

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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E.I. DUPONT DE NEMOURS & COMPANY)	
)	
Complainant)	
v.)	Docket No. NOR 42125
)	
NORFOLK SOUTHERN RAILWAY COMPANY)	
)	
Defendant)	
)	

**COMPLAINANT'S REPLY TO
DEFENDANT'S MOTION TO DISMISS**

Jeffrey O. Moreno
David E. Benz
Jason D. Tutrone
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036
(202) 331-8800

*Attorneys for Complainant E.I. du Pont de
Nemours and Company*

November 13, 2013

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E.I. du Pont de Nemours and Company (“DuPont”) hereby submits its reply to the Motion to Dismiss submitted by Norfolk Southern Railway Company (“NS”) in the above-captioned proceeding on October 24, 2013. NS has asked the Surface Transportation Board (“STB” or “Board”) to formally dismiss DuPont’s Complaint on the basis that dismissal is statutorily mandated by 49 U.S.C. § 11701(c), which dismisses any “formal investigative proceeding” begun by the Board under 49 U.S.C. § 11701(a) that has not been concluded with administrative finality by the end of the third year after the date on which it was begun. NS, however, comes to the Board with unclean hands, having substantially contributed to the delay in this proceeding, as explained in Part I. NS also misconstrues Section 11701(c), which on its face does not mandate dismissal of DuPont’s complaint, as explained in Part II. Moreover, as DuPont explains in Part III, dismissal of DuPont’s complaint under Section 11701(c) would violate DuPont’s constitutional right to due process. Even if dismissal were applicable and DuPont’s due process would not be violated, the facts surrounding this proceeding warrant deferral by the Board of automatic dismissal under its authority to defer mandated actions to realize broader statutory goals, as explained in Part IV.

I. NS PRESENTS AN INCOMPLETE, INACCURATE AND DISTORTED PROCEDURAL HISTORY OF THIS CASE IN AN ATTEMPT TO BLAME DUPONT FOR PROLONGING THIS PROCEEDING.

The NS Motion begins with a litany of the procedural history in this case, in which NS attempts to tar DuPont as the primary, if not the sole, reason why this case has not been concluded within three years. Indeed, NS brazenly contends that this procedural history is “evidence of DuPont’s utter indifference to the delays that its conduct has caused in this proceeding and of its ultimate responsibility for the fact that the Board did not issue an administratively final decision before the statutory deadline of October 7, 2013.” Motion at 5. Putting aside the argument that this is an inapplicable deadline, which DuPont addresses in Part II of this Reply, NS grossly distorts many facts, conveniently ignores other facts, and presents egregiously self-serving statements as if they were facts, in an effort to paper over its own significant role in prolonging the duration of this proceeding. Furthermore, NS all but ignores the most significant factor in the length of this proceeding, which is its unprecedented scope and complexity, to which NS has contributed through its litigation strategy.

This NS tactic is understandable because, regardless of the merits of its statutory interpretation arguments, NS cannot prevail on this Motion if it has contributed to the length of this proceeding. Moreover, NS also hopes to undermine due process concerns by blaming DuPont for the length of this proceeding. But, this tactic depends entirely upon incomplete, inaccurate and distorted characterizations of the procedural history in this case. A far more complete and balanced review of the procedural history exposes the omissions, inaccuracies and distortions in the NS Motion.

The Initial Procedural Schedule. NS disingenuously characterizes the initial procedural schedule in this case as “unusually long” and as “DuPont’s proposal.” Motion at 2. First, this was not DuPont’s proposal; it was a negotiated and mutually agreed upon schedule that sought to

balance the resource constraints of both parties and the Board in handling three SAC cases of unprecedented scope and complexity that had been filed within a five month period (from May 3, 2010 to October 7, 2010). In the “Motion for Procedural Schedule,” filed by DuPont on January 10, 2011, at pages 1-2, DuPont stated that:

This motion is being filed simultaneous with separate motions for procedural schedules in TOTAL Petrochemicals USA, Inc. v. CSX Transportation, Inc. et al and M&G Polymers USA LLC v. CSX Transportation, Inc., in STB Docket Nos. 42121 and 42123, respectively. DuPont asks that the Board consider all three motions together. Complaints in all three cases were filed within a six month period. All three dockets are complex [SAC] cases involving anywhere from 60 to 140 lanes of carload traffic. All three Complainants are represented by the same counsel and consultants, and both Defendants are represented by the same counsel and consultants. Therefore, careful coordination of procedural schedules is especially important to the fair and efficient prosecution of these cases. The dates in the proposed procedural schedules in all three dockets have been coordinated in order to minimize timing and resource conflicts; to provide the parties and the Board with adequate time to develop, present, and evaluate the evidence; and to produce timely decisions in these cases.

Because NS counsel and consultants represented the defendants in all three referenced cases, they very much benefited from a procedural schedule that did not unduly tax their resources or the Board’s, and they did not merely acquiesce in whatever schedule DuPont placed in front of them.¹ As the last filed of the three cases, this proceeding required a longer schedule than even DuPont itself desired.² Most importantly, regardless of the length of the initial procedural

¹ NS has admitted that this was a mutual schedule in prior pleadings. See “Norfolk Southern Railway Company’s Reply to Complainant’s Second Motion to Modify Procedural Schedule,” p. 5 (filed Dec. 20, 2011) (“NS and DuPont...agreed on a proposed procedural schedule...both to account for the relative complexities of a SAC case challenging carload movements between 140 separate lanes and to avoid overlap with other rate cases pending before the Board.”).

² The fact that DuPont’s initial procedural schedule was linked to modified procedural schedules in the *Total* and *M&G* cases also belies NS’s attempt to contrast DuPont’s schedule with that of *Total* and *M&G*. Motion at 2, n. 1. Both of those schedules required extensions, and in fact, the *Total* case is now over a year behind *DuPont* procedurally even though Total filed its complaint 5 months earlier. See *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, STB Docket No. NOR 42121 (served Sept. 26, 2013). The other cases cited by NS also are inapposite comparisons. The schedule cited by NS for *Seminole Elec. Coop., Inc. v. CSX Transp., Inc.*, STB Docket No. NOR 42110 (served Dec. 11, 2008) was extended four times after the cited decision. See *id.* (served May 6, 2009; July 13, 2009; March 5, 2010 and April 29, 2010). The schedule cited by NS for

schedule in this case, it turned out to be inadequate for DuPont's submission of opening evidence because of actions taken by NS, not DuPont.

The First Extension. Although NS correctly states that, in August 2011, DuPont requested a three-month extension, NS glosses over the reason why that extension was necessary. On or about March 7, 2011, NS informed DuPont that it could not produce traffic data because it constituted Sensitive Security Information ("SSI") and that the Federal Railroad Administration ("FRA") would have to authorize the disclosure.³ The parties brought this matter to the attention of the Board, which then coordinated meetings with FRA. FRA authorization, however, was not forthcoming until July 29, 2011, which was a month after the June 30, 2011 close of discovery under the initial procedural schedule, and more than four months after NS first raised this matter.⁴ NS began to produce traffic data to DuPont on August 3, 2011.

Because traffic data is the *sine qua non* of a SAC case, the analysis and review of which is essential prior to preparing most of a complainant's evidence, there was only so much that DuPont could do to prepare its opening evidence while waiting for the FRA order. Key foundational decisions such as identification of the Stand-Alone Railroad ("SARR") traffic group and the design of the SARR are highly dependent upon the traffic data. Furthermore, several other discovery matters could not be addressed until DuPont received, reviewed, and evaluated the traffic data, such as the selection of shipper contracts for production.⁵ Given the volume of traffic data in this case, that process of reviewing and evaluating the traffic data prior

South Mississippi Elec. Power Ass'n v. Norfolk So. Ry. Co., STB Docket No. NOR 42128 (served Mar. 14, 2011) was never truly tested because the case settled before the filing of any evidence. Furthermore, both the *Seminole* and *South Mississippi* cases were unit train coal cases that were much less complex than the multi-commodity carload cases involving between 60 and 140 lanes in this proceeding and the *Total* and *M&G* cases.

³ See E-mail from P. Hemmersbaugh to K. Dowd and C. Mills and copied to J. Moreno, dated March 7, 2011 (Ex. A).

⁴ See Memorandum from FRA Administrator Joseph C. Szabo, "Authorization to Share Sensitive Security Information (SSI) With Complainants and Other Parties Involved in Surface Transportation Board (STB) Administrative Proceedings" (July 29, 2011).

⁵ NS acknowledged this fact in a June 3, 2011 letter from M. Warren to J. Moreno, p. 2, n. 1 (Ex. B).

to being able to use it to prepare evidence would require many weeks. DuPont's request for a three month extension was intended to preserve the status quo that would have existed but for the SSI delay.⁶ This extension, like the initial procedural schedule, was negotiated with, and agreed to by, NS.⁷

The Second Extension. On December 12, 2011, DuPont requested an additional 90 day extension to the procedural schedule due to problems using the traffic data produced by NS and the sheer scope and complexity of this case.⁸ First, DuPont noted that NS had not produced mileage information associated with its traffic data until August 31, 2011.⁹ Second, DuPont noted that it had to submit multiple requests to NS for various decoders needed to understand the traffic data and information needed to link the car, train, and waybill files.¹⁰ Indeed, NS was still producing decoders on October 27, 2011.¹¹ Third, NS had provided incomplete car event data, which NS did not correct until September 29, 2011.¹² Fourth, NS did not produce intermodal event records until October 5, 2011, more than two months after its initial production of unusable car event data.¹³ Finally, on November 21, 2011, NS provided the final data set that enabled DuPont to link the disparate traffic databases in order to select traffic and design the SARR.¹⁴ It was not until this point, more than three months after NS first attempted to produce traffic data, and less than 50 days before the due date for DuPont's opening evidence, that DuPont possessed

⁶ See "Motion to Modify Procedural Schedule" (filed Aug. 9, 2011).

⁷ Despite its prior agreement to DuPont's requested extension, NS now suggests that 3 months was more than necessary because NS produced the traffic data just 34 days after the close of discovery. Motion at 3. But that logic only works if one assumes that NS never intended to produce its traffic data until the final day of discovery and that subsequent discovery that was dependent upon DuPont's review and analysis of the traffic data would have occurred after the close of discovery.

⁸ See "Motion to Modify Procedural Schedule" (filed Dec. 12, 2011).

⁹ *Id.* at 2-3.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 4.

¹² *Id.* at 3.

¹³ *Id.* at 4.

¹⁴ *Id.* at 5.

sufficient information to fully understand and analyze the NS traffic data.¹⁵ DuPont also noted that the unprecedented scope of the SARR required it to review and analyze an unprecedented amount of traffic data, which would have been difficult to accomplish even without the delays in production of that data by NS.¹⁶

NS denied most of DuPont's assertions regarding the impact of NS's production delays (although NS could not deny the delays themselves),¹⁷ and in this Motion, NS has described DuPont's difficulties as "substantially exaggerated."¹⁸ To support this mischaracterization, NS has presented a series of unproven allegations that it self-servingly describes as facts, in order to blame DuPont for the length of this proceeding. But DuPont's difficulties were thoroughly chronicled in contemporaneous correspondence with NS at the time and submitted as exhibits to DuPont's motion.¹⁹ Because the Board has never taken a position on either party's assertions, NS cannot portray its arguments as facts that prove DuPont is solely responsible for the length of this proceeding.

In granting DuPont's requested extension, the Board noted the parties' "widely divergent opinions regarding the importance of the discovery materials requested by DuPont and the timing of various discovery communications."²⁰ But the Board concluded that both parties' arguments underscored one key fact: "the unusual scope and complexity of this proceeding."²¹ Thus, the Board sought to ensure that DuPont had adequate time, after assembling a full set of

¹⁵ *Id.* at 5-6.

¹⁶ *Id.* at 7-8.

¹⁷ See "Norfolk Southern Railway Company's Reply to Complainant's Second Motion to Modify Procedural Schedule," (filed Dec. 20, 2011). NS also argued for the first time, in response to DuPont's motion, that DuPont's requested extension would jeopardize the Board's ability to issue a final decision within 3 years pursuant to 49 U.S.C. § 11701(c). *Id.* at 24.

¹⁸ Motion at 3.

¹⁹ See "Motion to Modify Procedural Schedule," Exs. A through M (filed Dec. 12, 2011).

²⁰ Decision served Jan. 13, 2012, p. 2.

²¹ *Id.*

information, to develop its evidence. DuPont subsequently submitted its opening evidence, without any further extensions, on April 30, 2012.

The Third Extension. The next extension of time was granted at the request of NS, which asked for 30 additional days to prepare its reply evidence.²² NS attempts to blame this extension entirely upon DuPont's submission of an errata just 17 days after it filed opening evidence. Motion at 4. But, NS also paved the way for requesting further extensions by asserting that "[d]ue to the complexity of this case, Norfolk Southern believes it is entirely possible that, once it has an opportunity to fully evaluate DuPont's revised evidence, NS may need to seek more time to prepare its Reply Evidence."²³ Furthermore, it is hypocritical for NS to use this errata, which was filed within 17 days, to cast blame upon DuPont for delays to this proceeding when NS itself waited nearly two full months before submitting an errata to its reply evidence.²⁴ The NS Motion fails even to mention this fact.

Although DuPont did not object to a 17 day extension, it opposed the NS request for 30 days as excessive. DuPont demonstrated that NS had grossly exaggerated both the scope of DuPont's errata and the amount of work that NS could have performed in just 17 days that might be nullified by the Errata.²⁵

The Board granted NS the full 30 day extension that it had requested.²⁶ As with its previous decision granting DuPont's extension request, the Board observed the parties' "widely divergent opinions regarding the importance of the materials submitted in DuPont's errata."²⁷

²² See "Norfolk Southern Railway Company's Motion for Modification of Procedural Schedule" (filed May 24, 2012).

²³ See "Norfolk Southern Railway Company's Motion for Modification of Procedural Schedule," p. 5 (filed May 24, 2012).

²⁴ See "Errata to Reply Evidence of Norfolk southern Railway Company" (filed Jan. 25, 2013).

²⁵ See "Reply of E.I. du Pont de Nemours and Company to Norfolk Southern Railway Company's Motion for Modification of Procedural Schedule," pp. 2-3 (filed May 29, 2012).

²⁶ See Decision served June 12, 2012.

²⁷ *Id.* at 1.

And, also like its prior decision, the Board declared that “[e]ven if the data submitted by DuPont in the errata were not central to the case..., it would still be important to ensure that the defendant in a case of this size has enough time, after assembling a full set of information, to develop its evidence.”²⁸

NS Request to Hold Proceeding in Abeyance. Approximately 8 weeks after receiving the foregoing 30 day extension, NS sought to bring the entire procedural schedule to a complete halt. Specifically, NS asked the Board to hold this proceeding in abeyance until the conclusion of the Board’s rulemaking proceeding in Ex Parte No. 715, *Rate Regulation Reforms*.²⁹ Although the Board ultimately denied that motion, the request itself, which had absolutely nothing to do with any action on the part of DuPont and was vigorously opposed by DuPont, is further evidence of NS’s role in attempting to prolong this proceeding. Moreover, it highlights the insincerity of NS’s attempt to blame DuPont for the length of this proceeding and the opportunism underlying the Motion to Dismiss.

