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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42125

E.I. DUPONT DE NEMOURS AND COMPANY
v.
NORFOLK SOUTHERN RAILWAY COMPANY

Digest:[1] The Board denies reconsideration of its prior decision finding that the challenged rates have not been demonstrated to be unreasonably high.

Decided: December 22, 2015

In this decision, the Board denies the parties' petitions for reconsideration of the Board's decision in the above titled docket served on March 24, 2014, as corrected and updated on October 3, 2014 (Decision on the Merits).

BACKGROUND

On October 7, 2010, E.I. DuPont de Nemours & Company (DuPont)[2] filed a complaint challenging the rates of Norfolk Southern Railway Company (NS) in 138 lanes of movements that cover 26 discrete commodities.[3] The 138 challenged lanes are governed by 100 separate

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] On July 14, 2015, DuPont filed a motion to substitute The Chemours Company FC, LLC and The Chemours Company TT, LLC (collectively Chemours) as the complainants in this proceeding, following DuPont's spinoff of its performance chemicals business into Chemours. On July 30, 2015, NS replied, noting that DuPont continues to be the responsible shipper for 14 lanes at issue in this case. On August 6, 2015, DuPont submitted a reply stating that it does not object to dismissal of those 14 lanes with prejudice. By decision served on October 29, 2015, the Board granted DuPont's request to substitute Chemours and dismiss with prejudice with respect to those 14 lanes. The Board held that, with respect to the 14 lanes, the Decision on the Merits remains final. For consistency with prior decisions in this docket, the complainant will be referred to in this decision as DuPont, notwithstanding the later substitution of Chemours.

[3] The parties designated certain information in this decision as confidential or highly confidential. While we attempt to avoid references to confidential or highly confidential

(continued . . .)

rates, which were established at the expiration of a long-term contract entered into by NS and DuPont in 1997.

DuPont pursued relief under the agency's stand-alone cost (SAC) test. In presenting its case under the SAC test, DuPont created the hypothetical DuPont Stand-Alone Railroad (DRR). The DRR would operate in 20 states with over 7,200 constructed route miles and another 820 miles in trackage rights and joint facilities. The DRR would handle all or some of the line haul for 92% of NS's current traffic base and would claim 74% of NS's overall revenues. The parties agreed that no effective intermodal or intramodal competition exists for 25 rates governing 39 of the challenged movements. Of the 75 rates governing the other 99 movements challenged by DuPont, the Board found that NS had market dominance over 71 rates. See 49 U.S.C. § 10701(d)(1).

In a decision served on March 24, 2014, the Board found that DuPont had not demonstrated that the challenged rates were unreasonable under the Stand Alone Cost (SAC) test. As part of the SAC test, the Board's discounted cash flow (DCF) analysis compares revenues the hypothetical stand-alone railroad (SARR) is expected to earn from the selected traffic group against the revenues the SARR would need to serve the same traffic group. In this instance, the Board's analysis found that the DRR would earn approximately $1.05 billion less from the traffic group than the DRR would require to serve the same traffic. Accordingly, the Board declined to prescribe rates for DuPont's traffic.

On April 14, 2014, the parties submitted a joint petition to correct technical errors. In the Decision on the Merits, the Board made technical corrections in response to the parties' joint petition. After the technical corrections, the Board's analysis showed that the DRR would earn approximately $6.45 billion less from the traffic group than the DRR would require to serve the same traffic. Decision on the Merits, NOR 42125, slip op. at 289. On November 12, 2014, DuPont and NS each filed a petition for reconsideration of the Decision on the Merits. On November 13, 2014, the parties submitted a supplemental joint petition for technical corrections. On December 12, 2014, DuPont and NS each filed a reply to one another's petition for reconsideration.

TECHNICAL CORRECTIONS

In their November 13, 2014 supplemental joint petition for technical corrections, the parties agree that the cost of capital used to discount the DRR's asset replacement costs and capital carrying charges to present value was miscalculated. This error is corrected.

The parties also agree that there was a computational error concerning tax depreciation for certain PTC investment. This error is corrected.

In its petition for reconsideration, DuPont also makes a number of generalized statements that the cumulative dollar amount of technical corrections in this case calls the Board's decision

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information in Board decisions, the Board reserves the right to rely upon and disclose such information in decisions when necessary. In this case, we determined that we could not present our findings with respect to issues in this case without disclosing certain information.

into question. (See DuPont Pet. for Recons. i.) DuPont is incorrect. Given the technical complexity and voluminous data in SAC cases—the most precise rate review methodology currently available[4]—technical corrections are inevitable and have long been a standard part of the SAC adjudicatory process. The Board has specific procedures for the submission of technical corrections, see Public Service Co. of Colo. v. Burlington Northern & Santa Fe Railway, 7 S.T.B. 1029 (2004), and such petitions are common. See, e.g., AEP Tex. N. Co. v. BNSF Ry., NOR 41191 (Sub-No. 1) (STB served May 15, 2009), vacated in part on other grounds sub nom. AEP Tex. N. Co. v. STB, 609 F.3d 432 (D.C. Cir. 2010); W. Fuels Ass'n v. BNSF Ry., NOR 42088 (STB served Feb. 29, 2008). Moreover, in this particular case, the size and operations of the DRR are far greater than any previous SARR submitted in a SAC case.[5] Accordingly, it is not surprising that the dollar figures associated with any technical corrections here will be far larger in magnitude than prior cases as well.

DISCUSSION AND CONCLUSIONS

A party may seek reconsideration of a Board decision by submitting a timely petition that (1) presents new evidence or substantially changed circumstances that would materially affect the case, or (2) demonstrates material error in the prior decision. 49 U.S.C. § 722(c); 49 C.F.R. § 1115.3. The Board generally does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages of the proceeding. Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry., 7 S.T.B. 803, 804 (2004).

Based on allegations of material error, DuPont seeks reconsideration with respect to 20 issues, and NS seeks reconsideration with respect to 11 issues. The Board has determined, however, that many of these issues are so limited in their effect that they cannot alter the outcome of this proceeding. As demonstrated in Appendix A, after addressing four critical issues raised by DuPont in its petition (discussed below), the DRR will earn approximately $7.125 billion less from the traffic group than the DRR would require to adequately serve that traffic group. The balance of the issues raised by DuPont are not material to the outcome of this case because as shown in Appendix B, even if all these issues were decided in DuPont's favor, the analysis would still show that the DRR would earn approximately $2.192 billion less from the traffic group than the DRR would require to adequately serve that same traffic group. The issues raised by NS, if resolved in NS's favor, would only serve to increase this deficit. Therefore, the Board determines for purposes of this proceeding that these issues are not material

[4] Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1), slip op. at 9 (STB served July 28, 2006).

