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August 1, 2016

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423

**Re: STB Ex Parte No. 733 – *Expediting Rate Cases***

Dear Ms. Brown:

Pursuant to the Advance Notice of Proposed Rulemaking served on June 15, 2016 in the above docketed proceeding, Norfolk Southern Railway Company respectfully submits the enclosed comments.

Sincerely,

A handwritten signature in black ink, appearing to read "A. S. Thamodaran", written in a cursive style.

Aarthy S. Thamodaran  
Counsel for Norfolk Southern Railway Co.

Enclosures

**UNITED STATES OF AMERICA  
SURFACE TRANSPORTATION BOARD**

**STB Ex Parte No. 733**

***EXPEDITING RATE CASES***

**COMMENTS OF  
NORFOLK SOUTHERN RAILWAY COMPANY**

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**Dated: August 1, 2016**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**STB Ex Parte No. 733**

**EXPEDITING RATE CASES**

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**COMMENTS OF  
NORFOLK SOUTHERN RAILWAY COMPANY**

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*“[T]he Surface Transportation Board shall initiate a proceeding to assess procedures that are available to parties in litigation before courts to expedite such litigation and the potential application of any such procedures to rate cases.”*

--Section 11(c), Surface Transportation Board Reauthorization Act of 2015

Norfolk Southern Railway Company (“NS”) provides these comments to assist the Surface Transportation Board (“STB” or “Board”) in fulfilling the statutory mandate set forth in Section 11(c) of the Surface Transportation Board Reauthorization Act of 2015, Public Law 114—110, 129 Stat. 2228 (“Act”). NS also generally joins in support of the comments filed in this proceeding by the Association of American Railroads.

The Act specifically instructs the STB to assess the potential applicability to rate cases of procedures used by courts to expedite litigation. As such, NS begins with an examination of such procedures and suggests how such procedures could be applied by the STB to expedite rate cases. NS also comments on the potential changes to SAC Cases introduced by the STB in the Advance Notice of Proposed Rulemaking served in this proceeding on June 15, 2016

(“ANPRM”). NS’s recommendations overall are informed largely by NS’s own experience in *E. I. DuPont de Nemours & Co. v. Norfolk Southern Railway Co.*, STB Docket No. NOR 42125. To date, *DuPont* is the largest and most complex rate case litigated to completion at the STB by any number of measures.

As a preliminary matter, it is important to remember that rate cases are complex litigation by their nature. As the STB and Congress have recognized, sound economic principles are and should remain the foundation for any rate regulatory regime that is not arbitrary.<sup>1</sup> And, applying sound economic principles is necessarily complex. Efforts to expedite rate cases must not compromise the sound economic principles that underpin the STB’s rate regulatory regime and, in particular, the stand-alone cost test (“SAC Test,” and cases thereunder, “SAC Cases”).

Relatedly, it is worth emphasizing that any complex and significant litigation—whether in court or before the STB—requires substantial outlays of time, effort, and money. SAC Cases are one of the most significant proceedings on the STB docket, often involving tens or even hundreds of millions of dollars. The time, effort, and money required to litigate a SAC Case before the STB are not appreciably different from that required to litigate a case in court where comparable damages are at stake.

The STB already has taken substantial steps to streamline SAC Cases and rate cases more broadly over the years. In 2003, the STB adopted mandatory mediation to “encourage full or

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<sup>1</sup> See, e.g., *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), 2007 STB LEXIS 516, at \*26 (STB served Sept. 5, 2007) (“The SAC test, which judges the reasonableness of a challenged rate by comparison to the rate that would prevail in a competitive market, rests on a sound economic foundation and has been affirmed by the courts. . . . Any simplified methodology for assessing the reasonableness of rail rates should be designed to achieve the same objective . . . .”) (“*Simplified Standards*”); Section 15(a)(3), Act (requiring the STB to report to certain congressional committees on rate case methodologies but specifying that the STB should “only include[] alternative methodologies, which exist or could be developed, that are consistent with sound economic principles”).

partial settlements” and certain technical conferences to “narrow the range of disputed issues.”<sup>2</sup> In 2006, the STB prohibited movement-specific adjustments to the Uniform Rail Costing System and settled longstanding disputes about issues like revenue allocation methodologies and productivity adjustments.<sup>3</sup> In 2007, the STB overhauled its simplified rail rate guidelines to create a simplified stand-alone cost test (“SSAC Test,” and cases thereunder, “SSAC Cases”) and a three-benchmark test (“3-B Test,” and cases thereunder, “3-B Cases”) for smaller rate cases whose values do not justify filing a SAC Case.<sup>4</sup> In 2013, the STB greatly expanded access to these alternative, simplified rate case methodologies by removing the rate relief limit for SSAC Cases and quadrupling the rate relief limit for 3-B Cases.<sup>5</sup> And, filing fees that once were nearly \$180,000 for SAC Cases have been reduced to \$350.<sup>6</sup> Although NS remains concerned that the SSAC Test and 3-B Test represent oversimplifications of the sound economic principles which should underpin the STB’s rate regulatory regime, it cannot be disputed that the STB has taken dramatic steps to streamline rate cases.

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<sup>2</sup> See generally *Procedures To Expedite Resolution of Rail Rate Challenges To Be Considered Under the Stand-Alone Cost Methodology*, STB Ex Parte No. 638 (STB served Apr. 3, 2003) (“*Procedures To Expedite*”).

<sup>3</sup> See generally *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1) (STB served Oct. 30, 2006), *aff’d sub nom. BNSF Ry. Co. v. STB*, 526 F.3d 770 (D.C. Cir. 2008) (“*Major Issues*”).

<sup>4</sup> See generally *Simplified Standards*.

<sup>5</sup> See generally *Rate Regulation Reforms*, STB Ex Parte No. 715 (STB served July 18, 2013). The D.C. Circuit remanded the portion of the decision related to 3-B Cases so that the STB could address arguments that it had double-counted costs of performing a Road Property Investment analysis. See *CSX Transp., Inc. v. STB*, 754 F.3d 1056 (D.C. Cir. 2014). On remand, the STB acknowledged some double-counting but reaffirmed that a \$4 million rate relief limit for 3-B Cases was appropriate. See generally *Rate Regulation Reforms (Remand Decision)*, STB Ex Parte No. 715 (STB served Dec. 3, 2014).

<sup>6</sup> See *Regulations Governing Fees for Services*, STB Ex Parte No. 542 (Sub-No. 18) (STB served July 7, 2011).

The STB should not gauge whether further reforms to its rate regulatory regime are necessary based on the number of rate cases filed. An optimally functioning regulatory environment *should* result in relatively few rate cases filed, as the Interstate Commerce Commission prophesized in 1986.<sup>7</sup> When rate regulations are certain, railroads are able to conform their pricing decisions thereto; and, shippers also understand their regulatory options, with the advice of outside counsel and consultants, and negotiate accordingly.<sup>8</sup> Under such conditions, rate cases arise only in those limited instances where shippers take a calculated risk to push the regulatory envelope, for example, by filing SAC Cases that do not account for the full costs of serving their selected traffic group.<sup>9</sup>

Notwithstanding the facts that rate cases are necessarily complex litigation and that the relatively few rate cases filed should not be construed as evidencing a need for further regulatory reform, NS respectfully submits that opportunities do exist to expedite rate cases. Such opportunities further the STB's statutory mandates, which are steadfastly supported by NS, to "provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part"<sup>10</sup> and to establish "procedures to ensure expeditious handling of

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<sup>7</sup> *Coal Rate Guidelines, Nationwide*, STB Ex Parte No. 347 (Sub-No. 1), 1 I.C.C.2d 520, 524 (ICC served Aug. 8, 1985) ("[A] benefit of these guidelines is to enable both the shipper and the railroad to estimate the maximum rate we would prescribe if the matter were brought to us for adjudication. We believe this will encourage contract solutions which (as shown below) may often be more efficient and more beneficial to both parties than a prescribed rate.").

<sup>8</sup> *See, e.g., Petition of Norfolk Southern Ry. Co. and CSX Transp. Inc. To Institute a Rulemaking Proceeding To Exempt Railroads from Filing Agricultural Transp. Contract Summaries*, STB Ex Parte No. 725, 2014 STB LEXIS 195, at \*14 (STB served Aug. 11, 2014) (V.C. Miller, concurring) ("My view is that when shippers have more information they can make better decisions and, as a consequence, fewer disputes will arise.").

<sup>9</sup> *Cf. E. I. DuPont de Nemours & Co. v. Norfolk Southern Railway Co.*, STB Docket No. NOR 42125, at 38 (STB served Mar. 24, 2014) ("*DuPont Merits*").

<sup>10</sup> 49 U.S.C. § 10101(15).

challenges to the reasonableness of railroad rates.”<sup>11</sup> However, NS reiterates that any efforts to expedite rate cases must not undermine the sound economic principles that underpin the STB’s rate regulatory regime and, in particular, the SAC Test.

In Part I of these comments, NS recommends ways for the STB to expedite rate cases based on procedures used by courts and made available to parties to expedite litigation:

- Triage more effectively within SAC Cases by promoting evidentiary alignment between the parties and across all STB proceedings by expanding exemptions pursuant to the STB’s statutory mandate;
- Encourage parties to SAC Cases to use intermediate technical conferences to narrow the issues in controversy;
- Establish a procedural schedule at the outset of a rate case that is consistent with the timelines set forth in 49 C.F.R. § 1111.8 and § 1111.9, as applicable;
- Create a pathway to impose sanctions to punish and deter violations of the established procedural schedule;
- Grant extensions to the established procedural schedule only if good cause exists and not simply because the parties agree to the extension;
- Require complainants in SAC Cases to serve enhanced initial discovery requests related to the creation of the SARR concurrently with the filing of their complaint;
- Require complainants in SAC Cases to serve initial disclosures related to market dominance concurrently with the filing of their complaint;
- Require defendants in SAC Cases to serve initial discovery requests related to market dominance concurrently with the filing of their answer;
- Experiment with presumptive limits and proportionality standards for any additional discovery requests;
- Codify that a party seeking to compel discovery must establish that it needs such information, that it cannot obtain such information through other means, and that the request is not unduly burdensome;

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<sup>11</sup> 49 U.S.C. § 10704(d).