The Fourth Extension. As foretold in the preceding NS request for a 30 day extension, NS in fact did request another extension of 60 days to submit its reply evidence.³⁰ Although NS attempts to blame this extension upon DuPont’s late production of certain workpapers, Motion at 4-5, DuPont provided those workpapers after NS filed its motion. Rather, the predicate for this NS motion was the “unusual scope and complexity” of this proceeding, which also was the basis for the Board’s prior two extensions to the procedural schedule.³¹ While the NS Motion was

²⁸ *Id.*

²⁹ See “Norfolk Southern Railway Company’s Motion to Hold Case In Abeyance Pending Completion of Rulemaking” (filed Aug. 27, 2012).

³⁰ See “Norfolk Southern Railway Company’s Motion for Modification of Procedural Schedule” (filed Aug. 16, 2012).

³¹ *Id.* at 2, *citing* Decision served Jan. 13, 2012. See also, *id.* at 3 (“Now that NS has had an opportunity to more fully review and analyze DuPont’s opening evidence, it has determined that it will need at least an additional 60-day extension...to allow it to develop and file complete evidence.”); 4 (noting the “extraordinary size” of this case); 8 (“Virtually every aspect of this case is of

pending, DuPont identified and served the missing workpapers, which NS subsequently argued to the Board as an additional reason to grant its motion.³²

In reply to this latest NS request for extension, DuPont acknowledged that the “unusual scope and complexity” of this proceeding might warrant additional time for NS.³³ But DuPont was forced to oppose the requested extension because NS previously had made clear that it would seek dismissal of this proceeding if not decided by October 7, 2013, which NS claimed was the deadline required by 49 U.S.C. § 11701(c), and any further extensions would jeopardize the Board’s ability to meet that deadline.³⁴ The present NS Motion now seeks dismissal on precisely that basis.

The Board granted the NS request for 60 additional days, citing both the delayed workpaper production and complexity of this case.³⁵ Furthermore, in response to DuPont’s concern that NS would invoke § 11701(c) to dismiss this case, the Board cited to its precedent holding that this deadline does not apply to rate cases initiated by complaint.³⁶ The Board also noted that a defendant can waive this issue through its course of conduct in a case.³⁷ NS finally filed its reply evidence on November 30, 2012.

The Fifth and Final Extension. On March 5, 2013, DuPont requested a final extension to the procedural schedule, which had two separate components: a modest 18 day extension for the

unprecedented scope and complexity”; “DuPont’s SARR traffic group and network are both larger and more diverse than in any previous SAC case, and the process of evaluating and correcting DuPont’s revenue projections and calculations and cross-over traffic revenue allocations is complex and time-consuming.”).

³² See Letter from P. Hemmersbaugh to C. Brown (STB Chief, Section of Administration) (filed Aug. 31, 2012).

³³ See “Reply to Norfolk Southern Railway Company’s Motion for Modification of Procedural Schedule,” p. 1 (filed Aug. 27, 2012).

³⁴ *Id.*

³⁵ Decision served Sept. 11, 2012.

³⁶ *Id.* at 2.

³⁷ *Id.*, citing *AEP Tex. N. Co. v. BNSF Ry.*, NOR 41191 (Sub-No. 1), slip op. at 6 (served Nov. 13, 2006) (holding that where a defendant agrees to an extended schedule, fairness precludes that defendant from claiming the complaint must be terminated after the three-year period).

submission of DuPont's rebuttal evidence and a similar 19 day extension for both parties' simultaneous submission of Final Briefs.³⁸ NS declined to take any position on this request, which was a clear attempt at posturing for this Motion to Dismiss so as to avoid overtly agreeing to this extension while also reaping the benefits of a longer time for preparing final briefs.³⁹ Given the lack of opposition by NS, the Board "grant-stamped" DuPont's motion. The critical fact here is that NS's own actions were directly responsible for this delay.

DuPont requested additional time for rebuttal evidence because NS had presented complex and extensive reply evidence that required more time to review and evaluate than initially anticipated. In particular, NS had both attacked DuPont's operating plan as irreparably flawed and proceeded to develop a completely new operating plan based upon a completely different methodology, using a completely new software program called MultiRail.⁴⁰ This required DuPont not only to defend its operating plan on rebuttal, but also to review and critique a completely new and different NS methodology, which included the need to obtain access to the MultiRail software and to learn how to use it.

This was complicated by the fact that NS did not file the software with its reply evidence and included only a cryptic statement, buried in footnote 245 on page III-C-158 of its Reply Evidence, that "NS has arranged with Oliver Wyman for both DuPont and the Board to be permitted limited access to MultiRail for purposes of this case." NS made no attempt to bring this fact to DuPont's attention or otherwise provide any instruction for obtaining the referenced

³⁸ See "Complainants' Joint Motion to Modify the Procedural Schedule" (filed March 5, 2013).

³⁹ The extra time for preparing final briefs significantly benefited NS, which used the extra time to submit a brief that contained 170 pages of narrative, plus 8 exhibits, that was nearly a point-for-point response to the DuPont rebuttal SAC evidence. In contrast, briefs serve very little purpose for complainants other than to repeat the highlights of their rebuttal evidence. In every case since this one, the Board has sought to curtail this abuse of final briefs by imposing page limits. See, *SunBelt Chlor Alkali Partnership v. Norfolk Southern Ry. Co.*, Docket No. 42130 (decision served July 15, 2013); *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, Docket No. 42121 (decision served Sept. 26, 2013).

⁴⁰ See "Complainants' Joint Motion to Modify the Procedural Schedule," p. 2 (filed March 5, 2013).

“access” until DuPont contacted NS on December 19, 2012.⁴¹ Even then, NS directed DuPont to contact Oliver Wyman directly for its terms of access to MultiRail.⁴² Despite multiple phone calls and e-mails to Oliver Wyman, DuPont did not receive a response until January 3, 2013, which was two weeks after first contacting NS.⁴³ There then ensued an additional exchange of communications between DuPont and Oliver Wyman, and then between DuPont and NS, regarding the terms of access to MultiRail.⁴⁴ In order to mitigate the delay that this dispute with NS already had caused, DuPont proceeded to procure MultiRail under the terms imposed by NS, while reserving the right to seek reimbursement of its expenses and other appropriate relief, at a later date.⁴⁵ DuPont finally obtained access to MultiRail on February 4, 2013, over two months after NS filed its reply evidence.

In addition to the foregoing delay caused by the NS use of MultiRail without submitting it as evidence, NS also filed an errata nearly 2 months after filings its reply evidence.⁴⁶ Although NS has pointed to DuPont’s submission of an errata just 17 days after its opening evidence in an attempt to blame DuPont for prolonging this proceeding, NS is conspicuously silent as to its own errata filed 2 months after its reply evidence. Furthermore, while NS requested a 30 day extension just to account for the 17 day delay caused by DuPont’s errata, DuPont requested just an 18 day extension to compensate for both the 2 month delay in the NS errata and the 2 month delay in obtaining access to MultiRail. DuPont’s very restrained request hardly constitutes “utter

⁴¹ See E-mail from J. Moreno to P. Moates, dated Dec. 19, 2012 (Ex. C).

⁴² See E-mail from P. Moates to J. Moreno, dated Dec. 19, 2012 (Ex. D).

⁴³ See E-mail from K. Foy, to R. Mulholland, dated Jan. 3, 2013 (Ex. E).

⁴⁴ See Correspondence attached as Exhibit F.

⁴⁵ See Letter from J. Moreno to P. Moates, dated Jan. 22, 2013 (Ex. G). That letter prompted NS to file “Norfolk Southern Railway Company’s Petition for Clarification,” on January 25, 2013, which the Board ultimately denied as moot. See Decision served March 27, 2013.

⁴⁶ See “Errata to Reply Evidence of Norfolk Southern Railway Company” (filed Jan. 25, 2013).

indifference” to delays in this proceeding; nor does it comport with NS’s attempt to assign ultimate responsibility for delays in this case solely to DuPont. *See* Motion at 5.

The extension of time for filing final briefs was necessitated by an overlapping procedural schedule in Docket NOR 42130, *SunBelt Chlor Alkali Partnership v. Norfolk Southern Ry. Co.*, that arose when SunBelt agreed to an NS request to extend the due date for NS reply evidence in that case because it fell just 18 days after NS filed reply evidence in DuPont’s case.⁴⁷ Because the complainants and defendants in both cases were represented by the same counsel and consultants, the proximity of dates would have caused substantial hardship to NS. As a consequence of SunBelt’s accommodation to NS, however, there now was only a single week between SunBelt’s submission of rebuttal evidence and DuPont’s due date for final briefs, which created a similar hardship for DuPont. Therefore, DuPont asked NS for the same accommodation that SunBelt had provided to NS.

* * *

The foregoing overview of the procedural history in this case provides a far more complete and accurate depiction than NS has presented. Two primary themes emerge from this history. First, the unprecedented scope and complexity of this proceeding has been the predominant factor influencing the length of this proceeding, and it has been the principal reason underlying nearly every procedural extension granted by the Board. Indeed, both DuPont and NS have invoked this factor in support of their separate requests for extensions of the procedural schedule. Second, NS cannot conceal its own significant role either in requesting extensions of the procedural schedule, tacitly acquiescing in extensions from which it also benefited, or in actively creating the need for extensions through its own actions in both this and other Board

⁴⁷ *See* Docket NOR 42130, “Norfolk Southern Railway Company’s Consent Motion to Modify Procedural Schedule,” p. 2 (filed Dec. 5, 2012).

proceedings. As discussed in the following sections, those are all factors that militate against granting the NS Motion to Dismiss.

II. SECTION 11701(C) DOES NOT REQUIRE DISMISSAL OF DUPONT'S COMPLAINT.

Despite Board precedent to the contrary,⁴⁸ NS asserts that 49 U.S.C. § 11701(c) requires dismissal of DuPont's Complaint. Motion at 5-9. NS contends, first, that an unambiguous reading of the statute requires dismissal, and second, even if the statute is ambiguous, the Board's prior interpretation is not reasonable. NS is wrong on both counts. Moreover, even if NS were correct, it cannot invoke the statute to dismiss DuPont's complaint because NS's own actions have contributed substantially to the length of this proceeding.

A. NS Misinterprets The Statute.

NS's attempt to derive a plain and unambiguous meaning from Section 11701(c) is severely strained. Subsection (c) states that:

A formal investigative proceeding begun by the Board under subsection (a) of this section is dismissed automatically unless it is concluded by the Board with administrative finality by the end of the third year after the date on which it was begun.

49 U.S.C. § 11701(c) (underline added). Although Congress used the term "formal investigative proceeding," it did not define that term. This fact alone created the need for interpretation by the agency. As early as 1983, the Board's predecessor, the Interstate Commerce Commission ("ICC" or "Commission"), had interpreted "formal investigative proceeding" to mean those investigations begun on the Commission's own initiative. *Complaints Filed Pursuant to the Savings Provisions of the Staggers Rail Act of 1980*, 367 I.C.C. 406, 410 (1983). Because a rate

⁴⁸ See, *AEP Tex. N. Co. v. BNSF Ry.*, STB Docket No. 41191 (Sub-No. 1), slip op. (served Nov. 13, 2006); *Complaints Filed Pursuant to the Savings Provisions of the Staggers Rail Act of 1980*, 367 I.C.C. 406, 410 (1983).

complaint is not a proceeding begun on the agency's own initiative, such proceedings are not included within the scope of Section 11701(c). That fact is dispositive of the NS Motion.

NS nevertheless claims that Congress, through changes to Section 11701(a) in the ICC Termination Act of 1995 ("ICCTA"), intended to change the meaning of a "formal investigative proceeding" in Section 11701(c). Motion at 8. But Congress did not provide a definition of a "formal investigative proceeding" in the ICCTA; nor did Congress make any change to Section 11701(c) other than to substitute "Board" for "Commission." Moreover, Congress is presumed to have been aware of the ICC's definition when it enacted the ICCTA without altering the term. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Had Congress intended for automatic dismissal of "formal investigative proceedings" to apply to complaint proceedings, it would not have been so cryptic. Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001). NS's attempt to divine a new definition of a "formal investigative proceeding" in subsection (c) from changes to subsection (a) is just such an attempt to find an elephant hidden in a mousehole.

The entirety of NS's statutory construction argument hinges upon a single flawed premise. NS contends that Section 11701(a) unambiguously "only authorizes Board investigations that are initiated by complaint." Motion at 6 (underline in original). According to NS, subsection (a) does not authorize any of the various Board-initiated investigations permitted by the statute. *See id.* (n. 11). Only through this contrived construction of the statute, however, can NS conclude that "[a] formal investigative proceeding begun by the Board under subsection (a)" includes a complaint proceeding, because as NS points out, then subsection (c) would have no meaning. But NS's interpretation of subsection (a) is unreasonable precisely because it

requires the conclusion that Congress *sub silentio* reversed the agency's long-standing interpretation of the term "formal investigative proceeding" to include proceedings that previously had been expressly excluded.

NS's interpretation also violates the very same cardinal principle of statutory interpretation that NS claims to be upholding. NS quotes *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) for the principle that "a statute ought, upon the whole, be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." Motion at 7. But, NS's own interpretation of subsection (a) has precisely that effect, by rendering superfluous the term "formal" in the phrase "formal investigative proceeding" in subsection (c). If formal investigative proceedings are the only investigative proceedings authorized by subsection (a), as NS insists, then there was no need for Congress to use the term "formal investigative proceeding" in subpart (c). By placing the descriptive term "formal" in front of "investigative proceeding," Congress plainly intended to delineate a subset of the investigative proceedings authorized by subsection (a).

A far more reasonable interpretation recognizes that Section 11701 does what it purports to do, which is establish the general authority of the Board. Section 11701(a) states:

Except as otherwise provided in this part, the Board may begin an investigation under this part only on complaint. If the Board finds that a rail carrier is violating this part, the Board shall take appropriate action to compel compliance with this part.

49 U.S.C. § 11701(a) (underline added). NS bases its interpretation upon the underlined phrase above, by which NS asserts that Congress intended to remove Board-initiated investigations from the scope of Section 11701 and instead authorized them in various other provisions

scattered throughout the statute.⁴⁹ But that interpretation is neither plainly obvious nor a reasonable construction of the statute. Rather, the post-ICCTA version of subsection (a), when read as a whole, applies to both complaint and Board-initiated investigations, just as the pre-ICCTA version did.

The core phrase in the first sentence of subsection (a) is “the Board may begin an investigation under this part....” The referenced “part” is to Part A, Subtitle IV, Title 49 U.S.C., which is titled “Rail.” In other words, it includes the entire rail section of the ICCTA, which encompasses provisions that permit the Board to begin various types of proceedings on its own initiative and provisions that permit the Board to begin a rate investigation only upon complaint.⁵⁰ The rest of the first sentence then clarifies the different levels of authority granted to the Board by subsection (a) for these two different types of investigations. It authorizes the Board to begin any type of investigation under Part A upon complaint and also to begin a narrower subset of investigations under Part A on its own initiative.

The second sentence in subsection (a) reinforces the foregoing interpretation. This sentence declares: “If the Board finds that a rail carrier is violating this part, the Board shall take appropriate action to compel compliance with this part.” It makes no distinction between complaint proceedings and Board-initiated proceedings, but instead broadly directs the Board to compel compliance with all of Part A. If Congress had intended for the Board to derive its non-complaint enforcement authority solely from disparate sections of Part A of 49 U.S.C. subtitle IV, as NS suggests, it would not have conferred in a single provision broad authority to compel compliance based on both complaint and non-complaint investigations.

⁴⁹ NS’s assertion that Board-initiated investigations are not authorized by Section 11701(a) because they are authorized in other sections of the statute is a red-herring, Motion at 6 (n. 11), because rate complaints also are authorized elsewhere in the statute, at 49 U.S.C. § 10704(b).