[5] For example, the DRR's road property investment (RPI) is approximately $40.6 billion, far greater than the largest two prior SAC cases. Likewise, the DRR's revenue needs of approximately $78 billion are far in excess of the SARRs in those same two prior matters. See Ariz. Elec. Power Coop. v. BNSF Ry., NOR 42113, slip op. at 143 (STB served Nov. 22, 2011) (RPI of $7.2 billion; revenue requirements of $19.4 billion); FMC Wyo. Corp. v. Union Pac. R.R., 4 S.T.B. 699, 738 (2000) (RPI of $8.4 billion; ten-year revenue requirement of $27.1 billion).

and denies reconsideration on that basis. See 49 C.F.R. § 1115.3; Ariz. Elec. Power Coop., NOR 42113, slip op. at 36. Below, the Board addresses the four critical issues raised on reconsideration with potentially significant impact that could be material to this proceeding.

1. Rates Resulting from the Board's Decision

DuPont argues that the Decision on the Merits allows NS to establish extremely high rates, which, it says, "effectively deregulates carload rates in the Eastern United States and perhaps nationwide" and indicates that the SAC test itself is flawed. (DuPont Pet. for Recons. 1) DuPont asserts that the $6.453 billion net present value (NPV) deficit in the DCF analysis means NS could charge DuPont (and/or any other shippers on lanes over which NS has market dominance) $6.453 billion more before a rate would be found unreasonable. Thus, DuPont calculates that the Decision on the Merits would allow NS to charge DuPont rates with revenue-to-variable cost (R/VC) ratios ranging from 6,105% to 49,836%. Citing Intermountain Power Agency v. Union Pacific Railroad, NOR 42127, slip op. at 3 n.11 (STB served Nov. 2, 2012), DuPont argues that NS could raise its rates by tenfold or more and DuPont would have no recourse to challenge those rates until 2020. DuPont adds that if the NPV deficit were spread across every DRR movement with an R/VC exceeding 180%, the average rate that NS could have charged in 2012 under the Decision on the Merits is over 534% R/VC. DuPont states that that 534% average R/VC ratio is nearly double the 261% average R/VC ratio for chemical movements with R/VC ratios over 180%, based on data from the Board's Commodity Revenue Stratification Report for 2012. Thus, DuPont contends, "the practical effect of the Board's decision is to deregulate carload rail rates." (DuPont Pet. for Recons. 4.)

DuPont also compares the average 2012 Revenue Shortfall Allocation Method (RSAM) figure for the DRR, which is 529%, to NS's average RSAM from 2009 to 2012 of 283% and NS's average R/VC ratio for movements over 180% R/VC from 2009 to 2012, which was 276%. This comparison, DuPont asserts, demonstrates that the Decision on the Merits would permit NS to charge rates significantly higher than the already-high rates challenged by DuPont.

On reply, NS argues that, contrary to DuPont's position, the fact that a SAC analysis did not find the rates challenged by DuPont to be unreasonable does not mean the SAC test is flawed. NS states that the SAC test does not presuppose that rates are unreasonable and then try to justify that conclusion. Rather, according to NS, DuPont's case was unsuccessful because it submitted a SAC presentation that claimed the lion's share of NS's traffic and revenues but did not account for the full costs of serving that traffic. NS asserts that the outcome of this case was a result of DuPont's deliberate decisions not to replicate the full operations required to serve DuPont's selected traffic group, not to use realistic evidence of the costs of construction, and to assume that the DRR could realize two-thirds of NS's revenue with only 18% of its workforce.

NS disagrees with DuPont's calculations of the rates permitted under the Decision on the Merits. DuPont's traffic, NS points out, constitutes only 0.1% of the DRR's carloads, and DuPont's calculation assumes that NS might seek to recover the entire $6.453 billion NPV deficit from DuPont alone. NS contends that this is a meaningless way to assess a SAC result, because no railroad would attempt to recover the entirety of a system-wide revenue deficit from a single shipper, particularly one that accounts for only 1/1000th of its traffic base.

NS also disagrees with DuPont's RSAM calculation. NS asserts that RSAM numbers steadily drop over the course of the SAC analysis and eventually dip well below NS's current RSAM. By taking the 2012 number, NS argues, DuPont is "cherry-picking." NS further argues that it is meaningless to compare a SARR's RSAM to the incumbent railroad's RSAM because the purpose of the SAC analysis is to recover sufficient revenue contribution to recover the SARR's capital costs on a replacement cost basis, while RSAM is predicated on historical book values. NS argues that it is to be expected that a SARR's RSAM, designed to measure the average markup necessary for the SARR to earn its cost of capital for assets valued at replacement costs, would be higher than an incumbent RSAM that measures the average markup necessary for the incumbent to earn its cost of capital for assets only valued at book value.

The Board rejects DuPont's assertion that the SAC analysis here contains any implication that NS could charge DuPont the entire NPV deficit or that the Board is deregulating carload rates. The Board's decision in this proceeding was the result of the evidence and arguments presented here. DuPont's failure to demonstrate that its rates were unreasonable does not preclude a different shipper in the future from making a better case, with stronger evidence, that a carrier is charging unreasonable rates. Moreover, it is unreasonable to assume that NS would recover the entire NPV deficit from a single shipper that constitutes a small fraction of the railroad's carloads.[6] And DuPont's reliance on the DRR's 2012 RSAM is misplaced, given that the DRR's RSAM decreases significantly below the 2012 number in later years of the SAC analysis period. (See DuPont Pet. for Recons. Ex. 3.) DuPont also expresses concern that, under Intermountain Power Agency, NS could adopt a different, higher rate and DuPont would be precluded from challenging it. But DuPont itself observes the reason why this concern is not well founded. (DuPont Pet. for Recons. 3 n.5.) That is, the Board's rate reasonableness analysis is predicated on the tariff rate challenged by DuPont in this case; should NS raise the rate beyond that set forth in the challenged tariff, DuPont could challenge the reasonableness of the new rate. See Sunbelt Chlor Alkali Partnership v. Norfolk S. Ry., NOR 42130, slip op. at 29 (STB served June 20, 2014). In effect, rather than deregulating carload rates in the Eastern United States, the Board's SAC analysis merely demonstrates that DuPont failed to show that its rates at issue were unreasonable, not that other rates or some future hypothetical rates would be reasonable.[7]

2. SAC Methodology

The Board's finding that the challenged rates have not been shown to be unreasonable is due to the merits of the evidence and arguments presented in this case, not due to inherent flaws

[6] Basic economic theory dictates that the incumbent railroad will only employ differential pricing to maximize profits on all its traffic, not to drive away profitable business.