- Clarify that a motion to strike is the appropriate response to late-filed evidence and evidence inconsistent with Board precedent on a minor issue;
- Clarify that a motion to dismiss is the appropriate response to fundamentally flawed evidence and evidence inconsistent with Board precedent on a major issue; and
- Rule on motions to strike and motions to dismiss in a timely fashion, to include creating an expedited motions practice for certain disputes.

In Part II of these comments, NS responds to the potential changes to SAC Cases introduced by the STB in the ANPRM. In addition to the items listed above (namely, promoting evidentiary alignment, encouraging technical conferences, standardizing initial discovery requests for both parties, standardizing initial market dominance disclosures for the complainant, experimenting with discovery limits, leveraging motions to strike/dismiss, and expediting motions practice), NS supports the following potential changes:

- Promote the parties' voluntary use of requests for admissions to narrow the issues in controversy;
- Define "to the present" as the filing date of the complaint, in the context of discovery;
- Clarify that disclosure of Security Sensitive Information in discovery does not violate Department of Homeland Security and Federal Railroad Administration regulations;
- Require the parties to meet and confer on discovery and other procedural issues prior to filing a motion to compel, while acknowledging that active STB control over these issues may yield more tangible benefits;
- Enforce more strictly the established limits for rebuttal evidence through motions to strike and other sanctions;
- Limit final briefs to subjects on which the STB would like further information, with some flexibility for the parties to highlight other important issues; and
- Stagger the filings of public and highly confidential versions, while acknowledging that this may not do much to expedite rate cases.

In Part II, NS strongly objects to the STB's proposal to collect data on an ongoing basis as this would create an unreasonable burden for both the STB and railroads in conflict with the

Paperwork Reduction Act and would not serve any useful purpose for rate cases. NS also strongly objects to the STB's proposal related to evidentiary standardization as this would tilt the playing field in favor of one party, undermine the sound economic principles of the SAC Test, and contravene the statutory directive for the STB to look to court procedures to expedite rate cases.

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**I. AN ANALYSIS OF THE APPLICABILITY TO RATE CASES OF PROCEDURES USED BY COURTS AND MADE AVAILABLE TO PARTIES TO EXPEDITE LITIGATION.**

Courts use a number of effective procedures to expedite litigation. Such procedures fall into six general categories: (A) triaging cases; (B) leveraging case management conferences; (C) scheduling deadlines early; (D) enforcing scheduled deadlines; (E) streamlining discovery; and (F) expediting motions practice. The specific procedures for each of these categories, as well as their applicability to rate cases, are discussed in turn below. The sum of these procedures reveals that active case management *by the court*<sup>12</sup> is essential to expedite litigation.

**A. Triaging Cases**

Triaging<sup>13</sup> has been at the heart of efforts by courts over recent decades to expedite litigation.<sup>14</sup> Recognizing that not all cases are created equal, triaging allocates cases upon filing to different processing tracks.<sup>15</sup>

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<sup>12</sup> Active case management is the “management of the continuum of processes and resources necessary to move a case from filing to disposition. . . . It is concerned with active attention by the court to the progress of each case once it has been filed with the court.” *Defeating Delay: Developing and Implementing a Court Delay Reduction Program*, AMERICAN BAR ASSOCIATION 24 (1986), available at [http://www.americanbar.org/content/dam/aba/migrated/jd/lawyersconf/pdf/Defeating\\_Delay\\_1986.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/jd/lawyersconf/pdf/Defeating_Delay_1986.authcheckdam.pdf).

<sup>13</sup> Triaging also is known as differentiated case management or mandatory pathway assignment.

At a minimum, there typically is an expedited track for routine cases requiring minimal court oversight, a standard track for disputed cases requiring average court oversight, and a complex track for multifaceted, highly contested cases requiring extensive court oversight.<sup>16</sup> However, “[t]here is no magic number; the number [of tracks] should reflect realistic distinctions in case-processing requirements.”<sup>17</sup>

Cases are allocated upon filing to the appropriate track based on particular characteristics intended to reveal the types of judicial tasks that will need to be performed in the case,<sup>18</sup> such as: (1) amount in controversy; (2) complexity of factual and legal issues; (3) expected scope of discovery; (4) anticipated pretrial motions; (5) degree of inter-party conflict; and (6) likely time between the filing date and trial date.<sup>19</sup> Allocation is dynamic; and, a case may switch tracks as it progresses.<sup>20</sup>

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<sup>14</sup> See, e.g., *Differentiated Case Management – Implementation Manual*, BUREAU OF JUSTICE ASSISTANCE 1 (June 1993), available at <http://babel.hathitrust.org/cgi/pt?id=mdp.39015040995618;view=1up;seq=3>.

<sup>15</sup> See, e.g., *Recommendations To Reduce Cost and Delay in the Delivery of Civil Justice*, CIVIL JUSTICE IMPROVEMENTS COMMITTEE 7-8 (Feb. 1, 2016), available at <http://nacmconference.org/wp-content/uploads/2014/01/CJI-Recs-6-0-1-2-1-16.pdf>; Thomas M. Clarke and Victor E. Flango, *Case Triage for the 21<sup>st</sup> Century*, NATIONAL CENTER FOR STATE COURTS 146 (2011), available at <http://www.ncsc.org/~media/Microsites/Files/Future%20Trends/Author%20PDFs/Clarke%20and%20Flango.ashx>.

<sup>16</sup> E.g., *Recommendations*, *supra* note 15, at 7-15; Clarke and Flango, *supra* note 15, at 146.

<sup>17</sup> *Implementation Manual*, *supra* note 14, at 21. See also James Cabral et al., *Using Technology To Enhance Access to Justice*, 26 HARV. J. L. & TECH. 241, 296 (Fall 2012) (outlining tracks for cases amenable to alternative dispute resolution and for cases likely to require ongoing decision-making and compliance activity, among others).

<sup>18</sup> E.g., Cabral, *supra* note 17, at 296.

<sup>19</sup> See, e.g., *Recommendations*, *supra* note 15, at 7-15; *Civil Litigation Manual, Second Edition*, THE JUDICIAL CONFERENCE OF THE UNITED STATES 9-10 (2010), available at <http://www2.fjc.gov/sites/default/files/2012/CivLit2D.pdf>.

<sup>20</sup> E.g., Cabral, *supra* note 17, at 296.

Based on its track, distinct procedural rules are applied and proportionate judicial resources are devoted to a case, “lead[ing] to efficiencies in time.”<sup>21</sup> Major case events, like pretrial conferences and additional discovery, are only scheduled for cases in those tracks where such events are necessary. “Only events that contribute to the case disposition process are scheduled, and each scheduled event is designed to promote case disposition.”<sup>22</sup> Thus, triaging ensures that procedural rules and judicial resources are effectively deployed to expedite cases.<sup>23</sup>

Empirical evidence confirms that triaging successfully expedites litigation, although such benefits tend to be concentrated in cases in the expedited and standard tracks.<sup>24</sup> Cases in the complex track generally are not expedited as a result of triaging for the very reason that they are inherently complex. Nonetheless, triaging benefits the court’s overall docket. As one example, in the 17 years following its adoption of the Birmingham Differential Case Management Plan, the Circuit Court for the Tenth Judicial Circuit of Alabama, Civil Division experienced a nearly 40% reduction in the average number of days from filing to disposition of a case—from 678.48 days to 423.08 days.<sup>25</sup>

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<sup>21</sup> E.g., *Recommendations*, *supra* note 15, at 7. See also Rick Dabbs, *Differentiated Case Management*, MONTGOMERY COUNTY CIRCUIT COURT, <http://www.montgomerycountymd.gov/circuitcourt/attorneys/dcm.html> (describing that triaging assures “timely provision of resources for the expeditious processing and resolution of cases on each track”).

<sup>22</sup> *Differentiated Case Fact Sheet*, BUREAU OF JUSTICE ASSISTANCE (Nov. 1995), available at <https://www.ncjrs.gov/txtfiles/dcm.txt>.

<sup>23</sup> See, e.g., Clarke and Flango, *supra* note 15, at 147.

<sup>24</sup> See, e.g., *Practical Aspects of Civil DCM*, Presentation, 2010 NACM ANNUAL CONFERENCE 6-7 (Aug. 20, 2010), available at <https://nacmnet.org/sites/default/files/conferences/PastConferences/PastConferences/2010Annual/Civil%20DCM.pdf>.

<sup>25</sup> *Birmingham Differential Case Management Plan*, BIRMINGHAM BAR ASSOCIATION 2 (Sept. 2008), available at [http://c.ymcdn.com/sites/birminghambar.org/resource/resmgr/Miscellaneous/Differential\\_Case\\_Management.pdf](http://c.ymcdn.com/sites/birminghambar.org/resource/resmgr/Miscellaneous/Differential_Case_Management.pdf).

The STB already employs triaging to some degree. But, the STB can do more—both within SAC Cases specifically and across the entire STB docket generally.