⁵⁰ Compare 49 U.S.C. §§ 10502(b) (exemptions), 10706(a)(4) & (d) (rate agreements), 10745 (services or facilities furnished by a shipper), 11123(b)(1) (emergency service orders), and 11233(c) (pooling agreements), with § 10704(b) (rate investigations).

Thus, even investigations initiated on the Board’s initiative are “begun by the Board under subsection (a).” As noted in long-held Board precedent, “formal investigative proceedings” refer to these investigations. *See AEP Tex. N. Co. v. BNSF Ry.*, STB Docket No. 41191 (Sub-No. 1), slip op. (served Nov. 13, 2006); *Complaints Filed Pursuant to the Savings Provisions of the Staggers Rail Act of 1980*, 367 I.C.C. 406, 410 (1983). Consequently, when Section 11701(c) declares that a “formal investigative proceeding begun by the Board under subsection (a) of this section is dismissed automatically” after three years, it is referring only to Board-initiated investigations, which has been the agency’s consistent interpretation of this section from its enactment.

B. The NS Interpretation Is Inconsistent With the Statute As A Whole.

The proper scope of Section 11701(c) also is informed by the context of the entire ICCTA. The “meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Thus, it is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Id.* at 133; *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989) (criticizing a “hypertechnical reading” of a statutory clause because “statutory language cannot be construed in a vacuum”). A court must “interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole.” *FDA*, 529 U.S. at 133 (internal quotations omitted). Upon this broader inquiry, it is apparent that Section 11701(c) does not apply to investigations initiated by complaint.

Automatic dismissal of rate cases within 3-years would be inconsistent with other provisions of the ICCTA, which embodies a policy “to provide for the expeditious handling and resolution of [rate cases].” 49 U.S.C. § 10101(15). The ICCTA requires the Board to:

- “establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case,” 49 U.S.C. § 10701(d)(3);
- “make its determination as to the reasonableness of [a] challenged rate—(1) within 9 months after the close of the administrative record if the determination is based upon a stand-alone cost presentation; or (2) within 6 months after the close of the administrative record if the determination is based upon [simplified standards],” 49 U.S.C. § 10704(c); and
- “establish procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates. The procedures shall include appropriate measures for avoiding delay in the discovery and evidentiary phases of such proceedings and exemption or revocation proceedings, including appropriate sanctions for such delay, and for ensuring prompt disposition of motions and interlocutory administrative appeals,” 49 U.S.C. § 10704(d).

These provisions indicate that Congress was acutely aware “that timely action by the Board is necessary, particularly when providing remedies to protect captive shippers against market abuse.” H.R. Rep. No. 104-422, at 166 (1995) (Conf. Rep.). That is, Congress sought to protect shippers’ access to relief from unreasonable rates under ICCTA, not curtail it with an automatic dismissal of rate cases after 3 years.

Also, nothing indicates that Congress intended automatic dismissal to be a loophole for carriers to avoid liability for charging unreasonable rates. Congress made rail carriers liable to shippers for damages they sustain as a result of a the carrier charging an unreasonable rate. 49 U.S.C. § 11704(b). Congress also gave shippers the right to obtain a rate prescription where a carrier charges an unreasonable rate. 49 U.S.C. § 10704(a). It makes little sense for Congress to give shippers these rights, but enact an automatic dismissal provision that would allow a carrier to undermine them for reasons wholly unrelated to the shipper’s own fault, including the use of dilatory tactics by the defendant or on the basis of Board inaction. Contrary to NS’s belief, this would result in an unfair windfall for a carrier, because a complainant stands to lose up to three

years of reparations even if it refiles its complaint.⁵¹ These are “absurd and unjust result[s] which Congress could not have intended.” *Clinton v. City of N.Y.*, 524 U.S. 417, 429 (1998).

Even a congressional intent to give railroads ratemaking discretion does not justify application of automatic dismissal to rate cases. Congress did not give railroads discretion to charge unreasonable rates—it expressly prohibited market dominant carriers from charging unreasonable rates and made them liable to shippers for damages incurred from such rates. 49 U.S.C. § 10701(d). The notion that Congress would require automatic dismissal of a rate complaint to protect railroads’ discretion to charge unreasonable rates is completely at odds with the statutory scheme Congress constructed.⁵²

Automatic dismissal under Section 11701(c) also is unnecessary to protect railroads from exposure to unlimited reparations because of agency delay. Motion at 7. First, Congress has already protected railroads from unlimited reparations and stale claims by enacting a limitations period on shipper rate complaints. 49 U.S.C. § 11705(c). Second, if Congress was concerned about unlimited reparations, it would have limited reparations, not enacted an automatic dismissal provision that denies all reparations after the 3-year mark.

Additionally, NS’s reading of Section 11701 does not support the notion that Congress intended to protect railroads from a complainant’s inability to timely demonstrate that the challenged rate is unreasonable. Motion at 7. If this were Congress’s intent, the automatic dismissal provision would not strip a complainant of relief where a railroad is the sole source of, or even contributes to, the delay. In contrast, an intent to protect both shippers and carriers from

⁵¹ The three years of lost reparations include the 2 years prior to filing its original complaint that a shipper can recover under the applicable statute of limitations, 49 U.S.C. § 11705(c), plus the first year of the proceeding that would be dismissed after the passage of three years.

⁵² Already, railroads have the benefit of being able to charge a shipper an unreasonable rate for the duration of a rate case. That alone protects a railroad’s rate setting discretion unless and until the rate is determined to be unreasonable, and thus unlawful.

Board delay in non-complaint investigations fits the contours of the statute and avoids the apparent injustice of dismissing a shipper's complaint as a result of a carrier's delay.

C. Equity Prohibits NS From Benefiting From Delays To Which It Contributed.

Even if the Board were to find that Section 11701(c) mandates dismissal of DuPont's complaint, NS has tolled dismissal by prolonging this proceeding through its own conduct, as explained in Part I. The Supreme Court has noted that "[t]ime requirements in lawsuits between private litigants are customarily subject to 'equitable tolling.'" *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990). Equitable tolling arises in situations where the passing of a deadline benefits a party whose conduct contributed to the passing of the deadline. *See Id.* at 96 (noting that tolling is applicable "where a complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass); *Baldwin County Welcome Ctr. V. Brown*, 466 U.S. 147, 151 (1984) (noting that equitable tolling would apply where the affirmative conduct of a party lulled the other party into inaction). NS should not be permitted to rob DuPont of relief by seeking dismissal for delays caused by NS's own actions.

Further, NS's Motion should be dismissed under the *in pari delicto* doctrine. This doctrine provides an equitable defense in a private action where the party seeking relief (1) as a result of its own actions, bears at least substantially equal responsibility for the violations it seeks to redress, and (2) preclusion of relief would not significantly interfere with the effective enforcement of law and the protection of the public. *Bateman Eicher, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985) (extending the doctrine to private actions under the securities laws). As explained in Part I, NS bears at least an equal level of responsibility for the delays in this proceeding. In addition, denying NS's Motion does not give rise to enforcement or public protection concerns. Indeed, by its Motion, NS is seeking to dodge enforcement of the statutory prohibition on unreasonable rates. Additionally, by their terms, the rate reasonableness statutes

were intended to protect the shipping public, of which DuPont is a member, from the unreasonable rates that form the basis of its Complaint.

III. DISMISSAL OF DUPONT’S COMPLAINT WOULD VIOLATE DUPONT’S CONSTITUTIONAL DUE PROCESS.

The NS interpretation of Section 11701(c) as requiring the Board to dismiss DuPont’s complaint solely due to the passage of three years would result in a violation of DuPont’s Constitutional due process. “The opportunity to be heard is an essential requisite of due process of law in judicial proceedings.” *Richards v. Jefferson County, Alabama*, 517 U.S. 793, 797 (n. 4) (1996) (citations omitted). *See also Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 (n. 7) (1972) (“[b]efore a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing”). Even if laws are adopted in accordance with the proper procedures of a democratically-elected, representative system of government, the application of those laws must also follow constitutionally-guaranteed procedures. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) (“the Due Process Clause provides that certain substantive rights...cannot be deprived except pursuant to constitutionally adequate procedures”). Without constitutionally sufficient due process, the legal basis for an adjudicator’s decision is just as infirm as if the substantive law were handed down by fiat instead of adopted in a democratically-elected legislature. To arbitrarily terminate an adjudicatory proceeding simply on the basis of a three-year time period would interrupt due process and violate the petitioner’s Constitutional rights. *See, e.g., Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (citations omitted) (“The fundamental requisite of due process of law is the opportunity to be heard.”).⁵³

⁵³ *See also Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (“[t]he touchstone of due process is protection of the individual against arbitrary action of government”) (citation omitted); *Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 811-812 (1985) (absent plaintiff member of class action is entitled to due process protections for its claim); 18A WRIGHT, MILLER, & COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449 (2d ed. 2002) (referring to “[o]ur deep-rooted historic tradition that everyone should have his own day in court”).

NS's erroneous attempt to apply the three-year limitation to DuPont's cause of action property right is akin to asserting that DuPont is not entitled to due process because the benefit sought by DuPont is a "privilege" rather than a "right." The Supreme Court long ago rejected the relevance of any possible Constitutional difference based on this distinction. *Graham v. Richardson*, 403 U.S. 365, 374 (1971) ("this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege'").

It is well-established that an interpretation of a statute that avoids serious constitutional conflict is preferred if the construction is not "plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). DuPont's interpretation of Section 11701(c) in Part II.A, above, avoids any constitutional conflict and is not plainly contrary to the intent of Congress. Because the statute is ambiguous, contrary to NS's assertions, the Board may disregard NS's contention that this doctrine of constitutional avoidance does not apply in this case. Motion at 9.

NS, however, also contends that Section 11701(c) does not implicate constitutional due process concerns because DuPont does not have a protected property interest in a rate case and because the delays in this proceeding are primarily attributable to DuPont's own actions, meaning that DuPont already has received all the process it was due. Motion at 9-10. The following subparts demonstrate that each of those NS contentions also is incorrect.

A. DuPont's Cause of Action Is a Property Interest Protected by Constitutional Due Process.

NS wrongly contends that complainants have no protected property interest in rate reasonableness cases. Motion at 9. In order to make this argument, NS completely ignores extensive precedent to the contrary, including at least one federal court decision that reached the

opposite conclusion on this precise question, and NS misstates the holding in a D.C. Circuit decision in order to create a very thin reed upon which to base its incorrect argument.

1. Established precedent confirms that a cause of action is a constitutionally protected property interest.

The law is clear that a cause of action is a property interest protected by the Fifth and Fourteenth Amendments. “Property extends to every species of right...and includes choses in action.” 63C Am. Jur. 2d *Property* § 4 (2009). As stated by the Supreme Court, “a cause of action is a species of property protected by the *Fourteenth Amendment’s Due Process Clause.*” *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 428 (1982) (citation omitted) (italics original). See also *Richards v. Jefferson County, Alabama*, 517 U.S. 793, 804 (1996) (“To conclude that the suit may nevertheless be barred...would thus be to deprive petitioners of their ‘choses in action,’ which we have held to be a protected property interest in its own right.”) (citations omitted). The *Logan* decision is particularly relevant to the NS Motion because, in that case, the Supreme Court found that an administrative agency’s dismissal of a proceeding due to the agency’s failure to meet a statutory deadline would violate the petitioner’s constitutional right to due process. *Logan*, 455 U.S. at 433 (“the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged”). Accord, *BNSF Railway Company v. STB*, 604 F.3d 602, 609-610 (D.C. Cir. 2010) (expressing concern in *dicta* that dismissal of a rate complaint under Section 11701(c) would violate the complainant’s due process); *BNSF Railway Company v. STB*, 453 F.3d 473, 479 (D.C. Cir. 2006) (same).

The foregoing decisions are reinforced by analogy to the Supreme Court’s decision in *Goldberg v. Kelly*, 397 U.S. 254, 264-266 (1970). In that decision, the Court held that a petitioner has a due process right to a hearing on eligibility for statutorily-defined welfare benefits, even if the petitioner has not yet shown that he or she qualifies under the statute. As

noted in other decisions, “The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing.” *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972). *See also Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 544 (1985). The situation facing the Board in DuPont’s case is no different: DuPont, like the petitioners in *Goldberg*, claims entitlement to a specific statutory benefit. In DuPont’s case, the “benefit” is a lawful, reasonable rail transportation rate as defined in 49 U.S.C. §§ 10701, 10702, and 10704. Regardless of whether DuPont, in fact, is entitled to the benefit, DuPont is guaranteed that there will be a fair and adequate hearing on the claim of entitlement. This is the essence of due process, and it forms a cornerstone of the American legal system.

Finally, neither NS nor the Board is writing on a blank slate as to the specific question presented by NS of whether DuPont’s rate reasonableness cause of action is a property right protected by constitutional due process. Consistent with the foregoing Supreme Court precedent, that question was explicitly answered 60 years ago when a federal district court held that a rate reasonableness cause of action under the Interstate Commerce Act “constitutes property within the meaning of the Fifth Amendment to the United States Constitution of which the plaintiff cannot be deprived without being given notice and a reasonable opportunity to be heard....” *Keystone Steel & Wire Company v. United States*, 117 F.Supp. 330, 333 (S.D. Ill. 1953). The NS argument clearly rests upon a foundation of quicksand.

2. The *Griffith* decision does not support NS’s position.

NS’s position that DuPont’s rate reasonableness cause of action is not a constitutionally protected property interest is based primarily on a misinterpretation of *Griffith v. Federal Labor Relations Authority*, 842 F.2d 487 (D.C. Cir. 1988). First, NS wrongly claims that *Griffith* applies to this case. Second, even if *Griffith* did apply, DuPont’s cause of action for reasonable

rates is distinguishable from the cause of action in *Griffith*. The following subparts address each of these points.

- a. The *Griffith* decision does not apply to DuPont's rate reasonableness cause of action.

NS contends that *Griffith* stands for the proposition that a cause of action is not a protected property interest if the fact finder has wide discretion. Motion at 9. But, the issue before the *Griffith* court was not a claim by the petitioner that a cause of action was a property right. Instead, the issue was petitioner's claim of a property interest "in an annual within-grade pay increase." 842 F.2d at 494. The "discretion" factor applied by the *Griffith* court, and cited by NS, is wholly inapplicable to situations where a party, such as DuPont, asserts a property interest in a cause of action.

DuPont has a statutorily-created right to use the Board's adjudicatory procedures that is wholly distinct from Ms. Griffith's assertion of a right to a pay increase – she had no such right, because, under the statute, a pay increase was granted solely in the judgment of her boss.⁵⁴ In contrast, the rate reasonableness statutes do not allow the Board to deny DuPont access to the rate case process.⁵⁵ In other words, there is no discretion applicable to DuPont's right to use the Board's rate case procedures; hence, DuPont has a protected property interest in the use of such procedures. *Logan*, 455 U.S. at 431 (a property interest can be a "right to use...adjudicatory procedures").

NS commits the fundamental error of mixing procedure and substantive law. The Supreme Court has emphatically stated that "[t]he categories of substance and procedure are distinct" and that property "cannot be defined by the procedures provided for its deprivation."

⁵⁴ *Griffith*, 842 F.2d at 496 ("federal employees are advanced to the next highest rate of pay within a particular grade only if 'the work of the employee...is of an acceptable level of competence as determined by the head of the agency.' 5 U.S.C. § 5335(a)(3)(B) (emphasis added)").

⁵⁵ *See, e.g.*, 49 U.S.C. § 10704(b).