[7] In this respect, DuPont's citation to the Intermountain Power Agency decision is without merit. Intermountain Power Agency states only that "dismissal with prejudice could be interpreted to mean that [the complainant] could not bring a second challenge to these same rates for past or future movements . . . unless it could demonstrate changed circumstances, new evidence, or material error that would justify a second investigation." Intermountain Power Agency, NOR 42127, slip op. at 3-4 n.11 (emphasis added).

in the SAC methodology. While SAC remains the most accurate procedure currently available for determining the reasonableness of rates,[8] the Board acknowledges DuPont's concern about the cost and complexity of a full SAC case. (DuPont Pet. for Recons. 1.) When a shipper elects to litigate a full SAC case (rather than pursuing one of the simplified rate reasonableness methodologies), even the most straightforward SAC case—where the SARR primarily moves a single commodity in unit trains from one origin to one destination—involves a lengthy and complex proceeding. In cases where the SARR moves many commodities in carloads from many origins to many destinations—and especially a case like this one where the SARR replicates much of a Class I railroad's network—or where the parties find less common ground on the thousands of inputs to a full SAC analysis, the case greatly increases in size and complexity.[9]

Recognizing the developments in full SAC cases in recent years, the Board is committed to reducing the complexity and burdens associated with the Board's rate review process. The Board has expanded the availability of the expedited Simplified SAC and Three-Benchmark approaches (by eliminating and reducing award caps) and begun a review of issues relating to grain rates (with the objective of ensuring that grain shippers have better access to the Board's rate procedures). See Rate Regulation Reforms, EP 715 (STB served July 18, 2013); Rail Transp. of Grain, Rate Regulation Review, Docket No. EP 665 (Sub-No. 1). The Board has also commissioned an independent analysis that evaluates potential alternative rate regulation approaches, with the goal of reducing the time, cost and complexity of rate reasonableness complaints brought before the Board.[10] Thus, although SAC is economically sound and has been upheld on judicial review, the Board recognizes the concerns expressed by DuPont and others over the burden and complexity of recent full SAC cases. The Board's continuing goal to improve its rate reasonableness process does not, however, provide a ground for reconsideration of any issue based on material error.

3. Operating Plan

In the Decision on the Merits, the Board adopted the operating plan proposed by NS, finding that DuPont's operating plan omitted a significant number of trains needed to carry the selected traffic group—including a large percentage of DuPont's own issue traffic—and did not provide complete service for the trains that it does carry, including a lack of facilities for serving

[8] Simplified Standards, EP 646 (Sub-No. 1), slip op. at 9; Rate Guidelines—Non-Coal Proceedings, 1 S.T.B. 1004, 1021 (1996); McCarty Farms v. Burlington N. Inc., 3 I.C.C.2d 822, 839-40 (1987).

[9] The magnitude of the alleged overcharge on the collective traffic group in this case—approximately $20.1 billion according to DuPont's opening evidence—further illustrates the complexity. (DuPont Opening Statement III-H-12)

[10] See STB News Release, Surface Transportation Board Awards Contract for Study of Railroad Rate Regulation Alternatives (Sept. 19, 2014), http://www.stb.dot.gov/newsrels.nsf/ (follow "Previous Years" hyperlink; then follow Release # "14-15" hyperlink).

and interchanging local traffic, and for the blocking of trains to ensure that carload shipments are delivered to their final destination.

A. Supplemental Evidence

In its petition for reconsideration, DuPont asserts that both parties' operating plans contained significant flaws, and that the Board erred by adopting NS's operating plan and not soliciting supplemental evidence, using that supplemental evidence to make adjustments to DuPont's operating plan, and then adopting DuPont's plan.

However, the flaws in the parties' two operating plans were not of equal degree. As the Decision on the Merits states, NS's operating plan provides the facilities and trains necessary to serve the issue traffic. The magnitude of problems in the NS operating plan—such as its treatment of foreign train crossings—simply do not rise to the level of the problems in DuPont's operating plan. Decision on the Merits, NOR 42125, slip op. at 36-37 n.53. Even with its errors, NS's operating plan worked—it included the facilities and operations needed to serve DuPont's selected traffic.[11] The flaws in DuPont's operating plan, by contrast, were foundational. DuPont omitted basic and crucial elements necessary to serve its selected traffic group, including large numbers of trains necessary for carrying DuPont's issue traffic, as well as facilities needed for blocking and classification of carload traffic. Decision on the Merits, NOR 42125, slip op. at 37-40. Supplemental evidence is not warranted here where the defendant, NS, has presented adequate, useable evidence.[12]

Similarly, to the extent DuPont's argument is that the Board should solicit supplemental evidence whenever an operating plan contains any degree of error—even the less significant flaws in NS's operating plan here—the Board agrees with NS that DuPont's proposal is

[11] DuPont points to a statement in the Decision on the Merits that one of these errors—external rerouting—is "an issue that, in another context, could be determinative in our evaluation of which operating plan to accept." Decision on the Merits, slip op. at 45. But this statement does not mean the external rerouting—of which DuPont shows only one instance—is an error so significant that it prevents the SARR from serving the selected traffic group. See id. Similarly, the Board's reference to errors in NS's operating plan as "not trivial" does not mean these errors are so significant as to prevent the SARR from serving the selected traffic group, as with the errors in DuPont's operating plan. See id. at 43.

[12] By contrast, in Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., NOR 42121, slip op. at 6 (STB served July 24, 2015), the Board solicited supplemental evidence when neither party provided the evidence necessary for the Board to complete its regulatory review. DuPont cites Otter Tail Power Co. v. Burlington Northern & Santa Fe Railway, NOR 42071 (STB served Dec. 13, 2004), and Arizona Electric Power Cooperative v. Burlington N. & Santa Fe Ry., NOR 42058 (STB served Nov. 19, 2003), as cases where the Board sought supplemental evidence "when necessary to obtain an adequate record upon which to decide a case." (DuPont Pet. for Recons. 10.) Those cases, however, are different from the instant case, as discussed above and in the Decision on the Merits—here, the Board had an adequate record without seeking supplemental evidence.

unreasonable. This approach would not be consistent with administrative efficiency, as it would require additional evidentiary submissions and Board decisions that do not correspond to the benefits gained.

The Board stated in the Decision on the Merits that, "in most circumstances, the Board would require the defendant in a SAC case to make any necessary corrections to the complainant's opening evidence rather than submitting something entirely new on reply, to avoid having operating plans so different as to impede comparison." Decision on the Merits, NOR 42125, slip op. at 41. DuPont asserts that the Board departed from this policy without explanation. But DuPont omits the language that follows, which provides an explanation why this case is different: "DuPont's operating plan on opening included no blocking and classification at intermediate yards. Thus, on this issue, there was nothing for NS to correct on reply. To provide this essential part of the operating plan for a predominantly carload system, NS needed to supply its own analysis." Decision on the Merits, NOR 42125, slip op. at 41 (footnote omitted).

DuPont contends that NS, on Reply, could have added blocking and classification at intermediate yards without submitting an entirely new operating plan. But as NS observes, DuPont does not explain how NS could have accurately integrated the traffic blocks that NS developed in MultiRail[13] with the list of historical NS trains that DuPont used in its operating plan. DuPont asserts that this problem should not have arisen in the first place, arguing that "NS has conceded that MultiRail was not necessary to develop car classification counts, thus annulling the Board's rationale for accepting NS's MultiRail-based evidence." (DuPont Pet. for Recons. 10 n.11.) As discussed in the Decision on the Merits and below, DuPont is correct that no party is required to use MultiRail or similar software to develop a SAC presentation involving carload traffic, and that adopting the classification and blocking plan of the incumbent railroad, with the necessary traffic and facilities sufficiently adjusted, inter alia, for volume differences, is one way to show that the proper blocking and classification is occurring at yards on a SARR. Decision on the Merits, NOR 42125, slip op. at 42. Thus, DuPont is also correct that MultiRail is not "necessary," in the sense that it is not the only approach a party can use to account for blocking and classification. Even though MultiRail is not required, however, the Board has found that it is one acceptable way to address blocking and classification for a predominantly carload SARR. Id. And at the time NS filed its Reply, the record contained no other way of accounting for blocking and classification, because DuPont did not include one on Opening. NS, having to produce the first analysis of this issue in this proceeding, was free to choose among the available approaches, including MultiRail. Had DuPont developed a blocking plan without using MultiRail, NS would have needed to respond to that blocking plan instead of creating its own from scratch.