With respect to SAC Cases specifically, there are four critical components of evidence: (1) traffic group; (2) traffic volumes (including peak week calculations); (3) operating plan; and (4) configuration of the stand-alone railroad (“SARR”). These four components are interrelated: traffic volumes depend, in part, on the traffic group; the operating plan depends on the traffic group and volumes; and the SARR’s configuration depends on the operating plan.<sup>26</sup> The remaining evidence in SAC Cases builds upon these four components. Accordingly, promoting evidentiary alignment from the start between the complainant and the defendant on these four critical components would expedite SAC Cases. For one thing, the STB would be faced with less competing evidence. And, once the four critical components are settled, the rest of the SAC Case flows relatively smoothly. Thus, the STB should triage its handling of SAC Cases by devoting more resources to achieve early resolution of the four critical evidentiary components.

With respect to the entire STB docket generally, the docket currently encompasses proceedings ranging from simple petitions for declaratory order to complex SAC Cases. These various proceedings are handled under different rules<sup>27</sup> and by different staff. For example, in November 2011, the STB implemented a “grant stamp procedure” for certain “uncontested, routine procedural matters” delegated to the Director of the Office of Proceedings (“Director”) in

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<sup>26</sup> See, e.g., *DuPont Merits*, at 26 (“How a SARR would operate influences both its configuration and annual operating expenses.”).

<sup>27</sup> For example, in many proceedings, responsive pleadings must be filed within 20 days and no replies to replies are permitted. See 49 C.F.R. § 1104.13. However, SAC Cases operate under entirely different pleading schedules. See 49 C.F.R. § 1111.8. And, SSAC Cases and 3-B Cases have their own distinct pleading schedules. See 49 C.F.R. § 1111.9. See also *Rate Regulation Reforms*, STB Ex Parte No. 715 (STB served July 18, 2013).

order to “streamline” STB processes.<sup>28</sup> As another example, many minor proceedings are handled pursuant to notices of exemption.<sup>29</sup> Exemptions are a valuable tool for triaging, and the STB should continue to expand the use of exemptions pursuant to its statutory mandate.<sup>30</sup> Expanding the use of exemptions would most effectively deploy limited STB resources by allowing the STB to concentrate on inherently complex cases like SAC Cases.

To sum, the STB should employ a greater degree of triaging in order to expedite SAC Cases as well as other proceedings on its docket.

### **B. Leveraging Case Management Conferences**

Case management conferences can be expressly designed to expedite cases. For example, the Superior Court of California explains that such conferences “are used by the court to expedite the movement of most civil cases through to an early resolution or trial.”<sup>31</sup>

At the case management conference, the judge and the parties can discuss pleadings and amendments, discovery, financial resources, cost-shifting provisions, dispositive motions, and the importance of cooperation, to name a few major topics.<sup>32</sup> As described by the Committee on Court Administration and Case Management of the Judicial Conference of the United States:

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<sup>28</sup> *Policy Statement on Grant Stamp Procedure in Routine Director Orders*, STB Ex Parte No. 709 (STB served Nov. 14, 2011) (“*Grant Stamp Policy*”) (noting that use of a grant stamp would “eliminate the time it takes to draft a decision and would allow for quicker responses to stakeholders” and “will allow for more efficient use of Board resources”).

<sup>29</sup> *See, e.g.*, 49 C.F.R. § 1152.50 (exempting abandonments and discontinuances from the application requirements of 49 U.S.C. § 10903 under certain circumstances).

<sup>30</sup> *See* 49 U.S.C. § 10502 (“[T]he Board, *to the maximum extent* consistent with this part, shall exempt a person, class of persons, or a transaction or service . . . .”) (emphasis added).

<sup>31</sup> *Case Management Conference Policies*, SUPERIOR COURT OF CALIFORNIA, COUNTY OF YOLO, <http://www.yolo.courts.ca.gov/divisions/civil/case-management-conference-policies>.

<sup>32</sup> *E.g., Reforming Our Civil Justice System*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 8-9 (Apr. 2015), *available at* [http://iaals.du.edu/sites/default/files/documents/publications/report\\_on\\_progress\\_and\\_promise.pdf](http://iaals.du.edu/sites/default/files/documents/publications/report_on_progress_and_promise.pdf).

One of the most important tasks in the initial case management conference is early identification of the issues in controversy (in both claims and defenses) and of possible areas for stipulations. . . . Issue narrowing is aimed at refining the controversy and pruning away extraneous issues. This effort will provide [the court] and the parties with an assessment of the resources that this case warrants, the likelihood of successful dispositive motions, and the issues to focus on at trial or in settlement.<sup>33</sup>

The STB similarly should leverage technical conferences to narrow the issues in controversy. Technical conferences could be held prior to the complainant's filing of its opening evidence and periodically thereafter during the course of the SAC Case. The ultimate goal would be clarity. With clear guidance from the STB on relevant issues, the parties could reevaluate their positions and recalibrate their strategies. This clarity would expedite SAC Cases by minimizing the competing evidence faced by the STB and even promoting settlement or withdrawal.

For example in *DuPont*, earlier resolution of several major issues<sup>34</sup> via such intermediate technical conferences would have streamlined the proceeding. To consider just one such issue,

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<sup>33</sup> *Civil Litigation Management Manual*, JUDICIAL CONFERENCE OF THE UNITED STATES 21 (2001), available at <https://public.resource.org/scribd/8763686.pdf>.

<sup>34</sup> First, the parties disagreed on whether leap-frog traffic was permissible. *See DuPont Merits*, at 253 (STB served Mar. 21, 2014) (“The parties have agreed on the composition of the DRR’s traffic group, with one exception, the inclusion of leapfrog, cross-over traffic (traffic that would move over multiple, physically discreet segments of the DRR, requiring multiple interchanges with the residual incumbent).”). Second, the parties disagreed on whether the SARR could earn revenues from certain NS subsidiaries without incurring the associated costs. *See id.* at 54 (“Further, as NS asserts, DuPont overstated SARR revenues in its opening by including revenues earned by TCS/TDIS without providing adequate evidence that the necessary infrastructure, operations, or corresponding expenses have been accounted for to provide such services. On rebuttal, DuPont still fails to include the necessary facilities, operations, capital investments, and expenses necessary to generate the TCS/TDIS revenue it seeks to include, and merely subtracts some TCS/TDIS operations costs from the intermodal revenues. DuPont has failed to show that the DRR is entitled to more than the rail line haul revenues.”). Third, the parties disagreed on whether the SARR could use tracks and facilities of third-party carriers in whom NS had varying ownership stakes. *See id.* at 48 (“DuPont did not account for the construction costs proportional to NS’s ownership interests in the BRC and the TRRA, even

DuPont's opening evidence included revenues from certain non-rail subsidiaries of NS—Triple Crown Services (“TCS”) and Thoroughbred Direct Intermodal Services (“TDIS”)—without accounting for any of the costs to build TCS's and TDIS's infrastructure. NS understandably was confused by this opening evidence: NS wondered whether DuPont had erred by including this revenue or erred by excluding these costs. At an intermediate technical conference, NS could have confirmed what DuPont intended to include and exclude; and, DuPont and NS could have resolved with the STB what should have been included and excluded. Armed with this clarity, NS and DuPont could have reevaluated their positions regarding TCS and TDIS, resulting in considerably less arguments back and forth requiring STB adjudication.

Technical conferences already are a proven method to expedite SAC Cases. *Procedures To Expedite* authorized STB staff to convene a technical conference with the parties to SAC Cases to address 20 operating characteristics common to all variable cost computations:

Agreement on these matters would expedite rate cases by narrowing the range of issues that the parties litigate and the Board needs to adjudicate. In past and pending SAC cases, seemingly obvious facts such as the number of miles that the complainant's traffic moves have frequently been in dispute. The parties agree that informal consultation with our staff could help to narrow the range of disputed issues.<sup>35</sup>

In the first technical conference in a major rate case, involving Otter Tail Power Company and BNSF Railway, the parties “resolved every one of the 200 issues on the

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though these partially owned facilities are owned by the railroad. The DRR must replicate and account for those costs. . . . At the same time, the Board will not require DuPont to account for the construction costs of the SAA and the IHB because these partially owned facilities are subsidiaries of NSC and not of NS. In this instance, the Board notes that NSC elected to set up its ownership interests in SAA and IHB as separate legal entities from its railroad subsidiary, and NS has failed to present a valid argument for ignoring this structure.”).

<sup>35</sup> STB Ex Parte No. 638 (STB served Apr. 3, 2003).

conference table.”<sup>36</sup> In the words of then-Chairman Roger Nober, “[t]he issues [the parties] have resolved between themselves, with expert assistance from board staff, will save them time and money in this litigation. Otter Tail and BNSF have set a high bar for parties in future rate cases to come together to resolve issues during technical conferences.”<sup>37</sup>

To sum, the STB should utilize intermediate technical conferences to narrow the issues in controversy which could contribute to unwarranted delay of SAC Cases.

### **C. Scheduling Deadlines Early**

Early scheduling of procedural deadlines allows courts to gain active control of a case from the outset. And, early scheduling, as directed by the court, helps ensure that the parties will resolve the case in a timely manner.<sup>38</sup>

[W]hen a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of . . . more efficiently and with less cost and delay than when the parties are left to their own devices.<sup>39</sup>

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<sup>36</sup> *Surface Transportation Board Announces Success of 1<sup>st</sup> Technical Conference in a Major Rail-Rate Case*, News Release No. 03-31, SURFACE TRANSPORTATION BOARD (July 16, 2003), available at <https://www.stb.dot.gov/newsrels.nsf/71c35e25bd34f1f68525653300425877/d0dbbd6be40ee3f785256d65006c323d?OpenDocument>.

<sup>37</sup> *Id.*

<sup>38</sup> *E.g., Civil Litigation Manual, Second Edition, supra* note 19, at 13. *See also* Mattia Landoni, *Justice Delayed . . . an Overview of the Options To Speed Up Federal Justice*, 18 J. OF PUBLIC & INT’L AFFAIRS 127, 143 (Spring 2007), available at <https://www.princeton.edu/jpia/past-issues-1/2007/6.pdf> (noting that early scheduling offers the greatest promise for expediting litigation).