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985). NS conflates DuPont’s right to use the Board’s procedures (where the cause of action is a property right) with the ultimate result in the rate case (whether DuPont obtains a rate reduction). *Griffith* does not support such a position. The *Griffith* court distinguished *Logan* on the grounds that “the property interest found and protected in *Logan* arose out of Illinois’s creation of a substantive cause of action, not out of its procedural specifications.” *Griffith*, 842 F.2d at 495. The court confirmed that a cause of action is a species of property protected by due process, whereas the legislative provision of procedural safeguards at issue in *Griffith* does not in itself create a property interest for purposes of due process analysis. *Id.* Because a rate reasonableness claim is a substantive cause of action, it is not within the ambit of *Griffith*.

If NS’s interpretation of *Griffith* were correct, then no protected property interest would ever exist for a cause of action adjudicated by trial, because, by definition, the jury (or judge if a bench trial) has “discretion” over whether or not to grant the requested relief. In short, NS’s argument proves too much because it would completely vitiate *Logan*. The Board should reject NS’s interpretation of *Griffith* because it is unsound and it results from an erroneous reading of the court’s opinion.

b. DuPont’s cause of action for reasonable rates is distinguishable from the cause of action in *Griffith*.

Citing to *Griffith*, NS contends that DuPont’s cause of action is not a property right because the Board has wide discretion over whether to order a rate prescription for DuPont under 49 U.S.C. § 10704(a)(1), which states that the Board “may prescribe” a rate. NS Motion at 9. But even assuming NS’s contention is correct, *Griffith* also acknowledges that a constitutionally protected property interest may arise through agency conduct that is independent of the statute:

Plaintiff makes no claim that agency conduct has, independently of the statute and regulations, created “mutually explicit

understandings” that would form an entitlement, *see Perry*, 408 U.S. at 601, so we have no occasion to assess that conduct.

Griffith, 842 F.2d at 495 (n. 3). In the decision cited by *Griffith*, the Supreme Court made clear that protected property interests can arise not just from statutes, but also from “rules or mutually explicit understandings.” *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). NS has ignored the fact that the ICC and the Board have created an elaborate system of rules and guidelines over the years to govern the rate case process and that those rules have created an expectation of a prescribed rate and reparations when specified criteria have been met.⁵⁶ These rules and guidelines also have been judicially affirmed.⁵⁷

The agency decisions in *Guidelines*, *Major Issues*, and various individual proceedings have created just such “rules” and “understandings”, leaving parties with no doubt that a rate will be prescribed in SAC cases upon meeting specified criteria. Under these established rules and guidelines, the Board will prescribe a rate when the complainant shows that the challenged rate is unreasonable pursuant to the criteria adopted by the Board for determining reasonableness. In *Guidelines*, the ICC stated that “railroads functioning in a noncompetitive market will be required to price as if alternatives to their services were available.” 1 I.C.C.2d at 542 (emphasis added). The *Major Issues* rulemaking confirmed that a rate will be prescribed if the challenged rate is unreasonable. In *Major Issues*, the Board stated that the percent reduction method was a process by which “the Board...required the railroad to reduce the challenged rate for each year

⁵⁶ See, e.g., *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985); *Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology*; STB Ex Parte No. 638 (served Sept. 4, 2002); *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1) (served Oct. 30, 2006). Additionally, numerous other Board proceedings have a direct impact upon the rate reasonableness process, such as the railroad cost of capital. See, e.g., *Methodology to be Employed in Determining the Railroad Industry’s Cost of Capital*, STB Ex Parte No. 664, slip op. at 1 (served Sept. 20, 2006) (the cost of capital “may also be utilized in other Board proceedings, including...those involving the prescription of maximum reasonable rates”).

⁵⁷ *Consolidated Rail Corporation v. United States*, 812 F.2d 1444 (3rd Cir. 1987) (affirming *Guidelines*); *BNSF Railway Company v. Surface Transportation Board*, 526 F.3d 770 (D.C. Cir. 2008) (affirming *Major Issues*).

of the SAC analysis period.”⁵⁸ The Board then “replace[d] the percent reduction approach with the Maximum Markup Methodology”, yet made no statement that application of MMM was not similarly required for each year of the SAC analysis period. Indeed, the Board’s explanation of MMM leaves no doubt that a rate will be prescribed:

- “the parties should first calculate the average R/VC ratio that would cover the total SAC costs in a given year”
- “[t]hey should then check to see if the share of the SAC costs assigned to any movement in the traffic group would exceed what could actually be charged that movement”
- “the difference should be reapportioned to the remaining traffic”
- “[t]his procedure should therefore be repeated”
- “[t]he SAC rate will be expressed as an R/VC ratio”

Major Issues, slip op. at 14 (emphasis added). Later in the same decision, the Board again stated that rates will be prescribed for the entire SAC analysis period:

The best policy is to tie the length of the rate prescription to the length of the SAC analysis. A 10-year analysis period will therefore mean no more than a 10-year rate prescription, should a railroad’s rates be deemed unreasonable.

Major Issues, slip op. at 65. These decisions demonstrate that the Board will prescribe rates for DuPont in the event that DuPont shows that the challenged NS rates are unreasonable. In other words, the Board has used the discretion afforded to it by Congress in 49 U.S.C. § 10704(a)(1) (“the Board may prescribe the maximum rate”) and decided that it will prescribe a maximum rate in SAC cases where the challenged rate is shown to be unreasonable.

Finally, a brief review of the actual facts in *Griffith* reveals that the Board has nowhere near the “discretion” sufficient to negate a property interest in a rate case cause of action. The SAC test is substantially driven by data, precedent, and prior rulemakings, leaving little room for

⁵⁸ *Major Issues*, slip op. at 9 (emphasis added).

the type of discretion described in *Griffith* – where the next pay level would be granted solely based on whether the employee’s performance was “acceptable” as determined by the head of the agency. *Griffith*, 842 F.2d at 496. Indeed, the *Griffith* court held that, in order for Ms. Griffith to establish a property interest in a “within-grade pay increase,” “she must show that the substantive provisions governing the grant of such increases give her a ‘legitimate’ claim of entitlement...by specifying ‘particularized standards or criteria [to]guide the...decisionmakers.’” *Id.* at 495, citing *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). The level of discretion that the court found in *Griffith* is worlds away from the very specific SAC rules and procedures developed and refined repeatedly in rulemakings and dozens of decisions over the past twenty-eight years. *Accord, Olim*, 461 U.S. at 249 (No property interest exists because the “regulations place[d] no substantive limitations on official discretion” and the decision-maker had “completely unfettered” discretion.). The details in *Major Issues* and other Board precedent constitute exactly the sort of “particularized standards or criteria” that confirm the existence of a protected property interest. *Id.* at 249 (quotation omitted).

Once the government has created a property interest, whether through statutes, regulations, rules, or other “understandings”, that property interest cannot be taken away except through due process.⁵⁹ NS’s Motion would impermissibly cause just such a result, and should be denied.

B. DuPont Has Not Received A Sufficient Opportunity To Be Heard.

Whether or not a protected property interest exists is one of the two factors that must be evaluated in any due process claim. *Logan*, 455 U.S. at 428. As explained in Part III.A, above, DuPont’s rate reasonableness cause of action is a protected property interest. The second factor

⁵⁹ See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974) (“The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests.”) (citation omitted).

consists of an evaluation of what process is due. *Id.* NS asserts that “DuPont has received all the process it was due, because the agency’s failure to meet the statutory deadline is primarily attributable to DuPont’s own decisions.” Motion at 10. As detailed in Part I, above, NS is wrong on the facts. This section summarizes those relevant facts which show that DuPont is not primarily responsible for the length of this proceeding.

As described by DuPont in Part I, NS presented a distorted characterization of the history of this proceeding in its Motion, ignoring or misrepresenting the following facts:

- the parties mutually agreed on the initial procedural schedule;
- the initial procedural schedule was developed to coordinate with two other cases of similar scope and complexity that were begun 4-5 months before DuPont’s complaint, in which the complainants and defendants were represented by the same counsel and consultants in all three cases, in order to alleviate burdens on both parties as well as the Board;
- the first extension, which was the subject of mutual agreement, was needed in order to obtain FRA authorization for NS’s production of SSI traffic data to DuPont in discovery;
- the second extension was needed to account for NS’s delayed and incomplete production of critical traffic data in this proceeding of unusual scope and complexity;
- the third extension was granted in order to account for DuPont’s submission of an errata just 17 days after its opening evidence;
- the fourth extension was at NS’s request, due to the unusual scope and complexity of the proceeding, to which NS subsequently added the late submission of a work paper by DuPont as further justification; and
- the fifth extension was needed because of a two month delay in the provision of access by NS to the MultiRail software; the submission of an errata by NS two months after the filing of its reply evidence; and conflicts with the procedural schedule in another proceeding involving NS where both parties were represented by the same counsel and consultants.

Moreover, NS’s suggestion that there was unusual delay in this case, with an “extraordinarily long [procedural] schedule,”⁶⁰ is belied by the fact that rate reasonableness cases

⁶⁰ Motion at 10.

routinely have exceeded three years in length.⁶¹ It strains credulity to suggest that DuPont is only “due” 36 months of a legal proceeding, up to 9 months of which is devoted to the Board’s deliberation on the evidence, after which the time, effort and expense of the preceding three years can be nullified by fiat.⁶² Fundamental principles of justice require a decision on the merits of DuPont’s claim that NS’s rates are unlawful in violation of 49 U.S.C. § 10701(d)(1). The most basic principles of fairness, equal treatment under the law, and the rule of law require that DuPont, like any other petitioner, is entitled to its day in court.

IV. AN AGENCY MAY DEFER ACTIONS MANDATED BY STATUTE IF NECESSARY TO REALIZE THE BROADER GOALS OF THE SAME STATUTE.

For the reasons expressed in the preceding sections of this Reply, the NS interpretation of Section 11701(c) is incorrect and would violate DuPont’s due process rights. However, even if NS has correctly construed the statute and there is no violation of due process, the Board still has the authority to decide DuPont’s complaint even after the expiration of three years, in order to realize the broader goals of the statute.

⁶¹ See, e.g., *Western Fuels Ass’n, Inc. and Basin Electric Power Coop. v. BNSF Railway Co.*, STB Docket No. 42088 (complaint Oct. 19, 2004; decision Feb. 18, 2009); *AEP Texas North Co. v. BNSF Railway Co.*, STB Docket No. 41191 (Sub-No. 1) (complaint Aug. 11, 2003; decision Sept. 10, 2007); *Otter Tail Power Co. v. BNSF Railway Co.*, STB Docket No. 42071 (complaint Jan. 2, 2002; decision Jan. 27, 2006); *Arizona Electric Power Coop., Inc. v. The Burlington Northern and Santa Fe Railway Co. and Union Pacific Railway Co.*, STB Docket No. 42058 (complaint Dec. 29, 2000; decision Mar. 15, 2005); *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Co.*, 7 S.T.B. 803 (complaint Oct. 3, 2000; reconsideration decision Sept. 24, 2004); *Public Service Co. of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Co.*, 7 S.T.B. 589 (2004) (complaint Dec. 20, 2000; decision June 7, 2004); *Duke Energy Corp. v. CSX Transp., Inc.*, STB Docket No. 42070 (complaint Dec. 19, 2001; voluntary dismissal on July 8, 2005); *Duke Energy Corp. v. Norfolk Southern Railway Co.*, STB Docket No. 42069 (complaint Dec. 19, 2001; voluntary dismissal on July 8, 2005); *Carolina Power & Light Co. v. Norfolk Southern Railway Co.*, STB Docket No. 42072 (complaint Feb. 1, 2002; voluntary dismissal on July 8, 2005); *Arizona Public Service Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 2 S.T.B. 367 (1997) (complaint January 3, 1994; decision July 21, 1997); *McCarty Farms, Inc. v. Burlington Northern, Inc.*, 2 S.T.B. 460 (1997) (court referral Mar. 16, 1981; decision Aug. 14, 1997); *Bituminous Coal – Hiawatha, Utah to Moapa, Nevada*, 10 I.C.C.2d 259 (1994) (remand from 10th Circuit in 1981; decision Oct. 12, 1994); *Arkansas Power & Light Co. v. Burlington Northern Railroad Co.*, 3 I.C.C.2d 757 (1987) (complaint Feb. 10, 1984; decision May 7, 1987); *Coal Trading Corp. v. The Baltimore and Ohio Railroad Co.*, 6 I.C.C.2d 361, 369 (1990) (stating that Opening Evidence was filed December 22, 1986; decision January 17, 1990); *Omaha Public Power District v. Burlington Northern Railroad Co.*, 3 I.C.C.2d 123, 134 (1986) (stating that the proceeding began prior to proposed rules issued on February 24, 1983; decision November 14, 1986).

⁶² See 49 U.S.C. § 10704(c)(1).

This conclusion is predicated upon *Western Coal Traffic League v. Surface Transportation Board*, 216 F.3d 1168 (D.C. Cir. 2000) (“WCTL”), in which the D.C. Circuit affirmed the Board’s imposition of a 15 month moratorium upon the filing of railroad merger applications despite a statutory requirement that, once a complete application is proffered, the Board must accept and consider it within 16 months as required by 49 U.S.C. § 11325. The court applied the two-part *Chevron* test to determine whether the Board had the statutory authority to suspend the statutory deadlines by imposing the merger moratorium. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

The Court noted, at the outset, that “[t]he statute does not address the unanticipated conflict this case presents between the process by which the Board is to review a proposed merger and the purposes for which the Board is to conduct its review.” *WCTL* at 1173. Although the Court acknowledged the logic in Petitioners’ claims that, because Congress intended to expedite the Board’s review of merger proposals, a moratorium that delays the start of that review depends upon an unreasonable reading of the statute as a whole, it was persuaded to uphold the Board’s moratorium “by the numerous cases upholding agency decisions to defer actions mandated by statute...where doing so is administratively necessary in order to realize the broader goals for the same statute....” *Id.*, citing *Westinghouse Elec. Corp. v. NRC*, 598 F.2d 759 (3rd Cir. 1979) and *Commonwealth of Penn. v. Lynn*, 501 F.2d 848 (D.C. Cir. 1974).

The Court also looked for guidance in cases seeking a *writ of mandamus* because the agency failed to meet a statutory deadline. *WCTL* at 1174-76. Citing to *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (“TRAC”), the Court noted that “the specificity of the statutory timetable is merely one of six factors we consider when determining whether a protestant is entitled to relief from the agency’s delay.” *WCTL* at

1174. Other factors, as pertinent to the NS Motion, are: (1) the time agencies take to make decisions must be governed by a “rule of reason;” (2) the effect of expediting delayed action on agency activities of a higher or competing priority; (3) the length of the delay, with longer delays being more reasonable in the sphere of economic regulation than would be tolerable when human health and welfare are at stake; and (4) the nature and extent of the interests prejudiced by delay. *TRAC* at 79-80. The *WCTL* court recognized that competing statutory standards can inform the “rule of reason” evaluation and that the importance of meeting the statutory deadline must be weighed against the effect of expedited action upon agency activities of a higher or competing priority.

In *WCTL*, the Court upheld the merger moratorium because “[n]either the statute nor the legislative history give any indication that the Congress considered compliance with the timeline in § 11325 more important than the substantive purposes for which the Board reviews merger applications.” *WCTL* at 1175. There was no evidence of bad faith on the part of the Board, which had demonstrated a reasonable need for delay, and the Court had “no reason to think that judicial intervention would advance either fairness or Congress’s policy objectives.” *Id.* at 1176, quoting *In re Barr Laboratories, Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991). In light of these considerations, the Board’s 15 month merger moratorium was a reasonable exercise of discretion in balancing the agency’s statutory objectives.