Citing Duke Energy Corp. v. Norfolk Southern Railway, 7 S.T.B. 89, 101 n.20 (2003), DuPont also states that, if DuPont's operating plan had been "'so flawed as to preclude the

[13] MultiRail computer software is a modeling tool that generates car classification and blocking service plans for a selected traffic group, based upon characteristics of the traffic, the railroad's network configuration, and customer service requirements.

development of appropriate reply evidence to address the flaws,' NS was required to 'file a separate motion bringing that problem to the Board's attention.'" But again, as explained in the Decision on the Merits, because DuPont's opening operating plan omitted blocking and classification, on this issue NS had nothing to correct on reply. These operations are an essential part of the operating plan for a predominantly carload system, and for NS to submit an operating plan that worked, it needed to supply its own analysis. Decision on the Merits, NOR 42125, slip op. at 41. In other words, under the rather unique circumstances of this case, NS's operating plan was appropriate reply evidence. The alternative proposed by DuPont—in which a complainant's omission of a crucial component of the operating plan would require the defendant to prompt the complainant for additional evidence supplying that component before the defendant could respond—would insulate complainants from all of the consequences of their own litigation decisions. On rebuttal, complainants have the opportunity to respond to criticism of their operating plans. See Decision on the Merits, NOR 42125, slip op. at 38 (noting that even after rebuttal DuPont's operating plan still failed to provide complete service for approximately 33% of the issue traffic, an issue that NS identified in its reply). DuPont's suggested procedure here could require multiple, additional rounds of evidence before the record could be completed—e.g., the defendant files a motion prompting the complainant for further evidence addressing a point omitted on opening, the complainant responds, the Board rules on that motion, the complainant submits its supplemental evidence, and the defendant finally replies. Expanding the SAC analysis in this way would increase the burden and cost of this process, contrary to the interests of parties and the Board. Instead, the Duke Energy Corp. footnote calling for a motion refers to the hypothetical situation in which the complainant's evidence is so flawed that the defendant cannot present an appropriate reply at all.

B. Missing Trains

One key flaw in DuPont's operating plan was its omission of large numbers of trains carrying DuPont's issue traffic. Decision on the Merits, NOR 42125, slip op. at 37-39. In its petition for reconsideration, DuPont argues that NS never informed DuPont of limitations in NS's traffic data that would have alerted DuPont to flaws in its train selection methodology or otherwise enabled DuPont to develop a proper methodology. Accordingly, DuPont argues that the Board erred by rejecting DuPont's train counts.

According to DuPont, shippers and railroads in prior cases selected trains that reported two or more events on the SARR based on the train event data.[14] Under this methodology, according to DuPont, if a train reported only one event on the SARR, it was excluded because the data did not indicate that the train moved over the SARR, but simply touched a single point

[14] Train event data are compiled into databases, the contents of which vary by railroad but generally include most activities that take place between the train's origin and its destination. Each train activity is identified by the type, time and location, the number of locomotives, and loaded and empty freight cars in the train's consist. Activities include picking up and setting out cars at industries, yards, and way points in the case of bad order cars, changes to the locomotive consist (including adding and removing helper trains), delays in transit, and defects detected by manual inspection and wayside electronic devices.

on the SARR, such as a yard, and either terminated or continued over a different line of the incumbent railroad. DuPont states that it followed this methodology here, but that later, in a separate proceeding that NS is a party to—Sunbelt Chlor Alkali Partnership v. Norfolk Southern Railway, Docket No. NOR 42130—NS disclosed that when a local train operates in and around a single operating station, NS's practice is to identify that train by a single milepost designation in its train event data. Thus, DuPont states, NS has a practice of using a single milepost designation for operating stations, which caused local trains to record only one event on the lines replicated by the SARR—even when those local trains are actually moving over the lines replicated by the SARR—but NS did not disclose that practice until later, in a different proceeding. (DuPont Pet. for Recons. 14 (citing NS Reply Evidence at III-C-25, Jan. 7, 2013, Sunbelt Chlor Alkali Partnership v. Norfolk S. Ry., NOR 42130).) DuPont asserts that if NS had disclosed this practice, DuPont would have been on notice that the train selection methodology used in past cases would not capture all essential trains in this case.

We conclude, however, that DuPont should have been on notice that its train selection methodology had not captured all essential trains, even without the disclosure by NS in a separate case. The trains selected by DuPont failed to move significant amounts of DuPont's own issue traffic from origin to destination—a conclusion that DuPont could readily have drawn from the data available before DuPont filed its opening evidence. (See NS Recons. Reply 11-12 & nn.17-18 (inter alia, citing to the record evidence identifying DuPont's missing trains in this case).)

Even if DuPont followed the train selection methodology used in prior cases, it was not reasonable for DuPont to omit trains necessary to carry the issue traffic. In most prior cases, the issue traffic was coal moving in unit trains from a single origin to a single destination. Thus, every train that carried issue traffic over such a SARR would have multiple on-SARR train events, because the same train would carry a shipment of issue traffic all the way from origin to destination. In this case, however, the issue traffic moves in carload service, and a train carrying issue traffic may have only a single train event on-SARR—for example, if a local train carries a shipment of issue traffic from the origin to a yard, at which point the car or cars carrying the issue traffic shift to another train. As the Board stated in reference to blocking and classification, a predominantly carload system differs from a SARR carrying unit trains of coal, and assumptions that applied consistently in coal cases—such as the exclusion of trains with only one train event on-SARR—may not apply on a carload system. Therefore, DuPont should have been on notice that a train selection methodology which excluded large numbers of trains carrying issue traffic was incorrect, even before NS's January 2013 disclosure of the practice described above.

Moreover, DuPont was on notice regarding the omission of trains necessary to carry issue traffic once NS filed its reply evidence in this proceeding, which called specific attention to this error. (NS Reply III-C-14 to III-C-21, Nov. 30, 2012.) DuPont had an opportunity to correct its omission in its rebuttal evidence, which it filed on April 15, 2013. See Sunbelt Chlor Alkali Partnership v. Norfolk Southern Railway, NOR 42130, slip op. at 7-8 (STB served June 20, 2014) (allowing complainant to add trains on rebuttal). DuPont chose not to take that opportunity. (See NS Br. 21-22.)