<sup>39</sup> FED. R. CIV. P. 16, Advisory Committee Note, amend. (1983) (citing STEVEN FLANDERS, FED. JUDICIAL CTR., CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 17 (1977)). *See also Working Smarter Not Harder: How Excellent Judges Manage Cases*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 16 (Jan. 2014), available at [file:///C:/Users/IB8JB/Downloads/Working\\_Smarter\\_Not\\_Harder%20\(1\).pdf](file:///C:/Users/IB8JB/Downloads/Working_Smarter_Not_Harder%20(1).pdf) (stating that “the best case management technique is ‘a firm trial date and a ready judge’”).

The California Rules of Court similarly emphasize that “[t]o enable the just and efficient resolution of cases, *the court*, not the lawyers or litigants, should control the pace of litigation.”<sup>40</sup> Absent early scheduling by the court, a case “may drop from sight.”<sup>41</sup>

Early scheduling typically begins with a case management conference, as discussed above, where the judge can “shape the pretrial process proportionally to the needs of the case.”<sup>42</sup> Based on the discussion with the parties at this conference, the judge schedules a trial date and all pretrial events, such as deadlines for pleadings, discovery, and motions, by working backwards from that trial date.<sup>43</sup> This scheduling order “controls the course” of the case.<sup>44</sup>

Empirical evidence confirms that early scheduling successfully expedites litigation, “with no detectable cost to the quality of dispute resolution.”<sup>45</sup> And, the earlier the scheduling, the better: a 2009 study of nearly 8,000 federal civil cases found a strong positive statistical correlation between the overall time to resolution of the case and the elapsed time between filing a case and setting a trial date.<sup>46</sup> Similarly, Judge Prince of the Fourth Judicial District of Colorado reports that early scheduling resulted in a 20-30% reduction in his caseload as well as 90% and 70% reductions in the time spent on dispositive motions and discovery, respectively.<sup>47</sup>

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<sup>40</sup> CAL. R. CT. STANDARD 2.1 (emphasis added).

<sup>41</sup> *Civil Litigation Manual, Second Edition, supra* note 19, at 13.

<sup>42</sup> *Reforming Our Civil Justice System, supra* note 32, at 8.

<sup>43</sup> *E.g., Recommendations, supra* note 15, at 11. *See also* FED. R. CIV. P. 16; Michael E. Tigar, *Pretrial Case Management under the Amended Rules*, 14 REV. OF LITIG. 137, 150-52 (1994).

<sup>44</sup> *Civil Litigation Manual, Second Edition, supra* note 19, at 6-8, 14.

<sup>45</sup> *E.g.,* Wayne D. Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RES. J. 873, 892 (1981).

<sup>46</sup> *Reforming Our Civil Justice System, supra* note 32, at 10.

<sup>47</sup> *Working Smarter Not Harder, supra* note 39, at 7.

As a broader example, consider the Eastern District of Virginia (“EDVA”) which consistently outpaces the national average in trial times and disposition times for civil cases, rightfully earning the title of the “rocket docket.”<sup>48</sup> The EDVA’s speed is directly tied to its rules and practices: (1) “not later than sixty (60) days from first appearance or ninety (90) days after service of the complaint, the Court shall enter an order fixing the cut-off dates for the respective parties to complete the processes of discovery, the date for a final pretrial conference and, whenever practicable, the trial date;” and (2) courts tend to issue initial scheduling orders shortly after a case is filed, generally setting the trial date a few months after the filing date.<sup>49</sup>

The STB typically establishes procedural schedules for SAC Cases relatively early, but there is always room for improvement. For example in *DuPont*, the STB adopted a procedural schedule approximately one month after *DuPont* submitted its motion for a procedural schedule but over four months after *DuPont* filed its initial complaint.

It is useful to expand further on the *DuPont* schedule. Chart 1 in Exhibit A compares the original *DuPont* schedule adopted by the STB on February 24, 2011 (“Original *DuPont* Schedule”), the final *DuPont* schedule adopted by the STB on March 8, 2013 (“Final *DuPont* Schedule”), and the schedule for SAC Cases set forth in 49 C.F.R. § 1111.8, both prior to its amendment by the Act (“Old STB Schedule”) and after (“New STB Schedule”).<sup>50</sup> The Original

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<sup>48</sup> See, e.g., Robert M. Tata and Wendy C. McGraw, *What Litigators Must Know About Va.’s ‘Rocket Docket’*, LAW360 1 (Mar. 19, 2013), available at [www.law360.com/articles/423669](http://www.law360.com/articles/423669).

<sup>49</sup> Loren Kieve, *Eastern District of Virginia Pretrial Procedures* (Mar. 2010), available at [file:///C:/Users/Owner/Downloads/loren\\_kieve\\_eastern\\_district\\_of\\_va\\_pretrial\\_procedures.pdf](file:///C:/Users/Owner/Downloads/loren_kieve_eastern_district_of_va_pretrial_procedures.pdf). See also Local Civil Rule 16, *Pretrial Conference*, LOCAL RULES FOR THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA.

<sup>50</sup> The charts in Exhibit A address only certain procedural phases of SAC Cases: (a) close of discovery; (b) filing of opening evidence; (c) filing of reply evidence; (d) filing of rebuttal evidence; and (e) submission of final briefs—the five phases most within the parties’ control.

DuPont Schedule was approximately three times as long as the Old STB Schedule and twice as long as the New STB Schedule.

So even though the STB established the Original DuPont Schedule relatively early, that schedule itself was doomed from the start. As shown in Chart 2 in Exhibit A, DuPont had proposed substantial extensions in all phases of the schedule, largely because it shared counsel with the complainants in *Total Petrochemicals USA, Inc. v. CSX Transportation, Inc.*, STB Docket No. NOR 42121 and *M&G Polymers USA, LLC v. CSX Transportation, Inc.*, STB Docket No. NOR 42123, and needed to stagger filings across these three contemporaneous SAC Cases.<sup>51</sup> And, the STB adopted DuPont’s proposed procedural schedule in its entirety. Although the Director should continue to use the “grant stamp” to approve a request for a procedural schedule, this stamp should not be affixed on any request that grossly violates the New STB Schedule simply because that request is not opposed by the other party. 49 C.F.R. § 1111.10(b) should be amended to reflect that the STB ultimately retains control over the procedural schedules of rate cases—not just over “unresolved disputes.”

To sum, soon after the filing of a rate case complaint, the STB should adopt a procedural schedule consistent with 49 C.F.R. § 1111.8 or § 1111.9, as applicable.

#### **D. Enforcing Deadlines**

It is not enough simply to schedule procedural deadlines.<sup>52</sup> Procedural deadlines must be enforced:

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<sup>51</sup> See *Motion for Procedural Schedule*, STB Docket No. NOR 42125 (filed Jan. 10, 2011) (“All three Complainants 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.”). NS did not join in DuPont’s motion for a procedural schedule.

<sup>52</sup> See *Tigar*, *supra* note 43, at 152 (noting that wise case management “also keeps pressure on the parties to complete discovery, to file dispositive motions, to structure the case for trial, and to explore settlement”).

Consistent application and enforcement of rules and procedures creates a culture and practice in which meaningful events occur as scheduled, and preparation and compliance are promoted. Policies of no continuances, extensions, or adjournments absent extraordinary circumstances create this culture. That culture moves a case toward timely and cost-effective resolution.<sup>53</sup>

The importance of this culture in expediting litigation cannot be overstated.

“[Q]uantitative and qualitative data . . . strongly suggest[] that both speed and backlog are determined in large part by established expectations, practices, and informal rules of behavior of judges and attorneys.”<sup>54</sup> Court practices of liberally accepting untimely filings and granting continuances and extensions generally are regarded as the greatest evils in creating a culture of delay.<sup>55</sup> For example, one survey of Colorado district courts finds that “[i]ncreasing the number of extension motions granted [] decreases the probability of earlier resolution by 16%.”<sup>56</sup> Thus, failure to enforce deadlines fuels a cycle of delay.

Empirical evidence confirms that enforcing deadlines, *notwithstanding any agreement of the parties to delay*, successfully expedites litigation. For example, the EDVA’s speed in trial times and disposition times for civil cases is directly correlated with its governing rules which

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<sup>53</sup> *Civil Caseflow Management Guidelines*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 10 (2009), available at [http://iaals.du.edu/sites/default/files/documents/publications/civil\\_caseflow\\_management\\_guidelines2009.pdf](http://iaals.du.edu/sites/default/files/documents/publications/civil_caseflow_management_guidelines2009.pdf). See also DAVID C. STEELMAN, ET AL., CASEFLOW MANAGEMENT: THE HEART OF COURT MANAGEMENT IN THE NEW MILLENNIUM 6 (National Center for State Courts, 2000) (“If case participants doubt that trials or hearings will be held at or near the scheduled time and date, they will not be prepared.”).

<sup>54</sup> Steelman, *supra* note 53, at xiv.

<sup>55</sup> See, e.g., Hon. William F. Dressel, *Time to Redefine: Court Organization and Effective Caseflow Management*, THE NATIONAL JUDICIAL COLLEGE 13 (2010), available at <http://www.judges.org/wp-content/uploads/Time-to-Redefine.pdf>.

<sup>56</sup> Corina D. Gerety and Logan Cornett, *Momentum for Change: The Impact of the Colorado Civil Access Pilot Project*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 29 (Oct. 2014), available at [http://iaals.du.edu/sites/default/files/documents/publications/momentum\\_for\\_change\\_capp\\_final\\_report.pdf](http://iaals.du.edu/sites/default/files/documents/publications/momentum_for_change_capp_final_report.pdf).

