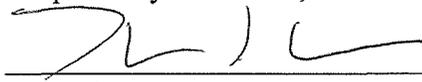
V. CONCLUSION

For the reasons stated above, the Board should deny DuPont’s Petition for Reconsideration.

⁵¹ For some examples, see “AL_33252[1].pdf” “AL_58060[1].pdf,” & “AL_58061[1].pdf” in DuPont Op. WP folder “Deed Documents,” subfolder “AL.”

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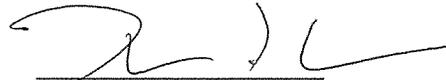
Counsel to Norfolk Southern Railway Company

Dated: December 12, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December 2014, I caused a copy of the foregoing Norfolk Southern Railway Company's Reply to DuPont's Petition for Reconsideration to be served by email and hand delivery upon:

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