C. MultiRail

In addition to its general arguments regarding MultiRail, addressed above, DuPont also renews its objection to the use of MultiRail from an evidentiary standpoint. DuPont argues that without a full version of MultiRail, DuPont and the Board were unable to assess NS's operating plan adequately.[15]

In the Decision on the Merits, the Board stated that, while the Board does not have the MultiRail software, we are able to analyze its inputs and outputs just as we would if the blocking and train service plans were developed by operating experts without the use of software. DuPont takes issue with this conclusion, asserting that "[t]he Board has admitted that it could not independently review the NS evidence because it did not have access to MultiRail." (DuPont Pet. for Recons. 16.) However, the language from the Decision on the Merits cited by DuPont does not state that the Board could not independently review the NS evidence. Rather, the Board stated that, even if it were appropriate to modify NS's operating plan to address DuPont's claims regarding external rerouting, see supra Part 2, Subpart A, this particular modification would not be possible because DuPont provided no evidence that would enable the Board to identify and alter each specific instance of a reroute. Decision on the Merits, NOR 42125, slip op. at 45. Thus, DuPont's assertion mischaracterizes the Decision on the Merits.

DuPont argues that, to assess NS's operating plan adequately, DuPont and the Board would have needed the ability to modify the NS plan to correct for inefficiencies, and that such modification was not possible without a full, read-write copy of MultiRail. We disagree with DuPont's claim that adequate assessment of NS's operating plan requires the ability to modify that plan. As the Decision on the Merits indicated, if the blocking and train service plans were developed by operating experts without the use of software, the Board would assess those plans by analyzing their inputs and outputs. Decision on the Merits, NOR 42125, slip op. at 42. In that instance, there would be no software program with which to re-run and alter the experts' analysis. As the Board has held, a party is not required to use MultiRail or similar software to develop a SAC presentation involving carload traffic. Id. Indeed, DuPont itself submitted car classification evidence on rebuttal that did not use software. Instead, DuPont adopted the classification and blocking plan of the incumbent railroad, which can be an appropriate way to show that the proper blocking and classification is occurring at yards on a SARR, if sufficiently

[15] DuPont also contends that, "[b]y not providing DuPont with the same fully-functional version of MultiRail that NS itself used to manipulate the data and produce its conclusions, NS has not fulfilled its evidentiary obligations." (DuPont Pet. for Recons. 15-16.) However, as the Board found in the Decision on the Merits, NOR 42125, slip op. at 40-41 n.75, and in the March 27, 2013 decision in this docket, DuPont withdrew its argument that NS should be required to provide DuPont with a full, read-write version of MultiRail. DuPont appears to concede that, for purposes of the current proceeding, it has waived this argument. (See DuPont Pet. for Recons. 16 n.28.) DuPont challenges the Board's conclusion that the Board can evaluate the evidence without its own copy of MultiRail, "an argument that DuPont has never waived in this proceeding"—in apparent contrast to DuPont's request for a full, read-write version of MultiRail from NS. Id.

adjusted for traffic and volume differences and if the necessary facilities are included.[16] Therefore, DuPont's position—that adequate assessment of blocking and train service plans requires the ability to modify that analysis—runs contrary to DuPont's own approach to blocking and classification and the Board's holding that MultiRail or similar software is not required.

DuPont further asserts that MultiRail creates alternate routes to those used by NS in the real world, that these re-routes distort the SAC analysis, and that in a discovery dispute, NS argued that re-routes could undermine the accuracy and validity of the SAC analysis. As the Board has held, however, even if it were appropriate to make adjustments in response to DuPont's re-routing concerns, DuPont failed to provide the evidence that would be necessary to make such adjustments. Decision on the Merits, NOR 42125, slip op. at 45.

4. Change in Average Total Cost (ATC) Methodology

In its opening evidence, DuPont used the Board's "Modified ATC" approach to allocate revenues from cross-over traffic between the facilities replicated by the SARR and those of the incumbent carrier. After DuPont submitted its opening evidence and NS submitted its reply evidence, the Board adopted the "Alternative ATC" approach through a rulemaking. Rate Regulation Reforms, EP 715, slip op. at 30-34 (STB served July 18, 2013).

In the Decision on the Merits, the Board chose to apply Alternative ATC in this proceeding. The Board noted that, although Alternative ATC had not been adopted prior to the start of this case, the parties were on notice fairly early on that the Board's ATC methodology was potentially subject to modification. See Decision on the Merits, NOR 42125, slip op. at 81. DuPont now argues that, because the cross-over revenue allocation methodology has ramifications for the type of traffic selected for a SAC analysis, the Board should permit DuPont an opportunity to redesign its SARR due to the Board's change in methodology. DuPont states that the Board has afforded the same opportunity to other SAC complainants in previous cases where the Board changed its cross-over revenue allocation methodology while those cases were pending. (DuPont Pet. for Recons. 18-19 (citing AEP Tex. N. Co. v. BNSF Ry., NOR 41191 (Sub-No. 1), slip op. at 23 (STB served Sept. 10, 2007)).) According to DuPont, whether traffic is profitable for the SARR may change based on a change from Modified ATC to Alternative ATC, and changing the traffic selection can change the size and footprint of the SARR system used to serve that traffic group. DuPont acknowledges that, in its August 27, 2012 reply to NS's motion to hold the case in abeyance, DuPont asserted that the choice of ATC methodology would have little impact on the results of this case. DuPont contends that that argument was

[16] What is critical is that the complainant shows in some manner that it includes the costs of all necessary facilities and services, and provides evidentiary support for these costs. This inclusion of costs, with evidentiary support, could satisfy the SARR's need for blocking in a carload system without adopting the blocking and classification of the incumbent railroad and without using a program such as MultiRail to model the blocking and movement of each car. Here, DuPont did not include the costs associated with the necessary facilities and services. See Decision on the Merits, slip op. at 39-40.

based on DuPont's opening evidence, which prescribed rates below 180% R/VC ratios using any of the ATC methodologies.

In its reply to DuPont's petition for reconsideration, NS argues that the change in cross-over traffic revenue allocation methodology did not materially affect DuPont's selection of traffic or the allocation of cross-over revenues in this case. NS asserts that DuPont's traffic selection programming did not filter traffic based on the level of revenues allocated by ATC, and DuPont's traffic selection methodology was unaffected by revenue allocation, because DuPont simply selected all, or nearly all, the available traffic on the NS lines replicated by the DRR. NS also argues that DuPont is estopped from arguing that the change in ATC methodology would change the result of the case, because DuPont argued the opposite in opposing NS's abeyance motion.

The Board will deny DuPont's request to redesign its SARR due to the Board's change in ATC methodology. The Board concludes that DuPont's argument is inconsistent with its arguments on this issue in its opposition to NS's abeyance motion. In its earlier filing, DuPont asserted that, "[w]hether the Board applies Original-ATC, Modified-ATC, or the Alternate-ATC proposed in EP 715, the impact upon this proceeding will be minimal. . . . The Board could proceed to apply any of the three ATC methodologies in this proceeding without there being a meaningful difference in the result." (DuPont Reply to NS Abeyance Mot., Aug. 27, 2012, at 30-31.) DuPont now contends that that argument assumed the use of DuPont's opening evidence, which prescribed rates below 180% R/VC ratios using any of the ATC methodologies. But DuPont's opposition to NS's abeyance motion does not reflect such an assumption. Rather, DuPont argued generally that:

> When dealing with a SARR the size of the DRR, there inevitably are many high density and low density segments. As a result, where one revenue allocation methodology favors certain SARR movements, another methodology favors different movements. On net, however, there is no systematic bias in this proceeding because different SARR movements will benefit from each variation of the ATC methodology, whether it be Original-ATC, Modified-ATC, or the recently proposed Alternate-ATC.