“disfavor” continuances and extensions.<sup>57</sup> Under Local Civil Rule 7(G) for the EDVA, continuances “shall not be granted by the mere agreement of counsel. No continuance will be granted other than for good cause and upon such terms as the Court may impose;”<sup>58</sup> and under Local Civil Rule 16, “[m]ere failure on the part of counsel to proceed promptly with the normal processes of discovery shall not constitute good cause for an extension or continuance.”<sup>59</sup> In harmony with such rules, studies find that attorneys in the EDVA file only 6 motions to extend discovery for every 100 cases, as compared to the national average of nearly 25 motions.<sup>60</sup>

As another example, under special rules adopted by five Colorado district courts in 2012 pursuant to the Colorado Civil Access Pilot Project (“CAPP Rules”), continuances and extensions are “strongly disfavored” and are denied absent “extraordinary circumstances” even if the motion for a continuance or extension is stipulated.<sup>61</sup> These CAPP Rules were expressly designed to “counteract the tendency for extensions and continuances to become par-for-the course.”<sup>62</sup> And, they worked. These CAPP Rules yielded a 40% decrease in filed motions for an extension and an 11% decrease in granted motions for an extension.<sup>63</sup>

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<sup>57</sup> See, e.g., Tata and McGraw, *supra* note 48, at 3.

<sup>58</sup> Local Civil Rule 7(G), *Pleadings—Motions—Continuances—Orders*, LOCAL RULES FOR THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA.

<sup>59</sup> Local Civil Rule 16, *Pretrial Conference*, LOCAL RULES FOR THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA.

<sup>60</sup> Rebecca Love Kourlis and Jordan M. Singer, *Managing Toward the Goals of Rule 1*, 4 THE FEDERAL COURTS L. REV. 1, 17 (2009), available at [http://iaals.du.edu/sites/default/files/documents/publications/managing\\_toward\\_the\\_goals\\_of\\_rule\\_1\\_2009.pdf](http://iaals.du.edu/sites/default/files/documents/publications/managing_toward_the_goals_of_rule_1_2009.pdf).

<sup>61</sup> Gerety and Cornett, *supra* note 56, at 27.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 28-29.

## 1. *Sanctions*

Sanctions, and even the threat of sanctions, generally are regarded as the most effective tools in enforcing deadlines. Failure to sanction creates a “restraint vacuum in which economic and competitive pressures often lead litigators and parties to violate clear duties or, at least, to test the outer limits of the elasticity of the rules or of the system for enforcing them.”<sup>64</sup> As such, it is “critical” that consequences exist for such violations or abuses.<sup>65</sup> Sanctions not only punish the specific violation or abuse at hand but also have a beneficial deterrent effect, creating a feedback loop that minimizes violations and abuses—and expedites litigation—over time.

Data confirms that courts utilizing strong case management techniques, like sanctions, benefit from an average disposition time for cases that is approximately half of the average disposition time in courts that fail to employ such techniques.<sup>66</sup> For example, the EDVA’s “rocket docket” culture is reinforced by sanctions: when “justified,” courts in the EDVA do not hesitate to sanction parties for violating deadlines with untimely filings or other procedurally barred behavior.<sup>67</sup> Further, the overwhelming majority of both judges and lawyers acknowledge the value of sanctions. Approximately 80% of judges from five representative federal district

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<sup>64</sup> Brazil, *supra* note 45, at 922.

<sup>65</sup> *E.g.*, *Reforming Our Civil Justice System*, *supra* note 32, at xi, 20-21. *See also Working Smarter Not Harder*, *supra* note 39, at 29 (describing an example from the Superior Court of California where Judge Karnow explicitly threatened to sanction frivolous filings in order to defend procedural deadlines against delay, by “set[ting] out an order listing those that appeared frivolous and why, and invit[ing] parties either to withdraw any and all motions they wished or file an answer within 10 days. Before this safe-harbor period ended, the lawyers had withdrawn all the motions.”).

<sup>66</sup> Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 21 n69 (Oct. 1984).

<sup>67</sup> Tata and McGraw, *supra* note 48, at 4.

courts believe that sanctions have a positive impact on civil litigation;<sup>68</sup> and, approximately 90% of lawyers want courts to sanction procedural violations or abuses.<sup>69</sup>

The STB does not truly allow parties in rate cases to move for sanctions to enforce procedural deadlines. Although the STB has suggested that it is guided by the principles of Rule 11 of the Federal Rules of Civil Procedure (“FRCP”),<sup>70</sup> based on NS’s review, the STB has never imposed sanctions in rate cases to punish and deter needless delay. Admittedly, the STB may not have the inherent power of courts; and therefore, its ability to sanction,<sup>71</sup> as well as the types of sanctions it may impose, may be limited.<sup>72</sup> But regardless of the legally permissible scope of the STB’s authority to sanction, the STB has not employed it to enforce deadlines and expedite rate cases.

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<sup>68</sup> Margaret L. Sanner and Carl Tobias, *Happy (?) Birthday Rule 11*, 37 LOY. L.A. L. REV. 573, 581 (Winter 2004).

<sup>69</sup> Brazil, *supra* note 45, at 884.

<sup>70</sup> See, e.g., *SF&L Ry., Inc.—Acquisition and Operation Exemption—Toledo, Peoria and Western Ry. Corp. Between La Harpe and Peoria, IL*, STB Finance Docket No. 33995; *Kern W. Schumacher and Morris H. Kulmer—Continuance in Control Exemption—SF&L Ry., Inc.*, STB Finance Docket No. 33996 (STB served Mar. 15, 2002) (“Courts have upheld the authority of agencies to enact disciplinary rules for professionals who practice before them, despite a lack of express statutory authority, as necessary to protect the integrity of the agencies’ processes. Therefore, under appropriate circumstances, the Board may impose sanctions to enforce its orders and ensure an efficient process for those under its jurisdiction.”) (citation omitted).

<sup>71</sup> Courts impose a variety of sanctions ranging from shifting attorneys’ fees, to monetary fines, to restrictions on claims or evidence, to dismissal of the case. In one case, the EDVA concluded that the plaintiff had “abandoned” the litigation and dismissed his complaint because the plaintiff had a long history of causing delays and consistently had refused to take initiative in the litigation. *Potter v. SunTrust Bank*, 2015 U.S. Dist. LEXIS 115877 (E.D.V.A. Aug. 31, 2015).

<sup>72</sup> See, e.g., *Burlington Northern, Inc. – Control and Merger – St. Louis-San Francisco Ry. Co.*, FD No. 28583 (Sub-No. 25), 1990 ICC LEXIS 20, at \*13-15 (ICC served Jan. 18, 1990) (noting that any exceptions to the American Rule, generally requiring each party to bear its own attorneys’ fees, for bad faith or willful disobedience “are unquestionably assertions of inherent power in the courts” as opposed to the agency).

The “restraint vacuum” created by the STB’s failure to sanction is exacerbated by the STB’s willingness to grant extensions. Chart 3 in Exhibit A depicts the effects of the STB’s willingness to grant extensions in *DuPont*. The Original DuPont Schedule was modified five times: DuPont requested five extensions to conduct discovery and to file evidence and final briefs; and NS requested two extensions to respond to DuPont’s late-filed errata and flawed Operating Plan.<sup>73</sup> All such requests for extensions were granted for the entire length of time requested. In total, these extensions accounted for an additional 301 days of delay.

To sum, the STB should enforce procedural schedules for rate cases, to the maximum reasonable extent, both by imposing sanctions for violations thereof and by granting extensions only where necessitated upon a showing of good cause. As in the EDVA, mere failure to proceed with the normal processes of discovery should not constitute good cause. Although the Director should continue to use the “grant stamp” to approve a request for an extension, this stamp should not be affixed on any motion simply because the motion is not opposed by the other party.

#### **E. Streamlining Discovery**

Recognizing that discovery often is the key culprit behind delays in litigation, many courts have attempted to control the discovery process:

Judges can contribute significantly to reducing the frequency and intensity of discovery disputes (and thus to increasing the overall

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<sup>73</sup> It is important not to lose sight of why and when an extension might be necessary. As in *DuPont*, many complainants have left defendants with no choice but to seek an extension in some instances. In *DuPont*, NS was forced to seek two extensions because DuPont untimely filed errata and because DuPont’s Operating Plan was so flawed. As discussed *infra* in Part I.F, NS would have filed a motion to strike and a motion to dismiss, respectively, in response to DuPont’s late-filed errata and flawed Operating Plan, had it been confident that the STB would have granted these motions promptly. But absent any such confidence, NS sought the necessary time to respond.

efficiency of the system) if, in the earliest stages of an action, they set appropriate expectations . . . .<sup>74</sup>

In the simplest version, courts use the case management conference and scheduling order, discussed above in Parts I.B and I.C, to manage the scope and timing of the discovery process. For example, the U.S. Chamber Institute for Legal Reform hails “case management orders that set clear guidelines for discovery early in the life of the case” as the best weapon against discovery abuses.<sup>75</sup> At the case management conference, the judge and the parties can “advance problem-solve” discovery issues as practicable: “judges can, with the parties’ help, identify the areas where discovery should *begin*, focusing discovery on the core issues and targeting the best sources. In many cases, the parties will find that is all they need.”<sup>76</sup> And, as discussed above in Part I.D.1, sanctions can be imposed, as necessary and appropriate, to punish and deter any violations of the scheduling order or other discovery abuses.<sup>77</sup> Even this simple form of active judicial control significantly expedites the discovery process, as quantified by Judge Prince.<sup>78</sup>

In more advanced versions, courts use various techniques to tailor the scope and timing of the discovery process to the particular case. Such techniques include presumptive limits, proportionality standards, and enhanced initial disclosure requirements:

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<sup>74</sup> Brazil, *supra* note 45, at 901.