Under the *WCTL* analysis, the delay in DuPont’s case beyond three years also is justified. The statute does not address the conflict between ensuring reasonable rates for captive shippers, 49 U.S.C. § 10701(d)(1), and the alleged three-year deadline for concluding such cases with administrative finality, 49 U.S.C. § 10701(c). This alleged deadline is rife with potential for abuse and unfairness that Congress could not have intended. For example, railroad-defendants

could avoid review of their rates by taking actions, with or without the objective of delay, that, either singularly or cumulatively, cause a rate case to require more than 3 years to complete. Also, the Board could allow an unreasonable rate to evade review by extending a rate case beyond 3 years. There could be—and in this case there are—many legitimate reasons why a rate case cannot be completed within 3 years. It would be particularly incongruous to require dismissal of a rate case after 3 years, without considering any of those circumstances, because the reasonable rate requirement in the statute is intended to protect the shipper, which is the only entity that would be injured by dismissal of its case.

There are several reasonable explanations, consistent with the factors identified in *TRAC*, as to why DuPont's rate case has taken longer than three years that would justify issuing a decision in this proceeding despite the passage of three years.

First, as discussed in Part I, this case was delayed by four months at the very outset while the Board and the parties sought authorization for NS to produce critical traffic data to DuPont that was considered to be SSI and without which DuPont could not prepare the vast majority of its evidence. The complications associated with the critical role played by SSI in rate cases was not contemplated by Congress when it adopted the ICCTA in 1995, because traffic data was not designated SSI until well after that.

Second, the unprecedented scope and complexity of DuPont's case was not contemplated by Congress in 1995. Nearly every prior SAC case has involved the transportation of coal unit trains, which have required much smaller SARRs and far less complex operations. Indeed, the SAC test was originally adopted with unit train coal traffic in mind. *See Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 521 (1985) (introducing new rate reasonableness standards in the context of coal rate cases). DuPont's case, in contrast, has required an 8,000 mile SARR that

handles extensive amounts of carload traffic in order to determine the reasonableness of rates for 138 movements of 26 different commodities in carload quantities, which makes this case one of the largest, if not the largest, and most complex SAC cases ever litigated before the agency. As the very first case of its kind, this proceeding has presented far more unique and difficult challenges for the parties to address than prior SAC cases.⁶³

As discussed in Part I, the “unusual scope and complexity” of this case was invoked by both parties in 3 of their combined 5 requests to extend the procedural schedule, and by the Board in its decisions granting those requests. The scope and complexity of this case adversely affected NS’s ability to produce traffic data in a complete and timely manner; DuPont’s ability to review, evaluate and process that data; and the time required by both parties to review, evaluate and respond to the other’s evidence. Congress surely did not intend to deprive DuPont of a final decision just because the complexity of the case precluded an administratively final decision in less than 3 years.

Third, also as discussed in Part I, this case was the third of three SAC cases filed at the Board within a 5 month period of similar unprecedented scope and complexity. Moreover, all three complainants were represented by the same counsel and consultants as were both defendants in all three cases. In addition to those three cases, there were two other SAC cases also being litigated before the Board during this time that brought the total number of SAC cases to five.⁶⁴ Of those five cases, four involved the same counsel on both sides and all five involved the same consultants. Consequently, as noted in two of the procedural schedule requests in this

⁶³ See, e.g., “Opening Evidence and Argument of E.I. du Pont de Nemours and Company,” Exs. III-A-2, III-A-3 and III-C-1 (filed April 30, 2012); and “Rebuttal Evidence and Argument of E.I. du Pont de Nemours and Company,” Ex. III-C-1 (filed April 15, 2013).

⁶⁴ *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, Docket No. 42121; *M&G Polymers USA, LLC v. CSX Transp., Inc.*, Docket No. 42123; *SunBelt Chlor Alkali Partnership v. Norfolk Southern Ry. Co.*, Docket No. 42130; and *Intermountain Power Agency v. Union Pac. R.R. Co.*, Docket Nos. 42127 and 42136.

case, there was a need to stagger these cases of unprecedented scope and complexity so as not to unduly tax the resources of both the parties and the Board. Scheduling and resource constraints were further magnified when the Board bifurcated the market dominance and SAC determinations in the *Total* and *M&G* cases against CSXT, which effectively doubled the number of evidence submissions in each of those cases from three to six.⁶⁵ The Board seldom has ever had this many SAC cases filed so close together and pending at the same time, much less cases of this scope and complexity.⁶⁶ All of these cases were competing for priority at the Board both with each other and with other types of Board proceedings.

Fourth, the nature and extent of the interests prejudiced by a delay beyond the alleged three year deadline are primarily, if not exclusively, those of the shipper. It is the shipper who must continue to pay the unreasonable rate throughout the duration of the agency proceeding, often at a higher rate level than the shipper previously had rejected when it decided to initiate its rate challenge. A longer proceeding also exposes the shipper to tremendous uncertainty concerning its logistics costs that impedes its ability to effectively compete for rail-served business, especially if that business is not profitable at the challenged rate but would be profitable at a reasonable rate.

In the ICCTA, which is the same legislation in which NS contends that Congress changed the statute to impose the three year dismissal requirement in Section 10701(c) upon complaint

⁶⁵ *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, Docket No. 42121 (served Apr. 5, 2011); and *M&G Polymers USA, LLC v. CSX Transp., Inc.*, Docket No. 42123 (served May 6, 2011).

⁶⁶ From 2002 through 2004, there were six rate cases pending before the Board at the same time, all of them unit train coal cases, four of which were filed within a two month window, and none of which was concluded with administrative finality within 3 years. See, *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Co.*, 7 S.T.B. 803 (complaint filed Oct. 3, 2000; reconsideration decision Sept. 24, 2004); *Public Service Co. of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Co.*, 7 S.T.B. 589 (2004) (complaint filed Dec. 20, 2000; decision June 7, 2004); *Duke Energy Corp. v. CSX Transp., Inc.*, STB Docket No. 42070 (complaint filed Dec. 19, 2001; proceeding voluntarily dismissed July 8, 2005); *Duke Energy Corp. v. Norfolk Southern Railway Co.*, STB Docket No. 42069 (complaint filed Dec. 19, 2001; proceeding voluntarily dismissed July 8, 2005); *Otter Tail Power Co. v. BNSF Railway Co.*, STB Docket No. 42071 (complaint filed Jan. 2, 2002; decision Jan. 27, 2006); *Carolina Power & Light Co. v. Norfolk Southern Railway Co.*, STB Docket No. 42072 (complaint filed Feb. 1, 2002; proceeding voluntarily dismissed July 8, 2005).

proceedings, *see* Motion at 8-9, Congress also added a new rail transportation policy “to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.” 49 U.S.C. § 10101(15). The legislative history behind the addition of this new policy was to “recognize[] that timely action by the Board is necessary, particularly when providing remedies to protect captive shippers against market abuse.” H. Conf. Rep. No. 104-422, 104th Cong., 1st Sess., 166, *reprinted in* 1995 U.S.C.C.A.N. 850, 851 (underline added). Yet, it is the shipper who would be punished if its complaint were dismissed solely because it was not concluded within three years. Thus, it would be particularly incongruous for Congress to have intended to dismiss DuPont’s complaint for taking too long while at the same time adopting a policy of expedited resolution of such complaints in order to protect captive shippers.

Even though NS asserts that a shipper could start all over again by filing a new complaint, Motion at 8 (n. 14), dismissal of the original complaint would extend the period of business uncertainty described above, deprive the shipper of up to three years of potential reparations,⁶⁷ and render for naught several million dollars of litigation costs.⁶⁸

NS also incorrectly asserts that its interests would be prejudiced by delay because, without Section 11701(c), it would be exposed to unlimited reparations. Motion at 7. But that is not true because a rate case exposes the defendant to a prescribed rate over a fixed period of 10 years, through any combination of reparations or rate prescriptions, regardless how long the proceeding lasts. *See Major Issue in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 64 (served Oct. 30, 2006).

⁶⁷ *See* note 51, *supra*.

⁶⁸ *See Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), slip op. at 32 (served Sept. 4, 2007) (estimating SAC litigation costs at \$5 million).

Finally, the total delay in this case is likely to be under a year if the Board decides this case within 9 months after the close of the record as required by 49 U.S.C. § 10704(c). That delay is hardly unreasonable under the foregoing circumstances. *Cf. WCTL* at 1176 (accepting 15 month merger moratorium). Nor is it exceedingly long when compared with the multitude of other SAC cases that have extended beyond three years.⁶⁹

* * *

Even if Section 11701(c) does require the Board to dismiss rate complaints that are not administratively final within three years (which DuPont does not concede), judicial precedent permits the Board to exceed that deadline under the extenuating circumstances of this case, in the interest of fairness and in order to realize the broader goals of the statute to ensure reasonable rates for captive shippers. There is no evidence in the statute or legislative history that Congress considered compliance with the timeline in Section 11701(c) to be more important than the substantive purpose in Section 10701(d)(1) that the rail rates of captive shippers be reasonable. Indeed, what little legislative history exists on the subject stresses the desire of Congress to expedite the resolution of rate complaints for the benefit of captive shippers, not to punish them. Thus, the Board would be acting reasonably and within its statutory authority to decide this case despite the passage of more than 3 years.

⁶⁹ See note 66, *supra*.

V. CONCLUSION.

For the foregoing reasons, the Board should deny the NS "Motion Strike" DuPont's Complaint.

Respectfully submitted,



Jeffrey O. Moreno
David E. Benz
Jason D. Tutrone
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036
(202) 331-8800

November 13, 2013

CERTIFICATE OF SERVICE

I hereby certify that this 13th day of November 2013, I served a copy of the foregoing via e-mail and first class mail upon:

G. Paul Moates
Paul Hemmersbaugh
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005
pmoates@sidley.com
phemmersbaugh@sidley.com

Counsel for Norfolk Southern Railway Company



Jeffrey O. Moreno

Exhibit A

Tutrone, Jason

From: Hemmersbaugh, Paul A. <phemmersbaugh@sidley.com>
Sent: Monday, March 07, 2011 9:41 AM
To: Kelvin Dowd; Christopher A. Mills
Cc: Moates, G. Paul; Moreno, Jeffrey
Subject: SMEPA v. Norfolk Southern, STB No. 42128

Kelvin,

Sidley Austin represents defendant Norfolk Southern Railway Company (“NS”) in the STB rate case brought by your client South Mississippi Electric Power Association (“SMEPA”). As I advised you last Friday, certain information sought by Complainant SMEPA in discovery in the pending rate case – including traffic data – constitutes Sensitive Security Information (“SSI”) subject to security protections and restrictions under federal law. As we discussed, Norfolk Southern has determined that, under applicable agency rules, regulations, and guidance, it may not release such SSI to third parties, including counsel and consultants for a rate case complainant. You requested that I memorialize in an email the information I conveyed to you last Friday.

Because some of the SSI that SMEPA seeks may be important to evidence the parties may wish to use and submit in the pending rate case, NS believes it is necessary and appropriate to obtain instruction and direction from the cognizant federal government agencies regarding potential production and use of that information in an STB rate case. As I further advised you on Friday, NS is willing to produce relevant and otherwise discoverable data and information containing SSI to SMEPA, but only if it first receives authorization, direction, and advice from the relevant federal agencies (including but not necessarily limited to, FRA, TSA, and STB) concerning the production of that information in an STB rate case, and NS’s obligations and responsibilities with respect to the type of information it may produce and the manner and conditions under which such information may be produced.

In order to address this important concern as expeditiously as possible, NS has contacted the STB’s Office of Proceedings and requested that the STB convene a discovery conference to discuss this matter at its earliest convenience. Because the same information and issues are raised by discovery requests served by complainant DuPont in another pending rate case against NS (STB Dkt. No. 42125), we propose that counsel for NS, SMEPA, and DuPont participate in the requested conference (counsel to DuPont, Jeff Moreno, is copied on this email). We will advise you when the Board has scheduled a discovery conference to discuss this matter. If you have questions in the interim, please contact Paul Moates or me.

Regards,

Paul Hemmersbaugh

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

(202) 736-8538
(202) 736-8711 (fax)
phemmersbaugh@sidley.com

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Exhibit B



SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
(202) 736 8000
(202) 736 8711 FAX

mjwarren@sidley.com
(202) 736 8996

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FOUNDED 1866

June 3, 2011

By Email and First Class Mail

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

Re: E.I. du Pont de Nemours and Company v. Norfolk Southern Railway Company,
STB Docket No. NOR 42125

Dear Jeff:

As part of Norfolk Southern's ("NS's") ongoing production in response to E.I. du Pont de Nemours and Company's ("DuPont's") discovery requests in the above referenced proceeding, NS will grant DuPont outside counsel and consultants limited access to NS's Real Property Management System ("RPMS") for purposes of reviewing material responsive to certain DuPont discovery requests. Specifically, RPMS contains electronic versions of certain contracts and agreements that DuPont has requested in discovery, including industrial track agreements, coal contracts, joint facility agreements, deeds and valuation maps, and real estate transaction documents. NS believes that RPMS offers the most efficient means for DuPont counsel and consultants to identify and access agreements of interest. Among other advantages, RPMS is a Citrix-based platform that can be accessed from any computer connected to the internet. Use of RPMS will allow the parties to avoid the time and expense of physically inspecting hard copies of agreements that are housed in several different locations.

NS will provide DuPont with a user guide to RPMS and an explanation of what responsive discovery materials can be located in RPMS and how to access them. Because RPMS contains many sensitive NS contracts, both RPMS and the documents contained in RPMS will be designated Highly Confidential, and RPMS access will be limited to DuPont outside counsel and consultants. The limited RPMS access that NS will provide to DuPont outside counsel and consultants will allow access to certain areas in RPMS that house documents responsive to DuPont's discovery requests. DuPont will have the capability to download and/or print

Jeffrey O. Moreno
June 3, 2011
Page 2

documents from RPMS. To allow DuPont ample time to identify documents in RPMS, NS will issue RPMS passwords to DuPont counsel and consultants that will remain valid for thirty days.¹

RPMS is an active database that NS personnel regularly use for ongoing business purposes. On occasion, documents have been loaded into RPMS that include material protected by the attorney-client privilege or work product doctrine. Because RPMS contains many thousands of documents, it is not possible for NS to review all documents in RPMS for potential privilege issues before granting DuPont access to the system. Therefore, as a condition to granting RPMS access to DuPont, NS asks that DuPont agree that NS's grant of limited RPMS access to DuPont will not waive the attorney-client, work product, or any other privilege for any privileged document discovered in RPMS.

In addition, if one or more of the documents reviewed by DuPont in RPMS reasonably appears to contain information protected by the attorney-client, work product, or any other privilege, NS asks that DuPont agree: (1) to notify NS of the privileged document; (2) to delete or destroy any hard copies of that document DuPont has printed and/or any electronic copies of that document DuPont has downloaded; and (3) to make no use of the document during the current rate proceeding or any future proceeding. NS further requests that DuPont take these same steps if NS notifies DuPont of any privileged materials that NS identifies in RPMS.

Please let us know if DuPont will agree to these conditions, and we will proceed with arranging RPMS access for DuPont's outside counsel and consultants. Access to RPMS requires the use of individualized passwords and credentials, and therefore each DuPont counsel or consultant wishing access to RPMS must be issued their own unique identifier. To expedite this process, please identify each counsel and consultant whom DuPont wants to have RPMS access.

Do not hesitate to contact me with any questions you may have.