Id. at 30.

DuPont used its opening evidence as a demonstration of this larger argument, not as a limitation. See id. ("To demonstrate this fact, DuPont has applied all three ATC variants to its Opening Evidence"). Thus, DuPont's current position—that the change in ATC methodology has so significant an impact on this proceeding that DuPont should be permitted to redesign its SARR and present essentially a brand new case—is fundamentally at odds with DuPont's position earlier in this case that a change adopting Alternative ATC would have minimal impact on the proceeding.

Further, we agree with NS that DuPont's traffic selection sought to maximize traffic density without regard to R/VC ratios generated by the selected traffic or the ATC revenue allocation it would receive. As a result, DuPont selected nearly all the available traffic on the

lines replicated by the DRR; as NS points out, more than one quarter of the selected traffic had an R/VC ratio below 100%, meaning that under any version of ATC that traffic would generate no contribution to fixed costs. (NS Recons. Reply 20.) Therefore, the Board is not persuaded that the change in ATC methodology would have any significant effect on DuPont's traffic selection.

Finally, DuPont's reliance on AEP Tex. N. Co. v. BNSF Ry., NOR 41191 (Sub-No. 1) (STB served Sept. 10, 2007), is misplaced. At the time of that decision, the Board had switched from its Modified Straight-Mileage Prorate (MSP) approach to allocating revenues from cross-over traffic to Original ATC, which not only represented a major methodological shift, but also significantly changed the incentives for the inclusion of cross-over traffic. The Board noted that basic fairness dictated that the shipper in that proceeding have an opportunity to redesign its SAC presentation in light of the new revenue allocation methodology. Id. slip op. at 23. In this instance, Alternative ATC is only a slightly adjusted version of the Modified ATC approach and does not represent the wholesale methodological departure that occurred when the agency moved from MSP to Original ATC. Moreover it has not been shown in this case to have altered the incentives for the inclusion of cross-over traffic. Given the position that DuPont took earlier in this case, we conclude that fairness does not require giving DuPont another bite at the apple on this issue.

5. Trestle Hollow

DuPont developed its rail construction costs using costs NS incurred on a single realignment project—the rerouting and building of a rail line—in Centerville, Tennessee (the Trestle Hollow Project). NS disagreed with this approach and instead used costs from the R.S. Means Handbook (Means).[17] In the Decision on the Merits, the Board rejected DuPont's proposed use of the Trestle Hollow Project unit costs as a benchmark for the DRR's costs because DuPont did not demonstrate that the costs incurred on a 1.3 mile rail line relocation project in Tennessee were representative of the costs the DRR would incur in constructing a 7,300 mile, multi-state railroad. The Board agreed with NS that the size, scope, and geographic and topographic diversity of the DRR make the use of Means more appropriate than the extrapolation of costs from a single project.

In seeking reconsideration, DuPont argues that the Trestle Hollow Project evidence is a "conservative overstatement" of the actual common excavation costs, contending that the Trestle Hollow Project was far more complicated than typical common excavation projects. (DuPont Pet. for Recons. 21.) DuPont also asserts that Means does not reflect the SARR's economies of scale and therefore overstates the SARR's costs. DuPont further claims that the Board's reference to "a fully supported 'real-world substitute'" means the Board unreasonably requires evidence of a project that matches the SARR in size and scope. See Decision on the Merits, slip op. at 149.

[17] Means is a construction cost publishing and consulting company which annually publishes current, comprehensive construction cost data. Among its many uses, the data are used to estimate construction costs.

In its reply to DuPont's reconsideration petition, NS argues that DuPont's arguments are unsupported, that the record included other examples of rail construction projects that could have been used as benchmarks, and that Means does account for economies of scale that would be available to the DRR.

DuPont's request for reconsideration of this issue will be denied. DuPont claims that the Trestle Hollow Project was far more complicated than typical common excavation projects, and therefore, that it is a "conservative overstatement" of common excavation costs. However, as NS argues, DuPont did not present evidence of other projects having lower excavation costs than the Trestle Hollow Project—leaving unidentified the basis for any comparison, on this record,that would support a conclusion that the Trestle Hollow Project costs were a "conservative overstatement." On the contrary, NS, in its reply evidence, cited other projects' costs and, compared to the evidence from all other sources in the record (including other projects and Means averages), the Trestle Hollow Project costs were outliers at the low end. (See NS Reply III-F-45 to III-F-51, Nov. 30, 2012.)

DuPont argues that NS provided only a limited number of documents containing earthwork cost information, and virtually all of these documents were estimates for short track extensions and yard track—projects involving additions or modifications to existing track and right-of-way, which are more expensive than new rail construction because they often require construction under traffic, or adjacent to active tracks. (DuPont Opening III-F-13 to III-F-14.) But NS demonstrates that it did not limit its document production to such projects. Rather, NS produced a list of Authorizations for Expenditure (AFE) for all NS construction projects completed during the time period from January 1, 2007 through December of 2010. NS states that its AFE list included information for 775 separate AFEs covering all aspects of NS capital expenditures over the relevant time frame. (NS Reply III-F-45, Nov. 30, 2012.) Moreover, NS describes information it provided in discovery regarding its Keystone Build-Out Project near Shelocta, Pennsylvania, one of the largest new rail construction projects in the U.S. in recent years. (NS Reply III-F-47 to III-F-50, Nov. 30, 2012.) DuPont claims that the Keystone Project is an unreliable source of cost information because it consists of NS internal estimates rather than bids from contractors, and its earthwork quantities do not distinguish between common, loose rock and solid rock, even though the project was within 15 miles of a segment included in a valuation section that has over 41 percent solid rock. (DuPont Rebuttal III-F-25 to III-F-26.) But these issues are no more significant than the atypical features of the Trestle Hollow Project, including several unusual advantages that benefited the construction, such as a high concentration of excavation volumes in a small geographic area,[18] as well as questions regarding

[18] (See NS Reply III-F-41 to III-F-44, Nov. 30, 2012.) DuPont argues that the high concentration of excavation volumes should be discounted as a factor because the Trestle Hollow Project was especially complicated and difficult, stating that the Trestle Hollow Project required "careful coordination" with regard to several construction activities. (See DuPont Rebuttal III-F-20). But DuPont makes no attempt to show that other construction projects on the DRR would not also require coordination.

the development of the lump sum bid price.[19] Moreover, NS did not attempt to rely solely on the Keystone Project for its construction costs—it merely used it as one basis of comparison.

Thus, notwithstanding DuPont's claim that the Trestle Hollow Project provides a "conservative overstatement" of common excavation costs, a comparison to costs from other sources in the record indicates that this evidence actually understates such costs. In any event, DuPont's characterization of the Trestle Hollow Project costs is unsupported, given the other rail construction cost evidence in the record.