<sup>75</sup> John H. Beisner, “*The Centre Cannot Hold*”—*The Need for Effective Reform of the U.S. Civil Discovery Process*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, [file:///C:/Users/Owner/Downloads/john\\_beisner\\_the\\_centre\\_cannot\\_hold.pdf](file:///C:/Users/Owner/Downloads/john_beisner_the_centre_cannot_hold.pdf).

<sup>76</sup> *Working Smarter Not Harder*, *supra* note 39, at 13.

<sup>77</sup> For example, the New Hampshire Superior Court is authorized to impose a variety of sanctions to punish and deter discovery abuses. See Rule 21(d) – Discovery Abuse; Sanction, RULES OF THE SUPERIOR COURT OF THE STATE OF NEW HAMPSHIRE. See also *New Hampshire: Impact of the Proportional Discovery/Automatic Disclosure (“PAD”) Pilot Rules*, NATIONAL CENTER FOR STATE COURTS (Aug. 19, 2013), available at <https://www.ncsc.org/~media/Files/PDF/Topics/Civil%20Procedure/12022013-Civil-Justice-Initiative-New-Hampshire.ashx>.

<sup>78</sup> See *supra* note 47.

- Presumptive Limits<sup>79</sup> are codified, as a default matter, under the FRCP: a party must obtain leave of court or a stipulation from the opposing party to: (1) conduct more than 10 depositions;<sup>80</sup> and (2) serve more than 25 interrogatories.<sup>81</sup> Such limits “aim . . . not to prevent needed discovery, but to provide judicial scrutiny before parties make potentially excessive use of this discovery device.”<sup>82</sup> Some courts also have created limits on discovery for different tiers of cases based on the amount in controversy.<sup>83</sup>
- Proportionality Standards acknowledge that discovery is “merely a means to an end. Discovery should promote the just, speedy, and inexpensive determination of actions and should be conducted in the most efficient, non-redundant, and cost-effective method available.”<sup>84</sup> As such, the party requesting discovery must demonstrate that its request satisfies a proportionality standard in addition to the traditional relevancy standard.<sup>85</sup>

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<sup>79</sup> See, e.g., Marc Therrien, *Talkin’ ‘Bout a Revolution?: Utah Overhauls Its Rules of Civil Discovery*, Note, 2011 UTAH L. REV. 669, 674 (2011).

<sup>80</sup> FED. R. CIV. P. 30(a)(2), 30(d).

<sup>81</sup> FED. R. CIV. P. 33(a)(1). See also FED. R. CIV. P. 26(b)(2)(C) (permitting courts to “limit the frequency or extent of discovery” if it determines that: (1) the discovery sought is unreasonably cumulative or duplicative or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (3) the proposed discovery is outside the permissible scope of relevance).

<sup>82</sup> FED. R. CIV. P. 33, Advisory Committee Note, amend. (1983). See also Carol Rice Andrews, *Thinking About Civil Discovery in Alabama: Using the Federal Rules of Civil Procedure as a Thinking Tool*, 60 ALA. L. REV. 683, 688-89 (2009) (noting that presumptive limits are “positive devices for both the requesting and responding parties” and a “legitimate means to control and focus discovery” by forcing lawyers to strategically plan and judicially use their allotted depositions and interrogatories).

<sup>83</sup> See, e.g., *Limits on Standard Discovery, URCP 26(c)(5)*, <https://www.utcourts.gov/howto/courtprocess/disclosure-discovery.html#limits>.

<sup>84</sup> *Civil Caseflow Management Guidelines*, *supra* note 53, at 7

<sup>85</sup> See Therrien, *supra* note 79, at 674-78 (describing the proportionality standard in Utah district courts: (a) discovery must be reasonable, considering the needs of the case, damages, complexity, parties’ resources, importance of the issues, and importance of discovery in resolving the issues; (b) likely benefits of discovery must outweigh its burden or expense; (c) discovery must be consistent with the overall case management and further a just, speedy, and inexpensive resolution; (d) discovery must not be unreasonably cumulative or duplicative; (e) discovery must not be capable of being achieved from another source that is more convenient, less burdensome, or less expensive; and (f) the party seeking discovery must have had no prior chance to obtain the information).

- Enhanced Initial Disclosure Requirements strive to “identify and narrow the disputed issues at the earliest stages of litigation and thereby focus discovery.”<sup>86</sup> For example under Rule 26 of the FRCP, a party serves, “without awaiting a discovery request,” shortly after the initial case management conference: (a) the names of individuals likely to have discoverable information used to support its claims or defenses; (b) a copy of all written records used to support its claims or defenses; (c) a computation of each category of damages as well as supporting materials; and (d) any relevant insurance agreement.<sup>87</sup>

Empirical evidence confirms that such advanced techniques successfully expedite the discovery process and litigation overall. Studies have found that imposing presumptive limits on discovery reduces the time spent thereon.<sup>88</sup> For example in Utah district courts, a two-track discovery system—with enhanced initial disclosure requirements, presumptive limits for additional “standard” discovery, and proportionality standards for additional “extraordinary” discovery—resulted in faster case disposition times.<sup>89</sup> As another example, under the CAPP Rules introduced above in Part I.D, enhanced initial disclosure requirements dramatically reduced the need for additional discovery: the amount of discovery in 81% of cases was less than that authorized in the scheduling order.

NS respectfully submits that the STB should streamline the discovery process by leveraging intermediate technical conferences to narrow the issues in controversy, as discussed above in Part I.B, and by adopting and enforcing deadlines for discovery consistent with its governing regulations, as discussed above in Parts I.C and I.D. This is consistent with the STB’s

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<sup>86</sup> See, e.g., Gerety and Cornett, *supra* note 56, at 31. See also *Utah: Impact of the Revisions to Rule 26 on Discovery Practice in the Utah District Courts*, NATIONAL CENTER FOR STATE COURTS iv, 13-22 (Apr. 2015), available at [www.ncsc.org/~media/Files/PDF/Topics/Civil%20Procedure/Utah%20Rule%2026%20Evaluation%20Final%20Report\(2015\).ashx](http://www.ncsc.org/~media/Files/PDF/Topics/Civil%20Procedure/Utah%20Rule%2026%20Evaluation%20Final%20Report(2015).ashx) (noting that enhanced initial disclosure requirements “provid[e] litigants with sufficient information about the merits of the case to engage in more productive settlement negotiations”).

<sup>87</sup> FED. R. CIV. P. Rule 26(a)(1).

<sup>88</sup> E.g., James S. Kakalik, *Analyzing Discovery Management Policies: RAND Sheds New Light on the Civil Justice Reform Act Evaluation Data*, 37 JUDGES J. 22, 27 (1998).

<sup>89</sup> *Utah: Impact*, *supra* note 86, at iv, 13-22.

promise in 2003 to prevent discovery abuses by “increas[ing] Board participation at the early stages of discovery, which we will do.”<sup>90</sup>

In addition, the STB should experiment with enhanced initial discovery requirements as well as presumptive limits and proportionality standards.

With respect to initial discovery requirements, *DuPont* provides a roadmap for how the STB could further streamline the discovery process in SAC Cases. As noted in Chart 2 in Exhibit A, DuPont served its first discovery request on NS 56 days after filing its complaint. This was not a novel discovery request. In fact, the first set of discovery requests in SAC Cases has been largely identical for years. The STB could easily require complainants in SAC Cases to serve initial discovery requests related to the creation of the SARR concurrently with the filing of their complaint. However, the complainants’ initial discovery request should be enhanced. For defendants in SAC Cases, pulling traffic tapes and other traffic data in response to discovery requests has one of the longest lead times. In order to expedite SAC Cases, complainants’ initial discovery request should include the detailed information necessary for defendants to start accumulating such traffic data (including the exact date ranges for such data).

Similarly, the STB could require defendants in SAC Cases to serve initial discovery requests related to market dominance concurrently with the filing of their answer. Typically, defendants know, immediately upon receipt of the complaint, which basic discovery questions related to market dominance to ask the complainants; for, the defendants already have some familiarity with the shipper, its traffic, and its competitive alternatives from conducting marketing and commercial negotiations and transactions in the ordinary course of business.

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<sup>90</sup> *Procedures To Expedite.*

NS also supports an attempt to create initial disclosures *from the complainant*, but NS emphasizes that those are the only initial disclosures that are workable. The STB actually sought comment on the concept of initial disclosures in 2003.<sup>91</sup> As noted above, the complainant likely would have basic information related to market dominance readily available from conducting commercial negotiations and transactions in the ordinary course of business. And, in the unlikely event the complainant has not previously examined its competitive alternatives, the complainant would have essentially unlimited time to prepare and gather the necessary documents and data related to market dominance prior to filing its complaint.

The same is not true for the defendant. Although the fundamental building blocks for any SARR are well-known, thus permitting initial standard *requests*, the railroad cannot initiate the search for material to be disclosed without the critical pieces of information in the discovery requests, such as what segments and which traffic are involved, thus preventing initial standard *disclosures*.<sup>92</sup> Moreover, the defendant's responsive documents and data cannot be collected in the mere 20 days between the filing of the complaint (and service of the initial discovery requests, if adopted) and the due date for the answer. For one thing, the defendant's responsive materials are complex and massive. For example in *DuPont*, NS produced approximately 51,000 pages and 36,197.50 gigabytes of relevant materials. Further, preparing and gathering such materials involves the coordination and efforts of numerous individuals across various corporate

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<sup>91</sup> See *Procedures To Expedite* (noting that “[c]ommentators should address this proposal both as if it were to be adopted alone and as if it were to be adopted in conjunction with a list of standard information and documents that the parties to a SAC case would be required to produce as initial disclosures”). See also ANPRM at 4.