¹ NS recognizes that DuPont's review of transportation contracts may need to be informed in part from review of NS traffic records. As you know, NS's production of those records has been delayed pending the government's determination of the Sensitive Security Information ("SSI") requirements governing production of that data. NS expects that the SSI issue will be resolved in the very near future, and NS is prepared to produce traffic data shortly after that resolution. If resolution of the SSI issue is delayed, however, NS is willing to discuss extending DuPont's RPMS access for the limited purpose of reviewing transportation contracts.



Jeffrey O. Moreno
June 3, 2011
Page 3

Sincerely,

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

Matthew J. Warren

MJW:lpj

DCI 2025011v.1

Exhibit C

Tutrone, Jason

From: Moreno, Jeffrey
Sent: Wednesday, December 19, 2012 9:31 AM
To: Moates, G. Paul; Hemmersbaugh, Paul A.; Warren, Matthew J.
Cc: Tutrone, Jason
Subject: MultiRail Program

Paul,
At page III-C-158, note 245, of the NS Reply Evidence, NS states that it “has arranged with Oliver Wyman for both DuPont and the Board to be permitted limited access to MultiRail for purposes of this case.” I am writing to request the access to MultiRail that is referenced. Please explain the process and timing for obtaining access. Also please confirm that this access will include manuals and any other information typically provided by the vendor to understand and use the program.

Best Regards,

Jeffrey O. Moreno | Partner | **Thompson Hine LLP**
1919 M Street, N.W. | Washington, DC 20036
Office: 202.263.4107 | **Mobile:** 202.615.2494
Fax: 202.331.8330 | **Email:** Jeff.Moreno@ThompsonHine.com
Web: <http://www.ThompsonHine.com>

Ranked a top-tier firm nationally for transportation law by *Chambers USA: America's Leading Lawyers for Business* and by U.S. News Media Group/Best Lawyers.

Atlanta | Cincinnati | Cleveland | Columbus | Dayton | New York | Washington, D.C.



Exhibit D

Tutrone, Jason

From: Moates, G. Paul <pmoates@Sidley.com>
Sent: Wednesday, December 19, 2012 10:37 AM
To: Moreno, Jeffrey
Cc: Foy, Kevin
Subject: OliverWyman contact information

Jeff, in response to your request this morning re access to the MultiRail model for the DuPont v. NS case, you should contact Mr. Kevin Foy of OliverWyman directly. Mr. Foy's contact information is attached below.
Regards, Paul

Sent from my iPad

-----Original Message-----

From: Scheib, John M [john.scheib@nscorp.com]
Sent: Wednesday, December 19, 2012 09:05 AM Central Standard Time
To: Moates, G. Paul
Subject: Kevin Foy's contact information

Kevin M. Foy
Oliver Wyman
Surface Transportation Practice
One University Square, Suite 100
Princeton, NJ 08540, USA
Tel: +1 609 520 2182
Mobile: +1 732 558 8933
Fax: +1 609 419 9600
kevin.foy@oliverwyman.com
<http://blog.railplanning.com/>

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Exhibit E

As I mentioned in my previous e-mail, Oliver Wyman will be supplying one read-only license that will allow for full use of the system for data analysis and report creation, but which will not allow for making changes that can be saved to the database. The license is applicable for the duration of the case data review, or the end of 2013, whichever occurs first. We are preparing the license agreement and I should be able to send a draft to you by Friday afternoon.

Please let me know if you have any questions. I am in the office this week and can be reached at the numbers shown below.

Best regards,

Kevin

Kevin M. Foy
Oliver Wyman
Surface Transportation Practice
One University Square, Suite 100
Princeton, NJ 08540, USA
Tel: +1 609 520 2182
Mobile: +1 732 558 8933
Fax: +1 609 419 9600
kevin.foy@oliverwyman.com
<http://blog.railplanning.com/>

Oliver Wyman is a leading global management consulting firm

From: Foy, Kevin
Sent: Thursday, January 03, 2013 5:18 PM
To: 'Robert Mulholland'
Cc: 'Thomas D. Crowley'; Moreno, Jeffrey; Case, Rod
Subject: MultiRail RE: STB Docket 42125

Robert,

Hi. I am writing as a follow-up to our call of earlier today. As promised, I have started preparation of the license agreement for MultiRail Freight Edition (FE), for your examination of the case database as prepared by Norfolk Southern. I hope to have a draft of the agreement available by the end of next week.

There are no software licenses fees to be paid by DuPont (or its representative) for use of the software for this case, but we strongly recommend that L. E. Peabody users receive some training for operating MultiRail FE. Additionally, there will be a need for some user support (telephone and e-mail) in the initial stages of use by your firm. We can arrange to hold the training either here in Princeton or in your Alexandria office.

As I mentioned earlier today, some of my colleagues are still away on vacation, but everyone should be back by Monday morning. I will confer with them and get back to you by Tuesday morning with detailed recommendations on the training and support plan for MultiRail FE.

We will be supplying one read-only license that will allow for full use of the system for data analysis and report creation, but which will not allow for making changes that can be saved to the database. MultiRail operates on MS Windows computers and we recommend an XP operating system for this particular version. However, we can also support either a Windows Vista or Windows 7 operating system. We have not yet tested a Windows 8 environment.

The MultiRail application uses a Paradox "desktop" database, which we supply (and integrate) with the system. You will only need a standard Intel processor, with a minimum of 1 Gigabyte of RAM and 20 Gigabytes of disk space. A 20 inch

(or larger) monitor is helpful and you should plan for local access to a printer (for reports). The details of the application and the operating environment & hardware will be described in the license agreement.

If you have any questions at this time, please call or e-mail. My contact details are shown below.

Best regards,

Kevin

Kevin M. Foy
Oliver Wyman
Surface Transportation Practice
One University Square, Suite 100
Princeton, NJ 08540, USA
Tel: +1 609 520 2182
Mobile: +1 732 558 8933
Fax: +1 609 419 9600
kevin.foy@oliverwyman.com
<http://blog.railplanning.com/>

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From: Robert Mulholland [<mailto:rmulholland@lepeabody.com>]
Sent: Wednesday, January 02, 2013 2:41 PM
To: Foy, Kevin
Cc: 'Thomas D. Crowley'; Moreno, Jeffrey
Subject: [Suspected SPAM] MultiRail RE: STB Docket 42125

Kevin,

Our firm is working as outside consultants to DuPont in support of its rate reasonableness complaint regarding NS rail rates that is pending before the Surface Transportation Board ("STB"). As part of its Reply evidence filed in this proceeding, NS relied on the MultiRail program to develop an operating plan and operating statistics for the hypothetical stand-alone railroad developed to serve the proposed traffic group. As I believe you know, NS has arranged with Oliver Wyman for both DuPont and the STB to be permitted limited access to MultiRail for purposes of this case.

I have been trying to reach you by phone for the last several days. I left several voicemail messages for you at the number provided by NS counsel, (609-520-2182), beginning on Friday, 12/21/12. I realize the holidays are a busy time, but we are on a tight schedule and must begin our analysis sooner rather than later.

As an initial matter, I would like to discuss with you how the limited access to MultiRail will be provided for purposes of this case and what that process will entail. Specifically, we would like to know whether the product will be licensed to us for use in our offices or if we will be required to travel to your facilities to use the product. If the product will be provided for our use in our offices, we would like to know what sort of operating system requirements are necessary to optimally run the package. We would also like to know for how long we will be allowed access to the product and what sort of documentation and/or tutorials will be provided to allow us to efficiently utilize the product.

I look forward to hearing from you on this matter.

Best regards,
Rob

Robert Mulholland
Vice President
L. E. Peabody & Associates, Inc.

Exhibit F

January 10, 2013

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

Re: *STB Docket NOR 42125, E.I. du Pont de Nemours & Co. v. Norfolk Southern Railway*;
STB Docket NOR 42130, SunBelt Chlor Alkali Partnership v. Norfolk Southern Railway;
Access to MultiRail

Dear Paul:

I am writing on behalf of E.I. du Pont de Nemours & Company (DuPont) and SunBelt Chlor Alkali Partnership (SunBelt) (collectively, the Complainants) regarding the MultiRail computer software that Norfolk Southern Railway Company (NS) used to generate its Stand Alone Cost evidence in the above-referenced rate cases.

In the NS Reply Evidence in both rate cases, NS states that "NS has arranged with Oliver Wyman for both [the Complainants] and the Board to be permitted limited access to MultiRail for purposes of this case." Per our exchange of e-mails on December 19, 2012, we contacted Oliver Wyman to obtain instructions for obtaining access to the MultiRail software. Based upon information from Oliver Wyman, the limited nature of the software access provided by NS substantially curtails the Complainants' right to verify and, if necessary, adjust the NS evidence generated by the MultiRail program. Specifically, under the arrangement NS crafted with Oliver Wyman, Complainants will only be supplied with a license to the read-only version of the MultiRail system. Also, the Complainants will be required to pay for the setup, training, and support needed to use MultiRail.

Although the Complainants will not be responsible for the read-only software license fees to use MultiRail, they will still be responsible for substantial access costs. Oliver Wyman has told the Complainant's expert, L.E. Peabody & Associates, that "there are costs associated with the software and data deployment, and [Oliver Wyman] strongly recommend[s] that L.E. Peabody users receive some training for operating MultiRail FE." See: email from Kevin Foy, Oliver Wyman, to Robert Mulholland, L.E. Peabody & Associates, Inc. (Jan. 8, 2013) (attached). Oliver Wyman also stated that "there will be a need for some user support (telephone and e-mail) in the initial stages of use" and "Oliver Wyman would like to supply the laptop computer to be used for the project." Id.

G. Paul Moates
January 10, 2013
Page 2

The total access costs that Oliver Wyman would charge are substantial. Just for initial setup and support for MultiRail, Oliver Wyman is charging \$12,000, plus expenses. *Id.* The training that Oliver Wyman strongly recommends will cost \$15,000 plus expenses for the initial two-day session plus \$3,500 per day for any additional training that may be required. *Id.* In total, it will cost DuPont and SunBelt each over \$20,000 to be in a position to use MultiRail. This sum only covers two months' access after which Complainants must pay \$2000 per month for continuing user support and hardware lease. By requiring the Complainants to incur substantial costs to use MultiRail, NS is not in fact providing access to MultiRail.

Furthermore, even after paying over \$20,000 for basic setup and training, the Complainants will only have read-only access, which may be sufficient for validating NS's evidence from a technical standpoint, but will not allow the Complainants (or the STB) to make any adjustments to NS' Reply evidence should it find errors that need to be corrected or simply wish to make reasonable adjustments to the multiple inputs and other intermediate files generated by the program. Adequate validation of NS's evidence involves much more than merely determining whether NS made technical errors (which is all a read-only license will enable). Rather, the Complainants (and the STB) must undertake an iterative process of manipulating numerous MultiRail inputs and parameters, running the MultiRail model, and analyzing the effects of the manipulations on a large set of outputs. Read-only access permits the Complainants to print a report of each modeling event, but not to make changes that can be saved to the database. Moreover, it is not clear whether the reports that may be generated will be formatted in a useable manner or contain relevant or sufficient data. Accordingly, DuPont and SunBelt will not have capability to develop and present their own Rebuttal evidence based on the MultiRail program. Similarly, the STB will not be able to test and implement adjustments it feels are warranted following its review of all the evidence presented by the parties. Oliver Wyman has stated that the cost to acquire a full access license would be well over six figures. See: email from Kevin Foy, Oliver Wyman, to Robert Mulholland, L.E. Peabody & Associates, Inc. (Jan. 10, 2013) (attached).

To prevent unfair prejudice to the Complainants, we are requesting that NS provide the licenses necessary for the Complainants to receive full access to MultiRail that permits them to adjust and electronically save MultiRail inputs and outputs and import them to downstream SAC analyses. In addition, we are requesting that NS cover or agree to reimburse the Complainants for the costs that Oliver Wyman will charge for MultiRail setup and training. Given the amount of time that already has passed, I would very much appreciate a prompt and expeditious response to this letter.

THOMPSON
HINE

G. Paul Moates
January 10, 2013
Page 3

Very truly yours,



Jeffrey O. Moreno

Moreno, Jeffrey

From: Foy, Kevin <Kevin.Foy@oliverwyman.com>
Sent: Thursday, January 10, 2013 4:02 PM
To: Robert Mulholland (rmulholland@lepeabody.com)
Cc: 'Thomas D. Crowley'; Moreno, Jeffrey; Case, Rod
Subject: RE: MultiRail RE: STB Docket 42125

Robert,

In our telephone conversation of Tuesday afternoon, you asked if Would Oliver Wyman be able to license or lease the MultiRail application to one or more of the parties involved in the DuPont case? The answer is a qualified "yes."

In the past, we have only licensed MultiRail to railroads, for use by railroad personnel. We have been sensitive to use of the MultiRail system by third parties, such as consulting and legal firms, since we did not want to create competition for our own consulting business. However, the use of MultiRail to examine data related to rate cases presents a different situation, for various reasons, and we would like to be able to offer a licensing plan that makes sense for all parties.

Oliver Wyman will make the MultiRail system available for licensing by Thomason Hine and/or L. E. Peabody, if the license agreement includes a base licensing fee as well as a royalty fee, to be paid when the system is used for a new case. We would structure the licensing and pricing as follows:

- Oliver Wyman will issue a MultiRail software license (to either Thomason Hine or L. E. Peabody) for a one-time license fee of \$190,000. This is an enterprise license (with full read and write capabilities) and can be used by anyone within the licensed organization.
- We will provide the set-up, installation and training support for the licensee on a time and materials basis at \$3,500 per day. We estimate that between 10-15 days will be required for this project.
- The maintenance fee, for the support of the software application, upgrades and bug fixes, will be \$28,500 annually. The first maintenance invoice would be issued 90 days after the initial installation. Telephone and e-mail user support would be provided on a time and materials basis at \$440 per hour.
- For each additional rate case, beyond the initial case, the licensee would pay Oliver Wyman a royalty of \$45,000, for the use of the software on the case. Additional training or technical support could be provided on a time and materials basis at \$3,500 per day.

We are also willing to provide the software on a lease basis at \$99,000 per year plus the case royalties. There is no maintenance fee for a leased license.

Please let me know if you have any questions, and I am available to discuss on the telephone at your convenience.

Best regards,

Kevin

Kevin M. Foy
Oliver Wyman
Surface Transportation Practice
One University Square, Suite 100
Princeton, NJ 08540, USA
Tel: +1 609 520 2182
Mobile: +1 732 558 8933

Fax: +1 609 419 9600
kevin.foy@oliverwyman.com
<http://blog.railplanning.com/>

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From: Foy, Kevin
Sent: Wednesday, January 09, 2013 6:10 PM
To: 'Robert Mulholland'
Cc: 'Thomas D. Crowley'; 'Moreno, Jeffrey'; Case, Rod
Subject: RE: MultiRail RE: STB Docket 42125

Robert,

Hi. As I mentioned on the telephone a short while ago, I have an answer for two of your questions, but not for the third.

- 1) In the "Base Hardware & MultiRail Setup" option, can Oliver Wyman provide just the MultiRail application (on a CD-ROM) to be installed on L. E. Peabody's computer?
 - Yes, we can simply send you the installation disk, along with written instructions for installation. The case database could be obtained through Norfolk Southern or their counsel. There is no charge for this option, but we can provide installation and training on a time and materials basis at \$440 per hour for telephone/e-mail support, and \$3,500/day for on-site support, as needed.
- 2) Would Oliver Wyman be able to license or lease the MultiRail application to one or more of the parties involved in the DuPont case?
 - I am still working on a detailed response for you on this issue, and should be able to respond by Thursday afternoon, January 10th.
- 3) Thompson Hine (and presumably L. E. Peabody) is working on another rate case, and would like to know if this NS-supplied MR license can be also applied to the additional case.
 - We will need to issue a new "read-only" license for each of the cases involving Norfolk Southern. There is no incremental license charge to the complainant, and we would provide installation, training and support on a time and materials basis (as described above) or in the packages, as described in my e-mail of last evening.