DuPont next contends that Means overstates the SARR's costs because it does not reflect the SARR's economies of scale. The Board agrees with NS, however, that Means, which has been used in many rate cases, accounts for economies of scale by providing costs for a wide variety of different sizes and types of equipment, including large equipment packages with higher productivity and efficiency that are used in large projects. NS points out that under the theory of unconstrained resources, a SARR using Means can deploy as many equipment and manpower packages (subject to feasibility limitations including size of equipment) as it wants along its right-of-way.

According to DuPont, the choice of equipment packages under Means is not sufficient to account for economies of scale, because these packages relate only to the size of the equipment and not the size of the project. In particular, DuPont refers to the statement of its expert witness that Means costs are overstated because they reflect an average of costs for projects of all sizes, and that economies of scale can reduce costs for large projects. But DuPont does not attempt to define or quantify the effect of those economies. Thus, DuPont presents a general argument that unit costs should be lower than those provided by Means due to economies of scale associated with a large project,[20] but it does not tie that argument to the specific Trestle Hollow costs it proposes. Even assuming DuPont were correct that the most accurate cost level is something lower than Means due to economies of scale, DuPont provides nothing to show that that accurate cost level is close to the Trestle Hollow costs—for example, as opposed to a cost level just below Means. Without making such a connection, DuPont cannot overcome the evidence indicating that the Trestle Hollow costs are a low outlier compared to other projects in the record.

Finally, DuPont claims that the Board's reference to "a fully supported real-world substitute" means the Board requires evidence of a project that matches the SARR in size and

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[19] DuPont argues that the contractor's invoice resolves questions about the bid price. (DuPont Rebuttal III-F-21.) However, NS asserts, and DuPont does not dispute, that this invoice was responsive to an NS discovery request, and DuPont did not provide it before citing the document on rebuttal. (See NS Br. 119-20.) DuPont argues that it invited NS to "renew" its discovery request if NS was not satisfied with DuPont's production, and NS did not. (DuPont Rebuttal III-F-22.) But if NS did not know that this document existed—which appears to be the case—it would not have been on notice that it needed to "renew" its discovery request to obtain a specific responsive document. DuPont should have produced this document in response to NS's discovery request, and the Board will disregard DuPont's analysis based on the document.

[20] (See DuPont Rebuttal III-F-16 to III-F-17.)

scope, which imposes an impossible standard on DuPont. While the Board agrees that this would be an impossible standard, we reject DuPont's argument that the Board imposed such a standard. As DuPont points out, railroads the size of the DRR have not been constructed in the United States in recent history. Thus, the Board's use of the phrase "fully supported real-world substitute" cannot be read to require the submission of actual construction costs from such a project. Instead, the Board was referring to the need for evidence that is "representative of the costs the DRR would incur" and the inclusion of "more than one estimate to avoid potential aberrations," Decision on the Merits, NOR 42125, slip op. at 148-49, as opposed to the single, non-representative sample on which DuPont relied. DuPont contends that, if a complainant chooses to rely on direct project evidence rather than project averages from Means, it should not be required to identify multiple real-world rail construction projects at locations on or near the SARR, which DuPont claims is not feasible. But the Decision on the Merits does not state that projects cited by parties must be located on or near the SARR, only that they must be more representative of the SARR's construction than the single, outlier sample DuPont relied on here. And it is not unreasonable for parties who choose not to rely on Means to provide more than one estimate, to avoid a result skewed by a single, atypical observation—such as reliance on the Trestle Hollow Project as a proxy for the DRR. As discussed above, NS produced evidence in discovery regarding numerous rail construction projects, which provides a basis for the examination of multiple estimates.

6. Conclusion

In summary, the Board finds no material error on these four critical issues in DuPont's reconsideration petition. As noted in Appendix B, even if the Board were to find in DuPont's favor on the remaining 16 issues raised in its petition for reconsideration, DuPont would still not have demonstrated that the rates at issue were unreasonable. The Board's analysis shows, even with a favorable finding for DuPont on these 16 issues, that the SARR would earn approximately $2.192 billion less from the traffic group than the DRR would require to adequately serve the same traffic group. Accordingly, the Board finds that these 16 DuPont issues are not material to the outcome of this decision. Moreover, because the 11 issues raised by NS would only serve to increase this deficit, consideration of these issues is moot based upon the outcome here.

It is ordered:

1. DuPont's petition for reconsideration is denied.

2. NS's petition for reconsideration is denied as moot.

3. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller. Commissioner Miller concurred with a separate expression. Vice Chairman Begeman dissented with a separate expression.

COMMISSIONER MILLER, concurring:

I concur in the Board's decision denying reconsideration in this case. Under longstanding agency and court precedent, SAC has been determined to be an appropriate methodology for assessing rate reasonableness. Applying that precedent and because DuPont did not show that the Board committed material error in the Decision on the Merits, I believe that DuPont's petition for reconsideration must be denied.

That does not mean, however, that I am fully satisfied with the SAC methodology. Part of my concern stems from arguments made with regard to how the Board determines revenue adequacy. For some time now, I have questioned arguments advanced by the railroad industry that the Board is improperly relying on depreciated or "historical book" value as part of its annual revenue adequacy calculation. Although I agree and would passionately defend the railroads need to earn sufficient revenues to reinvest in their systems, the notion of earning revenues to cover the costs of replacing the entire network has struck me as excessive. Clearly, while many assets will need to be replaced, many others will not, such as the cost of land and earthwork, while yet others can be kept in use through upgrades and maintenance.[1]

As I have reflected on the discussions that have taken place around replacement costs versus book value, I have been struck by how that issue plays out in the SAC test. The SARR by its very definition is the construction of a "new" railroad that then compares its revenue needs against the needs of a real world railroad whose system was likely constructed and paid for over 150 plus years. This comparison of "new" to "historic" cost heightens my unease with the SAC test.

Here the argument has been made by NS that DuPont improperly compared NS's real-world RSAM calculation, which is predicated on historical book value, to the RSAM of the hypothetical railroad, which is predicated on replacement costs.[2] NS appears to be drawing the same connection about comparing new costs to historical costs that I have made. While I agree with the point being made by NS, I would argue that rather than this meaning the Board should switch to using replacement costs in its revenue adequacy determinations, the Board may need to consider the implication of comparing "new" versus "historic" costs in SAC.

As an example of how "new" versus "historic" cost might play out in SAC, consider the case of bridges. In reality, a bridge, if properly maintained, may have a life span of 50 to 100 years. Yet in the SAC world, the shipper has to account for the cost of constructing an entirely new bridge. Admittedly, there are some benefits to the SARR from being able to design and

[1] See Hr'g Tr. 131-37, July 22, 2015, R.R. Revenue Adequacy, EP 722 et al.

[2] See discussion supra Section 1, Rates Resulting from the Board's Decision. Although the Board rejected DuPont's RSAM comparison on other grounds, the concept of developing a RSAM figure for a SARR itself seems questionable.

construct new assets.[3] But even with these benefits, on balance, the expense of building that bridge is still likely to be considerably more than the railroad's cost for that bridge, given that the railroad is unlikely to construct a new bridge for decades. Although there is indisputably a cost for upgrading and maintaining the bridge (and a railroad should be permitted to account for this cost in the rate it charges to shippers that use that bridge), that cost is no doubt significantly less than the cost of constructing the bridge from scratch. Whatever assets the SARR needs, the fact of the matter is that it must incur these costs as new construction, and that those costs are factored into the final SARR rate.