<sup>92</sup> See ANPRM at 4 (noting that such information might include “waybill data; train and carload data; timetables; track charts; authorizations for expenditure; grade, curve, and profile data; Wage Forms A&B; Geographic Information System data; forecasts; and contracts”).

departments, which distracts significant time from the business of running a railroad.<sup>93</sup> Thus, it would be impracticable to require initial disclosures from the defendant.

With respect to requiring initial disclosures from the defendant, any citation to Rule 26 of the FRCP is misplaced.<sup>94</sup> The initial disclosures required under the FRCP are relatively simplistic—relating to the sources of relevant information and discrete information within the party’s possession used to support *its* claims or defenses.<sup>95</sup> Because the party is in control of its claims or defenses, it also is in control of these initial disclosures. The same is not true with respect to the proposed initial disclosures by the railroad relating to the creation of the SARR. The complainant decides which lanes, traffic groups, and routes are included in its SARR, and that information is not available on the face of the complaint. As such, the defendant essentially is producing information relevant to the complainant’s claims—claims that are not within its control.

With respect to presumptive limits and proportionality standards, the STB actually sought comment on a similar concept in 2003, noting that limited discovery “is the procedure that applies to complex commercial litigation conducted in the federal courts.”<sup>96</sup> NS believes that document requests should not be unreasonably cumulative, duplicative, burdensome, or expensive and that interrogatories and depositions could be subject to presumptive limits. The STB could even experiment with different presumptive limits for different types of rate cases

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<sup>93</sup> Complainants do not suffer a proportionate distraction from their business operations, because they do not produce nearly the same volume of discovery and because they tend to rely on outside lawyers and consultants for most purposes of their cases. For example in *DuPont*, DuPont produced approximately 6,000 pages and 16.1 gigabytes of relevant materials, which amounts to only about 12% and 0.044%, respectively, of the pages and gigabytes NS produced.

<sup>94</sup> See ANPRM at 3.

<sup>95</sup> See *supra* note 87.

<sup>96</sup> *Procedures To Expedite*.

based on complexity, *i.e.*, the presumptive limits for interrogatories and depositions for a SAC Case involving a unit train SARR would be lower than those for a SAC Case involving a carload network SARR. And, the STB could look to the FRCP<sup>97</sup> and prior rate cases<sup>98</sup> for guidance in crafting presumptive limits. In the context of SAC Cases, NS emphasizes that only additional discovery requests, beyond the initial requests discussed above, should be subject to presumptive limits, as is consistent with the practice of courts.<sup>99</sup>

The presumptive limits could be lifted upon a showing of good cause. However, consistent with the expeditious approach of the Utah district courts, any additional discovery beyond the presumptive limits should be subject to a proportionality standard. The STB should affirmatively determine that any such additional discovery is proportionate to the needs of the case, considering its value and complexity as well as the likely benefits of the additional discovery weighed against its burden, time, and expense.<sup>100</sup> This is a logical extension of the STB's existing precedent requiring a party moving to compel discovery to "demonstrate a real, practical need for the information" requested<sup>101</sup> and denying discovery "if it would be unduly burdensome in relation to the likely value of the information sought."<sup>102</sup>

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<sup>97</sup> See *supra* notes 80-81.

<sup>98</sup> In *DuPont*, for example, DuPont served 28 interrogatories and 171 document requests; and, NS served 52 interrogatories and 25 document requests. These tallies are based on the itemized numbered requests and do not account for various sub-requests therein. But on April 25, 2011, NS noted that "DuPont has now posed over 900 discovery requests (including subparts), in response to which NS personnel are spending thousands of person-hours to identify and produce responsive material." *Norfolk Southern Ry. Co.'s Reply in Opposition to Motion to Compel of E.I. DuPont de Nemours & Co.*, STB Docket No. NOR 42125 (filed Apr. 25, 2011). Requests for depositions have not been used in recent SAC Cases, based on NS's experience.

<sup>99</sup> See *supra* note 89.

<sup>100</sup> See *supra* note 85.

<sup>101</sup> *E.g., Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, STB Docket No. NOR 42121, at 2 (STB served Nov. 24, 2010). See also *CF Indus., Inc. v. Kaneb Pipe Line Partners, L.P.*,

Relatedly, it also may be worth codifying “rulings addressing discovery disputes in individual SAC cases,” as proposed by the STB in 2003.<sup>103</sup> The STB should codify that “a party seeking to compel discovery must show (1) that it needs the information to make its case, (2) that the information cannot be readily obtained through other means, and (3) that the request is not unduly burdensome.”<sup>104</sup> Such rules would serve the STB’s then-stated purpose of preventing discovery “from being used for delay and harassment, and from becoming unduly burdensome and overwhelming the process” without compromising access to necessary information.<sup>105</sup>

To sum, the STB should streamline discovery in rate cases by more actively controlling the process and by experimenting with advanced techniques like presumptive limits and proportionality standards. In SAC Cases, the STB should require complainants and defendants to file initial discovery requests concurrently with the filing of their complaint and answer, respectively, and should require only complainants to serve initial disclosures concurrently with the filing of their complaint.

#### **F. Streamlining Motions Practice**

A targeted effort to streamline motions practice prevents cases from stalling in particular phases of litigation due to a “nebulous ‘pending motion.’”<sup>106</sup> Courts use various techniques to streamline motions practice such as deadlines, “motions days,” and limits on written motions:

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STB Docket No. NOR 42084 (STB served Nov. 23, 2004) (noting that a party’s “right to discovery . . . has limits”).

<sup>102</sup> *E.g., Waterloo Ry. Co. – Adverse Aban. – Lines of Bangor & Aroostook R.R. Co.*, STB Docket No. AB-124 (Sub-No. 2) (STB served Nov. 14, 2003).

<sup>103</sup> *Procedures To Expedite.*

<sup>104</sup> *See id.*

<sup>105</sup> *See id.*

<sup>106</sup> Becky Bye, *Implementing “Time-Denied” Pre-Trial Motions in Civil Cases*, 39 THE COLORADO LAWYER 62 (Feb. 2010).

- Deadlines. Many courts simply require prompt rulings on motions.<sup>107</sup>
- Motions Days. On these set dates, parties are afforded an oral hearing for all pending motions.<sup>108</sup> The difference in ruling times “is really quite startling—from about twenty-seven days in a court using motions days and favoring oral hearings, to over ninety days in a court using ad hoc scheduling and written opinions,” according to a survey of federal district courts.<sup>109</sup> Courts with motions days tend to issue more rulings from the bench<sup>110</sup> and are less likely to grant extensions for submissions of briefs.<sup>111</sup>
- Limits on Written Motions. Limits “improve the chances for meaningful conferral and resolution of some if not most of the disputes early on” between the parties,<sup>112</sup> reducing the number and complexity of disputes that require judicial resolution. Experience suggests that any remaining disputes are “mostly capable of resolution during a hearing lasting from five to thirty minutes.”<sup>113</sup> Even if additional written briefing is required or useful, it tends to be “focused (and non-combative)” with “intelligent page limits” and a “short time frame.”<sup>114</sup> Most importantly, a judge who takes months to rule on extensive written briefs “is no more likely to make the ‘correct’ decision.”<sup>115</sup>

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<sup>107</sup> E.g., C.R.C.P. 121 § 1-15.

<sup>108</sup> E.g., Edward J. Devitt, *Effective Judicial Management of Motion Practice*, JUDICIAL PANEL ON MULTIDISTRICT LITIGATION (1981), available at <https://casetext.com/case/effective-judicial-management-of-motion-practice>. For example, the Circuit Court of Alexandria in EDVA has Civil Motions Days on the second and fourth Wednesdays of each month, except May, with corresponding deadlines to file motions and responses and a 30-minute limit for hearings on motions per case. *Circuit Court Local Procedures – Civil*, CITY OF ALEXANDRIA, VIRGINIA, <https://www.alexandriava.gov/circuitcourt/info/default.aspx?id=214> (requiring orders reflecting the court’s rulings to be presented promptly).

<sup>109</sup> Devitt, *supra* note 108.

<sup>110</sup> *Id.* (noting that courts thus have more time to write opinions where warranted).

<sup>111</sup> *See id.* In contrast, “written submissions courts tend to overlook whatever time limits their local rules may set” and “experience delays in the receipt of opposition briefs which, on average, were submitted two to three weeks after the established deadline.” *Id.* Written submissions courts rely on written requests for motions followed by reply briefs followed by the judge’s determination of whether to hold an oral hearing.

<sup>112</sup> Richard P. Holme et al., “No Written Discovery Motions” *Technique Reduces Delays, Costs, and Judges’ Workload*, 42 THE COLORADO LAWYER 65, 66 (Mar. 2013). *See also* Hon. James G. Carr, *From the Bench: Fixing Discovery: The Judge’s Job*, 38 LITIG. J. 4, 7-8 (Summer/Fall 2012) (noting that the need for judges to resolve disputes is “generally infrequent”).

<sup>113</sup> Holme, *supra* note 112, at 67.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 68.

Streamlining motions practice does not translate to limiting or prohibiting motions to strike/dismiss. In fact, such motions should be encouraged. Motions to strike/dismiss function as procedural devices that filter out frivolous and unmeritorious claims or cases, thus expediting litigation.<sup>116</sup> As Thomas Main describes, the “judiciary’s aversion to delay, combined with substantial increases in the civil caseload, led to the activation of motions to dismiss and motions for summary judgment . . . that, in turn, led to the termination of cases at earlier stages of litigation.”<sup>117</sup> Absent such motions, cases may “languish” on the court docket for no reason.<sup>118</sup>

Data reveals that the majority of motions to strike/dismiss are legitimate filters that do not threaten the administration of justice or fairness to the parties. For example, a 2007 survey of approximately 7,700 cases in federal district courts found that less than 30% of all motions to strike/dismiss were denied.<sup>119</sup> Similarly, Kent Sinclair and Patrick Hanes find no literature suggesting that “specious” motions are a prevalent problem.<sup>120</sup>

Accordingly, in light of data that unmeritorious claims and cases comprise a substantial portion of court dockets, many academic commentators urge courts to take the following actions:

(1) configure case management systems that quickly identify such unmeritorious claims and

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<sup>116</sup> Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People*, 63 THE RECORD 326, 394 (2008).