Please let me know if you have any questions about these points, and I should be able to respond to you on the licensing issue tomorrow.

Best regards,

Kevin

Kevin M. Foy
Oliver Wyman
Surface Transportation Practice
One University Square, Suite 100
Princeton, NJ 08540, USA
Tel: +1 609 520 2182
Mobile: +1 732 558 8933
Fax: +1 609 419 9600
kevin.foy@oliverwyman.com

<http://blog.railplanning.com/>

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From: Foy, Kevin
Sent: Tuesday, January 08, 2013 5:54 PM
To: 'Robert Mulholland'
Cc: 'Thomas D. Crowley'; 'Moreno, Jeffrey'; Case, Rod
Subject: RE: MultiRail RE: STB Docket 42125

Robert,

Hi. I have had an opportunity to speak with my colleagues regarding the installation, training and support for the use of MultiRail for the DuPont rate case. As I mentioned in the previous e-mail, there are no software licenses fees to be paid by DuPont (or its representative) for use of the software for this case, but there are costs associated with the software and data deployment, and we strongly recommend that L. E. Peabody users receive some training for operating MultiRail FE. Additionally, there will be a need for some user support (telephone and e-mail) in the initial stages of use by your firm.

To reduce the possibility of hardware and operating system complications, Oliver Wyman would like to supply the laptop computer to be used for the project. The base "Base Hardware & MultiRail Setup and Initial Support" package includes all of the hardware, software and data prep, as well as the computer lease and user support for the initial two months. We are also offering you additional options for more detailed training and for the on-going support of MultiRail.

Base Hardware & MultiRail Setup and Initial Support (\$12,000 plus expenses)

- Preparation of the project computer and application software
- Preparation and loading of the "standalone operating plan" database
- Delivery of the computer to L. E. Peabody
- Work with Peabody staff to confirm that that the model is functioning
- This package includes 12 hours of telephone support over the first two months
- It also includes the use of an Oliver Wyman computer for up to two months

Software User Training (\$15,000 plus expenses)

- This option is in addition to "Base Hardware & MultiRail Setup and Initial Support" package
- Two days of training in Alexandria or in Princeton, which includes:
 - Introduction of the software functionality
 - Introduction to reports and output files
 - Training of one expert on navigation of the rate case model

Continued User Support and Hardware Lease (\$2,000 per month)

- Additional to "Base Hardware & MultiRail Setup and Initial Support" and "Software User Training" packages
- Phone and e-mail technical and user support (up to 4 hours per month)
- This will also cover the lease for the laptop PC for each period after the initial 2 months

We can provide additional on-site support and training, as needed, at \$3,500 per day plus expenses.

We can arrange to hold the training session either here in Princeton, or in your Alexandria office. One of our Specialists can be available for the hardware/software and data delivery on January 21st -22nd, or on January 31st - February 1st. We can also do the set-up and training at any time in February.

As I mentioned in my previous e-mail, Oliver Wyman will be supplying one read-only license that will allow for full use of the system for data analysis and report creation, but which will not allow for making changes that can be saved to the database. The license is applicable for the duration of the case data review, or the end of 2013, whichever occurs first. We are preparing the license agreement and I should be able to send a draft to you by Friday afternoon.

Please let me know if you have any questions. I am in the office this week and can be reached at the numbers shown below.

Best regards,

Kevin

Kevin M. Foy
Oliver Wyman
Surface Transportation Practice
One University Square, Suite 100
Princeton, NJ 08540, USA
Tel: +1 609 520 2182
Mobile: +1 732 558 8933
Fax: +1 609 419 9600
kevin.foy@oliverwyman.com
<http://blog.railplanning.com/>

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From: Foy, Kevin
Sent: Thursday, January 03, 2013 5:18 PM
To: 'Robert Mulholland'
Cc: 'Thomas D. Crowley'; Moreno, Jeffrey; Case, Rod
Subject: MultiRail RE: STB Docket 42125

Robert,

Hi. I am writing as a follow-up to our call of earlier today. As promised, I have started preparation of the license agreement for MultiRail Freight Edition (FE), for your examination of the case database as prepared by Norfolk Southern. I hope to have a draft of the agreement available by the end of next week.

There are no software licenses fees to be paid by DuPont (or its representative) for use of the software for this case, but we strongly recommend that L. E. Peabody users receive some training for operating MultiRail FE. Additionally, there will be a need for some user support (telephone and e-mail) in the initial stages of use by your firm. We can arrange to hold the training either here in Princeton or in your Alexandria office.

As I mentioned earlier today, some of my colleagues are still away on vacation, but everyone should be back by Monday morning. I will confer with them and get back to you by Tuesday morning with detailed recommendations on the training and support plan for MultiRail FE.

We will be supplying one read-only license that will allow for full use of the system for data analysis and report creation, but which will not allow for making changes that can be saved to the database. MultiRail operates on MS Windows computers and we recommend an XP operating system for this particular version. However, we can also support either a Windows Vista or Windows 7 operating system. We have not yet tested a Windows 8 environment.

The MultiRail application uses a Paradox "desktop" database, which we supply (and integrate) with the system. You will only need a standard Intel processor, with a minimum of 1 Gigabyte of RAM and 20 Gigabytes of disk space. A 20 inch

(or larger) monitor is helpful and you should plan for local access to a printer (for reports). The details of the application and the operating environment & hardware will be described in the license agreement.

If you have any questions at this time, please call or e-mail. My contact details are shown below.

Best regards,

Kevin

Kevin M. Foy
Oliver Wyman
Surface Transportation Practice
One University Square, Suite 100
Princeton, NJ 08540, USA
Tel: +1 609 520 2182
Mobile: +1 732 558 8933
Fax: +1 609 419 9600
kevin.foy@oliverwyman.com
<http://blog.railplanning.com/>

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From: Robert Mulholland [<mailto:rmulholland@lepeabody.com>]
Sent: Wednesday, January 02, 2013 2:41 PM
To: Foy, Kevin
Cc: 'Thomas D. Crowley'; Moreno, Jeffrey
Subject: [Suspected SPAM] MultiRail RE: STB Docket 42125

Kevin,

Our firm is working as outside consultants to DuPont in support of its rate reasonableness complaint regarding NS rail rates that is pending before the Surface Transportation Board ("STB"). As part of its Reply evidence filed in this proceeding, NS relied on the MultiRail program to develop an operating plan and operating statistics for the hypothetical stand-alone railroad developed to serve the proposed traffic group. As I believe you know, NS has arranged with Oliver Wyman for both DuPont and the STB to be permitted limited access to MultiRail for purposes of this case.

I have been trying to reach you by phone for the last several days. I left several voicemail messages for you at the number provided by NS counsel, (609-520-2182), beginning on Friday, 12/21/12. I realize the holidays are a busy time, but we are on a tight schedule and must begin our analysis sooner rather than later.

As an initial matter, I would like to discuss with you how the limited access to MultiRail will be provided for purposes of this case and what that process will entail. Specifically, we would like to know whether the product will be licensed to us for use in our offices or if we will be required to travel to your facilities to use the product. If the product will be provided for our use in our offices, we would like to know what sort of operating system requirements are necessary to optimally run the package. We would also like to know for how long we will be allowed access to the product and what sort of documentation and/or tutorials will be provided to allow us to efficiently utilize the product.

I look forward to hearing from you on this matter.

Best regards,

Rob

Robert Mulholland
Vice President
L. E. Peabody & Associates, Inc.

(703) 517-1118
(518) 824-1289 (fax)
rmulholland@lepeabody.com
www.lepeabody.com

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SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
(202) 736 8000
(202) 736 8711 FAX

pmoates@sidley.com
(202) 736 8175

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FOUNDED 1866

January 17, 2013

By Email and First Class Mail

Jeffrey O. Moreno
Thompson Hine LLP
1919 M Street, N.W.
Washington, DC 20036-1600

Re: E.I. du Pont de Nemours & Co. v. Norfolk Southern Railway Co., STB Docket No. NOR 42125; SunBelt Chlor Alkali Partnership v. Norfolk Southern Railway Co., STB Docket No. NOR 42130

Dear Jeff:

We write in response to your January 10, 2013 letter requesting that Norfolk Southern Railway Company (“NS”) purchase additional software licenses and computer-related services for Complainants E.I. du Pont de Nemours & Company (“DuPont”) and Sunbelt Chlor Alkali Partnership (“SunBelt”) (collectively, “Complainants”), for Complainants’ use in preparing their Rebuttal Evidence in the above-referenced rate cases. *See* J. Moreno Letter to P. Moates (Jan. 10, 2013) (the “January 10 Letter”). Complainants’ extraordinary demand that NS buy them licenses for additional MultiRail functions and pay MultiRail training costs for Complainants’ consultants is completely at odds with the fundamental American Rule principle that parties to litigation are responsible for their own costs—a principle that has been repeatedly endorsed by the Surface Transportation Board.

Moreover, Complainants’ demand that NS pay for additional licenses and training so that Complainants can “develop and present their own Rebuttal evidence based on the MultiRail program” (*id.* at 2) ignores the fact that it is far too late for Complainants to use MultiRail to introduce new evidence in attempts to correct the glaring deficiencies and methodological flaws in the operating evidence they submitted for their respective SARRs. As detailed below, NS utilized the MultiRail program to develop the car blocking and train service plans that are part of NS’s Reply operating plans submitted in both cases.

Both DuPont and SunBelt filed rate cases involving unprecedented amounts of carload traffic. Yet, they chose to present operating plans that did not include any type of car

Sidley Austin (DC) LLP is a Delaware limited liability partnership doing business as Sidley Austin LLP and practicing in affiliation with other Sidley Austin partnerships.

Jeffrey Moreno
January 17, 2013
Page 2

classification or blocking plan. In short, they failed to provide operating plans that could move each individual carload from its specific origin, through the network, to its specific destination. Instead, Complainants developed their respective train service plans via an “automated” methodology that adopted certain historical NS trains as SARR trains (rather than developing a train service plan specifically designed for each SARR’s selected traffic group).

The deficiencies in the operating plans submitted by DuPont and SunBelt on Opening are so great as to constitute a failure to tender a prima facie case. But, at a minimum, having made those evidentiary and methodological choices when preparing their Opening Evidence, Complainants may not now use MultiRail either to create the car blocking plans that they failed to include in Opening Evidence or as a substitute methodology to develop a list of the trains that the SARR would operate. Use of MultiRail for either purpose would “significantly modify the foundation” of Complainants’ operating evidence and would be impermissible Rebuttal Evidence. *Intermountain Power Agency v. Union Pacific R.R. Co.*, STB Docket No. 42127, Decision at 3 (served April 4, 2012).

If Complainants nonetheless wish to develop new evidence using MultiRail and to argue that such new evidence would be appropriate Rebuttal, NS will not foot the bill for Complainants’ consultants to buy additional software licenses and training to develop new affirmative MultiRail evidence. Indeed, NS has already done far more than what is required of it by arranging for Complainants to have access to a MultiRail license that is sufficient to enable them to review and assess NS’s MultiRail evidence. There is no basis in law or fairness for Complainants to demand more.

I. NS Used MultiRail To Develop The Carload Blocking Plans That Complainants Omitted and the Train Service Plans for Which Complainants Used a Hopelessly Flawed Alternative Methodology.

NS’s use of MultiRail is the result of Complainants’ own litigation choices. Both DuPont and SunBelt chose to select traffic groups containing massive amounts of carload traffic. *See* NS Reply at III-C-56, *DuPont v. NS* (filed Nov. 30, 2012) (“NS/DuPont Reply”) (three million cars of carload traffic); NS Reply at III-C-122, *SunBelt v. NS* (filed Jan. 7, 2013) (“NS/SunBelt Reply”) (471,597 carloads of general freight traffic). Unlike the unit-train and trainload traffic that has been the predominant component of SARR traffic groups in most previous SAC cases, the traffic groups that DuPont and SunBelt selected include enormous numbers of individual car movements that must be classified and blocked at intermediate terminals and transported in multiple trains between origin and destination. A feasible operating plan for such traffic must include a detailed plan to classify and block traffic and a train service plan that accounts for all of the line haul transportation required to move the cars across the network in a manner that meets the service needs of the SARRs’ customers. *See* NS/DuPont Reply at III-C-52 to III-C-56; NS/SunBelt Reply at III-C-41 to III-C-44.

Jeffrey Moreno
January 17, 2013
Page 3

As detailed in NS's Reply Evidence in *DuPont* and *SunBelt*, Complainants' operating plans chose to ignore the complexities of carload rail service for their selected traffic groups. Complainants presented no plan whatsoever for carload classification and blocking. *See* NS/DuPont Reply at III-C-56 to III-C-60; NS/SunBelt Reply at III-C-41 to III-C-46. And rather than developing trains (and train schedules) geared to the specific traffic groups they selected, both DuPont and SunBelt proffered SARR train lists culled from NS's historical train movement data through an automated process that failed to include thousands of trains that would be necessary to provide complete on-SARR train service.¹ *See* NS/DuPont Reply at III-C-9 to III-C-10; NS/SunBelt Reply at III-C-13. NS's Reply Evidence demonstrated that these and many other failures and omissions in Complainants' operating plans caused those plans to be incomplete, infeasible, and incapable of adequately serving Complainants' selected traffic.

Complainants' failure to present complete and feasible operating plans required NS to develop operating plans capable of efficiently serving the traffic group selected by the Complainant. To develop the DRR's and SBRR's carload blocking and train service plan, NS's operating experts utilized a software program called MultiRail. MultiRail is a modeling tool that generates optimized blocking and train service plans for selected traffic groups.² The MultiRail program uses information about a railroad's traffic, network, and customer service requirements to model the best possible blocking plans and train schedules. While it is possible for competent operating experts to develop blocking plans and train schedules without using such a software tool (as railroads did for many years before the advent of computerized modeling tools), the car blocking and train service plans that MultiRail generates are compelling evidence of how a least-cost, most-efficient SARR would function in the real world. MultiRail has been used by all of the North American Class I railroads for network planning and service design, and it has been used in several prior STB proceedings to create blocking plans and train schedules.³

MultiRail is commercially available software developed and owned by Oliver Wyman and Company ("Oliver Wyman"). NS paid to acquire and use MultiRail by purchasing a license from Oliver Wyman. To facilitate Complainants' review of those aspects of the SARR operating plan that NS and its rail operating experts developed with the aid of MultiRail, NS purchased

¹ As detailed in NS's Reply Evidence, Complainants' automated selection methodology failed to provide complete service for 76% of the DuPont issue traffic and 91% of the SunBelt issue traffic. *See* NS/DuPont Reply at III-C-20; NS/SunBelt Reply at III-C-14.

² NS included a general description of MultiRail and its functions as NS Reply WP "MultiRail Freight Edition," which was submitted in NS's Reply workpapers in both *DuPont* and *SunBelt*.

³ *See, e.g.,* Reply Evidence of CSX Transportation, Inc. at III-C-56 through III-C-58, *Seminole Electric Cooperative, Inc. v. CSX Transp., Inc.*, STB Docket No. NOR 42110 (filed Jan. 19, 2010). *See also* NS Reply WP "MultiRail Freight Edition" (stating that MultiRail was used to support operating plans submitted to STB in the *UP/SP*, *CN/IC*, and *Conrail* transactions).