By having to factor the replacement costs of certain assets that the railroad would not actually replace in the real world into its SARR rate, I worry that the ability of a shipper to design a SARR that can "compete" with the real-world railroad is greatly diminished. For me, this is yet another reason for the Board to reconsider SAC and Coal Rate Guidelines.

VICE CHAIRMAN BEGEMAN, dissenting:

Unlike most prior SAC cases that have focused on unit-train coal service from a single origin and destination, this is a predominantly carload traffic case seeking relief for 26 commodities governed by 100 separate rates. The shipper's Stand Alone Railroad (SARR) covered 20 states, 8,000 miles, 92% of the carrier's traffic base, and 74% of the carrier's revenues. The parties and the Board were in unchartered waters with this uniquely complex carload traffic SAC case, yet all attempted to approach it as if it were a typical case. That was a mistake.

The Board should have provided guidance to the parties on how to present evidence in this rate case—guidance that was badly needed. But the Board did not step in, and the parties submitted insufficient evidence. In assessing that insufficient evidence, the Board made a number of significant errors (including a $7 billion miscalculation). Even our technical corrections needed technical corrections.

Under the so-called "gold standard" SAC test, the shipper is supposed to have the opportunity to *design and defend* the most efficient SARR to prove the carrier's rates are unreasonable, while the carrier is expected to *critique* the SARR and propose adjustments it argues are necessary for the hypothetical railroad to serve its traffic.[1] Here, because the

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[3] For example, the shipper might build the bridge for less than the railroad's original cost through the use of innovative materials and more modern construction techniques. The shipper can also construct the bridge in a way that results in greater efficiencies for the SARR than the real-world railroad enjoys. There are also instances where the shipper can forgo the construction of certain assets by designing a different network configuration. But in most instances, these benefits still would be more than offset by the costs of constructing new assets.

[1] See Decision on the Merits at 41; Gen. Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases, 5 S.T.B. 441, 446 (2001); but see Duke Energy Corp. v. CSX Transp.,

(continued . . .)

shipper's opening evidence was so insufficient (e.g., missing trains and facilities, "leapfrog" traffic, and incomplete service for over one-third of the issue traffic), the carrier submitted an entirely *new* operating plan. In hindsight, as soon as the Board realized how problematic the evidence was, we should have seriously considered either dismissing the case or directing the parties to submit supplemental evidence. But we proceeded with flawed evidence, the parties defended their positions as superior, and the Board tried to do the best it could under the circumstances.

This case inspired important changes in how the Board handles rate cases—changes that will benefit neither DuPont nor Norfolk Southern (NS). It was this case that prompted the Chairman to commission an independent analysis of our rate processing and call for an outside analysis of rate regulation approaches, both of which are still under way. This case also forced the Board to recognize the value of instructing parties on basic procedures for the format and submission of evidence (see Consumers[2]), the importance of holding technical conferences between Board staff and the parties, and the need to require supplements when presented with mismatched evidence (see TPI[3]). The parties in this case should have been afforded some of the same considerations being given the parties in these other pending rate cases.

I am not suggesting that the Board materially erred in all of the calls DuPont and NS specified in their reconsideration requests or that the parties shouldn't be held responsible for their share of the errors. But given our actions to improve the rate case process for other parties, I cannot support today's decision to merely double-down on the 2014 conclusion. At this point, the fairest resolution would be to allow DuPont to bring a new case (see IPA[4]), rather than be barred from seeking relief for a decade as otherwise will occur as a result of today's decision. It remains to be seen whether carload traffic rates can be fairly judged under the SAC process (see Sunbelt dissent[5]), but DuPont should have the option to try.

I dissent.

(. . . continued)
Inc., 7 S.T.B. 89, 101 n.20 (2003) (In response to a motion from the carrier, the Board may find shipper opening evidence so flawed as to "preclude development of appropriate reply evidence …").

[2] Consumers Energy Co. v. CSX Transp., Inc., NOR 42142 (STB served July 15, 2015).

[3] Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc., NOR 42121 (STB served May 18, 2015); Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc., NOR 42121 (STB served July 24, 2015).

[4] Intermountain Power Agency v. Union Pac. R.R., NOR 42127 (STB served Oct. 31, 2012).

[5] Sunbelt Chlor Alkali Partnership v. Norfolk S. Ry., NOR 42130, slip op. 32 (STB served June 20, 2014).

APPENDIX A

Discounted Cash Flow

($ millions)

Year	SARR Revenue Requirement	SARR Revenues	Overpayments (Shortfalls)	Present Value
2009	$3,946.2	2,930.1	(1,016.1)	(991.2)
2010	$7,285.4	5,768.4	(1,517.0)	(1,323.8)
2011	$7,852.2	6,252.0	(1,600.2)	(1,240.7)
2012	$8,126.5	6,739.2	(1,387.3)	(974.8)
2013	$8,520.1	7,201.8	(1,318.3)	(831.0)
2014	$8,885.8	7,721.4	(1,164.3)	(658.4)
2015	$9,259.6	8,192.9	(1,066.7)	(541.1)
2016	$9,735.3	8,897.1	(838.2)	(381.5)
2017	$10,243.5	9,765.7	(477.9)	(195.1)
2018	$10,777.1	10,657.8	(119.3)	(43.7)
2019	$4,694.6	4,858.5	163.9	56.9
Cumulative Net Present Value				**(7,124.5)**

APPENDIX B

Results if DuPont was Successful on the Remaining Issues Raised on Reconsideration
($ millions)

Item No	Item	Section	Cumulative NPV Diff.	Impact of Each Item from Technical Correction*
1.	Parties Technical Correction		(7,125)	
2.	Land Valuation	RPI	(6,128)	(997)
3.	ATC-SOL Coding Mistake	REV	(5,825)	(1,300)
4.	Intermodal Revenue	REV	(6,545)	(579)
5.	Debt Amortization and Terminal Value Correction	DCF	(6,706)	(419)
6.	PTC	DCF	(7,124)	(1)
7.	Weighted Average Cost of Equity	DCF	(6,894)	(230)
8.	Ad Valorem Taxes	OpEx	(6,888)	(237)
9.	Intermodal and General Freight Car Costs	OpEx	(6,952)	(173)
10.	Fringe Benefit Ratio	OpEx	(6,989)	(135)
11.	ES44AC Locomotive Count	OpEx	(6,985)	(139)
12.	Intermodal and Bulk Transfer Facilities	RPI	(7,074)	(51)
13.	Clearing and Grubbing	RPI	(7,097)	(28)
14.	Railcar Dwell Times	OpEx	(7,091)	(34)
15.	Set Out Tracks and Electric Locks	RPI	(6,969)	(155)
16.	Land Inflation Index	DCF	(6,614)	(510)
17.	Equity Flotation and Real Estate Acquisition Costs	DCF	(7,042)	(82)
All Changes			**(2,192)**	

* Cumulative Net Present Value of the Parties Technical Correction minus the Cumulative Net Present Value of each item.