Jeffrey Moreno
January 17, 2013
Page 4

additional MultiRail licenses for use by Complainants and their consultants in these cases.⁴ Although NS had no obligation to purchase such licenses for Complainants, it did so in order to ensure that they would be able to review and evaluate the MultiRail evidence submitted by NS.

II. Complainants' Demand That NS Buy Them Full MultiRail Licenses and MultiRail Training Is Meritless.

Complainants acknowledge that the MultiRail licenses NS bought for them “may be sufficient for validating NS’s evidence from a technical standpoint,” which is all Complainants are permitted to do with MultiRail on Rebuttal. Nevertheless, they complain that NS did not pay for Oliver Wyman to provide a computer with MultiRail installed or for MultiRail training to Complainants’ consultants, which Complainants claim would “cost DuPont and SunBelt each over \$20,000 to be in a position to use MultiRail.” January 10 Letter at 2.⁵ They also protest that read-only access to MultiRail would not allow them “to make changes that can be saved to the database” and would not give them “capability to develop and present their own Rebuttal evidence based on the MultiRail program.” *Id.* Neither claim has any merit, both because of the well-established litigation rule that each party pays its own costs and because the Board’s rules prohibit Complainants from using MultiRail (or any other program) to present on Rebuttal either a classification and blocking plan for carload traffic or new SARR train lists developed via an alternative methodology.

⁴ In addition, NS purchased MultiRail licenses for use by the Board in these cases.

⁵ The January 10 Letter’s claim that Complainants would each incur over \$20,000 in expenses “to be in a position to use MultiRail” appears to be a substantial exaggeration. Indeed, the email chain appended to the letter indicates that Oliver Wyman has given Complainants the option of obtaining the MultiRail application and written installation instructions for “no charge” in lieu of receiving a laptop loaded with the software and of paying only for any requested training and support as needed at a rate of \$440 per hour or \$3500 per day. *See* January 9, 2013 K. Foy email to R. Mulholland *et al.* (attached to January 10 Letter). And even assuming that Complainants chose to purchase Oliver Wyman’s “Base Hardware & MultiRail Setup and Initial Support” and “Software User Training” packages (which include installation on an Oliver Wyman-provided computer, 12 hours of telephone support, and two days of on-site training), those charges would amount to \$27,000, or just \$13,500 per case. *See* January 8, 2013 K. Foy email to R. Mulholland *et al.* (attached to January 10 Letter). Moreover, L.E. Peabody personnel already received MultiRail training from Oliver Wyman in the *Seminole v. CSXT* rate case, and the January 10 Letter does not say what additional training Complainants’ consultants believe that they need. *See* Rebuttal Evidence of Seminole Electric Cooperative, Inc. at III-C-23 n.21, *Seminole Electric Cooperative, Inc. v. CSX Transp., Inc.*, STB Docket No. 42110 (filed Apr. 15, 2010).

A. Complainants Have No Legitimate Basis to Request That NS Pay For Them to Obtain Additional MultiRail Licenses or Training.

As the January 10 Letter makes clear, Oliver Wyman has offered Complainants both all the MultiRail functionality and all the MultiRail training they may desire. *See* January 10 Letter at 2 and attached emails. Complainants simply do not want to pay for those services. Tellingly, Complainants are unable to cite any principle or precedent in support of their extraordinary demand that NS pay for Complainants to procure additional MultiRail licenses and training, other than a vague and unsupported claim that if NS does not buy those additional services and license for Complainants, they would suffer “unfair prejudice.” *Id.* But there is nothing unfair about the basic, longstanding American Rule that requires each party to bear its own litigation expenses.⁶

The Board has consistently held that parties to litigation are responsible for their own litigation costs. As the Board has explained, “[a]warding ‘professional fees’ (and *associated* or miscellaneous *expenses*) . . . would be contrary to agency practice. The ICC consistently rejected awarding attorney fees unless specifically authorized by the statute.” *Caddo Antoine et al – Feeder Line Acquisition – Arkansas Midland R.R.*, 4 S.T.B. 610, 630-31 (2000) (emphasis added).⁷ Similarly, the Board has rejected SAC complainant requests that a railroad be required to “reimburse” complainant’s filing fee, finding that the Board lacked authority to order such litigation cost shifting. *See Carolina Power & Light v. Norfolk Southern Railway Co.*, 7 S.T.B. 245, 268 (2003); *see also CF Industries v. Koch Pipeline Co, L.P.*, 4 S.T.B. 637, 637 n.2 (2000) (Board has “no authority” to award litigation costs, in this case attorney fees). More recently, the Board reaffirmed that it had “consistently rejected requests for [litigation] costs in the past.” *KCS Ry. Co. – Abandonment Exemption – Line in Warren County, MS*, STB Docket No. AB-103 (Sub-No. 21X) (May 20, 2008), 2008 WL 2113244 at *10. The January 10 Letter does not even acknowledge this longstanding precedent, let alone offer any rationale as to why it should not apply here.

Contrary to Complainants’ assertion, there is nothing “unfair” about the routine requirement that they pay for available third-party goods and services if they wish to use them in

⁶ *See, e.g., Unbelievable, Inc. v. N.L.R.B.*, 118 F.3d 795, 800-801 (D.C. Cir. 1997) (American Rule requires each party to bear its own litigation costs; absent clear, exceptional statutory authorization, parties to agency litigation may not recover their litigation expenses from opposing parties); *PCI/RCI v. U.S.*, 37 Fed. Cl. 785, 788 n.2 (“[f]or over 200 years, United States courts have generally required each party to bear its own litigation costs.”) (*citing Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796)).

⁷ *Aff’d in part, rev’d in part on other grounds sub nom GS Roofing Products v. STB*, 262 F.3d 767 (8th Cir. 2001).

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their cases. In order to pursue the rate cases they initiated, Complainants retained numerous lawyers, consultants, and experts, and used a variety of computer programs and applications purchased or licensed from third parties. Similarly, in order to defend this case, NS has been required to retain lawyers, consultants, and experts, and to expend substantial resources on computer applications and services to respond to extensive discovery requests, to analyze Complainants' evidence, and to develop Reply Evidence. But there is no question that NS is responsible for paying its own litigation costs and that DuPont and SunBelt are responsible for their costs.

The absurdity of Complainants' suggestion that NS's use of MultiRail to develop its Reply Evidence requires it to pay for Complainants to use MultiRail for Rebuttal is clear. Did Complainants' use of software like Rail Traffic Controller ("RTC"), Microsoft Excel, and Microsoft Access on Opening require them to pay NS's license fees for that software? Did their use of real estate appraisers on Opening require them to pay for NS to hire real estate appraisers for use on Reply? Indeed, DuPont dismissed NS's concern about the capacity of the RTC Model to simulate a network the size of the DuPont SARR by indicating that NS should buy a larger, more powerful computer.⁸ NS in fact was required to purchase an advanced liquid-cooled computer to run the RTC model on the scale required by the SARR posited by DuPont. Should DuPont have been required to pay for that computer? If not, what logical distinction is there between the hardware NS was required to purchase and MultiRail software license fees? Under the American Rule of litigation that has been accepted by the Board, NS is not required to buy software and software training for Complainants that they are perfectly capable of purchasing themselves.⁹

B. Complainants May Not Use MultiRail or Any Other Tool to Present on Rebuttal Evidence That Should Have Been Submitted in Their Cases-in-Chief.

Furthermore, Complainants' request that NS buy a license that would allow them "to develop and present their own Rebuttal evidence based on the MultiRail program" disregards the Board's clear, well-established rule that precludes Complainants from offering such new

⁸ See DuPont Reply to NS Motion for Modification of the Procedural Schedule at 4 n.4, *DuPont v. NS*, STB Docket No. NOR 42125 (filed May 29, 2012).

⁹ This is not a situation in which a software application used by one party is not available for the opposing party to purchase itself. For example, the proprietary yard sizing tool that NS used in its Reply Evidence was provided to Complainants' counsel and consultants (including both the outputs and the program files that would enable them to develop rebuttal yard sizes using that tool). See NS Reply WP Folder "Yard Sizing Analyses." The additional MultiRail training and license that Complainants seek, on the other hand, are available for them to purchase. NS is not required to subsidize that purchase.

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evidence on Rebuttal. January 10 Letter at 2. Complainants chose to present operating plans in their Opening Evidence that did not include any carload classification or blocking plans. Although they tendered traffic groups containing large volumes of carload traffic, DuPont and SunBelt failed to provide an operating plan that accounted for the need to move each individual carload from its specific origin, through the network and yards, and to its specific destination. Moreover, in both cases, Complainants elected to apply an “automated” methodology to “select” historical NS trains to use as a surrogate for SARR trains. DuPont and SunBelt made this choice despite their consultants being fully aware of MultiRail and its functionality for developing a carload operating plan. *See* Rebuttal Evidence of Seminole Electric Cooperative, Inc. at III-C-23 n.21, *Seminole Electric Cooperative, Inc. v. CSX Transp., Inc.*, STB Docket No. 42110 (filed Apr. 15, 2010) (involving the same L.E. Peabody consulting firm used by DuPont and SunBelt and noting that consultants received training on MultiRail). Now that NS’s Reply Evidence has demonstrated the manifold flaws in both of these litigation decisions, Complainants apparently are contemplating using MultiRail to redo their operating plans. That plainly would be impermissible Rebuttal evidence that the Board would not consider.

The Board’s rules grant SAC Complainants a substantial procedural advantage over railroad defendants—the right to two evidentiary filings instead of one, and the right to have the last evidentiary word in their Rebuttal submissions. But fairness dictates that in exchange for that procedural advantage, complainants must submit their entire case-in-chief in their Opening Evidence. As the Board explained in *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, 5 S.T.B. 441 (2001):

[T]he party with the burden of proof on a particular issue must present its entire case-in-chief in its opening evidence. Rebuttal presentations are limited to responding to the reply presentation of the opposing party. Rebuttal may not be used as an opportunity to introduce new evidence that could and should have been submitted on opening to support the opening submissions. New evidence improperly presented on rebuttal will not be considered.

Id. at 445-46 (emphasis added). The Board recently reaffirmed the principle that a complainant may not use its Rebuttal to substantially revise its Opening Evidence in *Intermountain Power Agency v. Union Pacific Railroad Co.*, holding that “[a] complainant may not significantly modify the foundation of its case after it and the defendant carrier have put forward their initial evidence and arguments, an expensive and time-consuming effort, merely because the complainant believes the modification to be in its best interest.” STB Docket No. 42127, Decision at 3 (served April 4, 2012). The Board went on to make clear that a complainant’s methodological errors on Opening are not sufficient grounds to allow it to modify a core part of its evidence on Rebuttal. *Id.* (“The complainant cannot claim that a technical error, brought on

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by the complainant's own mistake, is grounds for it to modify a core part of its evidence after the defendant carrier has already filed a reply to that evidence."').¹⁰

DuPont and SunBelt are thus precluded from using their Rebuttal Evidence to revise or materially supplement their operating plans with new carload classification and blocking plans, or to substitute a MultiRail-based train service plan for the fatally flawed train lists that they presented based on their "automated" train selection methodology. Either change would "significantly modify the foundation of [their] case[s]" and would be impermissible Rebuttal. Because the only purposes of the MultiRail software are to develop car blocking plans and train service plans, there is no way for Complainants "to develop and present their own Rebuttal evidence based on the MultiRail program" without that evidence being impermissible Rebuttal. January 10 Letter at 2. Put differently, were Complainants to use MultiRail to present the car blocking plans they chose not to include on Opening or to replace their automated train selection methodology with a MultiRail-based methodology, they would be substantially revising their cases with evidence to which NS has no opportunity to respond. That is precisely the sort of unfair, sandbagging revision that the Board's rebuttal rules are designed to prevent.

* * *

In sum, there are no grounds for Complainants' request that NS buy them additional MultiRail rights or training. The Board adheres to the standard American Rule that each party to litigation must bear its own litigation costs, and Complainants have presented no argument or rationale to justify an exception to that rule. Moreover, Complainants' admission that they want broader MultiRail access so that they can use MultiRail to revise their cases on Rebuttal dooms their request, for that purpose is plainly not permissible Rebuttal. There is no basis in law or logic for Complainants to expect NS to make such purchases on Complainants' behalf, and NS declines to do so.

Sincerely,



G. Paul Moates
Paul A. Hemmersbaugh

¹⁰ See also *Western Fuels Ass'n v. BNSF Ry. Co.*, STB Docket No. 42088 (served Sept. 10, 2007) ("[I]n rail rate cases the shipper may use its rebuttal presentation either to demonstrate that its opening evidence was feasible and supported, to adopt the railroad's evidence, or in certain circumstances to refine its opening evidence.").

Exhibit G

January 22, 2013

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

Re: *STB Docket NOR 42125, E.I. du Pont de Nemours & Co. v. Norfolk Southern Railway;*
STB Docket NOR 42130, SunBelt Chlor Alkali Partnership v. Norfolk Southern Railway;
Access to MultiRail

Dear Paul:

I am writing on behalf of E.I. du Pont de Nemours & Company (DuPont) and SunBelt Chlor Alkali Partnership (SunBelt) (collectively, the Complainants) in response to your January 17, 2013 letter refusing the Complainants' request that Norfolk Southern Railway Company (NS) provide full access to the MultiRail software that NS used to generate its Stand Alone Cost evidence in the above-referenced rate cases.

The Complainants have opted not to waste time engaging NS in a point-by-point debate by correspondence over the merits of their opening evidence or whether the read-only access to MultiRail offered by NS is sufficient for either the Complainants or the Board to review, challenge, and, if necessary, correct the NS Reply Evidence. Contrary to the principal focus of your letter, the Complainants do not have, and never had, any plans to submit "new" rebuttal evidence based on MultiRail. Rather, they requested full access to MultiRail to enable them to review the NS analysis and to correct errors and/or assumptions contained therein, which is the right of every complainant. The read-only access provided by NS constrains their ability to do so. The Complainants fully intend to demonstrate on rebuttal that their operating plan is supported, feasible and realistic and that the NS operating plan is not, in part because NS has not supported its operating plan by providing the Complainants and the Board with the necessary access to MultiRail.¹

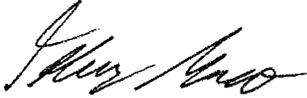
For now, the Complainants will proceed with the limited access that NS has provided to MultiRail, in order to determine more precisely what they can and cannot do with such access. This decision merely defers the issues raised in my January 10, 2013 letter without prejudice to

¹ Complainants presume that NS has provided the Board with the same level of access to MultiRail as the Complainants, which includes requiring the Board to pay the same set-up and training costs as the Complainants. If NS is providing any greater access to the Board, or covering any of the Board's set-up and training expenses, I request that you promptly inform the Complainants of the precise scope and nature of the access that NS has provided to the Board.

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the Complainants' right to pursue greater access if this limited access proves inadequate. The Complainants still believe strongly that NS is required to provide complete access without charge; however, in order to avoid delay, the Complainants also will incur the MultiRail set-up and training costs while reserving their right to seek reimbursement from NS for this expense.²

Very truly yours,



Jeffrey O. Moreno

² Complainants note for the record that, contrary to the allegation in note 5 of your letter that L.E. Peabody personnel already received MultiRail training in the *Seminole v. CSXT* case, L.E. Peabody personnel did not receive any such training because they were not the consultants engaged by Seminole to develop the operating plan.