<sup>117</sup> Thomas O. Main, *How Delay Aversion Shapes Reform*, 15 NEV. L. J. 1597, 1628 (Summer 2015).

<sup>118</sup> *Id.*

<sup>119</sup> *Civil Case Processing in the Federal District Courts*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 6 (2009), available at [file:///C:/Users/Owner/Downloads/iaals\\_civil\\_case\\_processing\\_in\\_the\\_federal\\_district\\_courts\\_0.pdf](file:///C:/Users/Owner/Downloads/iaals_civil_case_processing_in_the_federal_district_courts_0.pdf).

<sup>120</sup> Kent Sinclair and Patrick Hanes, *Summary Judgment: A Proposal for Procedural Reform in the Core Motion Context*, 36 WM. & MARY L. REV. 1633 (Summer 1995).

cases; and (2) either (a) order the relevant party to move to strike such claims or dismiss such cases or (b) strike such claims or dismiss such cases on the courts' own motion.<sup>121</sup>

The STB currently does not leverage motions to strike/dismiss as courts do to expedite litigation. First, the STB should clarify that a motion to strike is the appropriate remedy for late-filed evidence and for evidence inconsistent with Board precedent on a minor issue. A minor issue does not affect other issues and evidentiary submissions—such as the locomotive peaking factor. Second, the STB should clarify that a motion to dismiss is the appropriate remedy for fundamentally flawed evidence and for evidence inconsistent with Board precedent on a major issue. A major issue does affect other issues and evidentiary submissions—such as the costs borne by the SARR.

It currently is difficult for parties to rate cases to place much faith in filing motions to strike/dismiss primarily because the STB does not rule on such motions in a timely fashion. For example in *AEP Texas North Co. v. BNSF Ry. Co.*, BNSF filed a motion to strike certain of AEP's evidence in September 2004. However, the STB did not rule on that motion until it issued its final decision—three years later in September 2007.<sup>122</sup> Effectively, BNSF's motion to strike was prevented from serving as a valuable procedural tool to expedite litigation because of the STB's delay in ruling on such motion. Similarly in *DuPont*, when the fundamental flaws in DuPont's Operating Plan became apparent,<sup>123</sup> NS chose not to file a motion to dismiss, as it

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<sup>121</sup> *E.g., Recommendations, supra* note 15, at 24-26.

<sup>122</sup> STB Docket No. NOR 41191 (Sub-No. 1) (STB served Sept. 10, 2007).

<sup>123</sup> *DuPont Merits*, at 41 (“DuPont is correct 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. *See, e.g., Gen. Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, 5 S.T.B. 441, 446 (2001) (explaining that “a railroad’s SAC evidence should be limited to addressing deficiencies in the complaining shipper’s evidence”). Here, however, DuPont’s operating plan on opening included no blocking and

would have done in court, for two key reasons: (1) NS did not believe the STB would treat its motion as an appropriate case management tool; and (2) NS did not believe the STB would rule on its motion in a timely manner (*i.e.*, sufficiently before NS had to file its reply evidence).<sup>124</sup> In hindsight, at least one STB member has publicly acknowledged the value that a motion to dismiss would have offered in such circumstances.<sup>125</sup>

The STB could create an expedited motions practice, perhaps limited to discrete issues that lend themselves to quick and clear answers, to demonstrate that it will rule on motions in a timely fashion. First, a party could file a motion with the STB. Second, both parties could brief the STB on the issue subject to an abbreviated timeline and/or page limits. Third, the STB could hold a dedicated motions day and issue either an oral decision on such day or a written decision shortly thereafter (and if necessary, provide a more fulsome explanation of its ruling in the final decision). Regardless of the medium, the STB's decision would be brief. The STB would simply rule with the complainant or the defendant, either in whole or in part, or rule that the issue is not appropriate for intermediate ruling, thus giving the parties a quick answer on the motion.

To sum, the STB should leverage motions to strike/dismiss as procedural devices to filter out late-filed and fundamentally flawed evidence as well as unmeritorious claims or cases. The

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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.”).

<sup>124</sup> When NS previously had filed a motion to strike DuPont's late-filed errata in July 2013, as an unauthorized new evidentiary filing in violation of STB rules, the STB only ruled on this motion and agreed with NS in March 2014—nearly one year later. *DuPont Merits*, at 33-34.

<sup>125</sup> *DuPont*, STB Docket No. NOR 42125, at 20 (STB served Dec. 23, 2015) (V.C. Begeman, dissenting) (“In hindsight, as soon as the Board realized how problematic the [complainant's operating plan] evidence was, we should have seriously considered either *dismissing the case* or directing the parties to submit supplemental evidence.”) (emphasis added).

STB could create an expedited motions practice to ensure that it rules on such motions in a timely fashion, thus giving the parties the confidence to utilize such motions to strike/dismiss.

## **II. A REVIEW OF THE SPECIFIC CONCEPTS INTENDED TO EXPEDITE SAC CASES, AS PROPOSED BY THE STB IN THE ANPRM.**

In the ANPRM, the STB proposed for comment a host of concepts intended to expedite SAC Cases, based on the STB's own experience and the feedback received from stakeholders during the informal meetings. Some of the STB's concepts are similar to those suggested by NS in Part I of these comments and likely would help to expedite SAC Cases. Other concepts are unworkable; and, a few must be rejected because they would fundamentally undermine the sound economic principles underlying the STB's rate regulatory regime.

### **A. Pre-Filing Requirement**

NS does not oppose the STB's proposal to create a pre-filing requirement, although NS respectfully submits that it likely would not do much to expedite rate cases. A pre-filing requirement would not have the STB's intended effect of allowing the railroad "to start preparing for litigation, including gathering documents and data necessary for the discovery stage, which in turn could benefit both parties by accelerating the discovery process."<sup>126</sup> The railroad can only begin to gather the necessary documents and data once the shipper has filed its case, indicating whether it is a SAC, SSAC, or 3-B Case, and served its discovery requests, informing the railroad of the time frame for discovery materials and the segments of the railroad for which discovery is sought. Even if the shipper's initial discovery request were required to be served on the railroad concurrently with any pre-filing notice, a pre-filing requirement does nothing to

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<sup>126</sup> See ANPRM at 3.

expedite SAC Cases. A pre-filing requirement simply adds time to SAC Cases “off the books” by creating a new procedural phase before the rate case formally starts.

The STB’s citation to 49 C.F.R. § 1180.4(b)<sup>127</sup> is inapposite. A pre-filing requirement makes sense in the context of major and significant mergers for two primary reasons: (1) it puts any interested stakeholders who may participate in the merger proceeding on notice of the filing date for the application in order to ensure a comprehensive, multi-dimensional record for the proceeding; and (2) it allows the STB to determine whether the transaction is major, significant, or minor, a determination which has implications for the substantive content of the application and the procedural course of the proceeding. These rationales are inapplicable in the context of SAC Cases: (1) SAC Cases are solely between the railroad and the shipper who already know how their commercial discussions are progressing; and (2) the shipper—not the STB—determines whether the shipper will bring a SAC Case as opposed to a SSAC or 3-B Case.

## **B. Discovery**

### ***1. Standardizing Requests***

As discussed above in Part I.E, NS strongly supports the concept of standardizing initial discovery requests for both the complainant and the defendant, and further supports the concept of requiring these initial discovery requests to be served concurrently with the complaint or answer, as applicable.<sup>128</sup> NS generally agrees with the categories of information related to the creation of the SARR and to market dominance, as outlined by the STB in the ANPRM.<sup>129</sup> Per the STB’s request, NS attaches the initial discovery requests it received from DuPont and that it served on DuPont as Exhibit B and Exhibit C, respectively.

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<sup>127</sup> See ANPRM at 3 n5.

<sup>128</sup> See ANPRM at 4.

<sup>129</sup> See ANPRM at 4.

## 2. *Standardizing Disclosures*

As discussed above in Part I.E, NS supports an attempt to require initial market dominance disclosures from the complainant, but NS believes that any attempt to require initial disclosures from the defendant is simply unworkable.

## 3. *STB Data Collection*

NS strongly objects to any proposal for the STB to collect data for use in rate cases (“STB Library”). Based on NS’s experience, the STB’s concerns “about how to standardize the data and the burdens collection of the data could impose”<sup>130</sup> are extremely well-founded. As described above, massive amounts of complex data are provided by the railroad during discovery in a particular SAC Case. Even *more* data would need to be collected by the STB for use in potential SAC Cases. Because the STB would not know which parts of the defendant’s rail network the potential SARR might traverse, the STB would have to collect data regarding the defendant’s *entire* rail network. Requiring railroads to submit such data for the STB Library would raise serious concerns under the Paperwork Reduction Act, Public Law 96—511, 94 Stat. 2812, creating immense administrative burdens for the STB.<sup>131</sup> And, for the reasons described above, the STB Library also would impose enormous collection costs on the railroads.

Moreover, the STB would have to wrangle with how to standardize the documents and data submitted by the railroads. The STB either could require railroads to submit “raw” data, as maintained by the railroads, or “polished” data, as scrubbed for rate cases according to some guidelines. Even under this latter approach, further scrubbing likely would be necessary once the

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<sup>130</sup> See ANPRM at 4.

<sup>131</sup> The Paperwork Reduction Act imposes various procedural requirements on agencies that seek to implement a recordkeeping or reporting requirement on the public, including obtaining approval from the Office of Management and Budget.

potential SAC Case becomes a reality, as noted above. Bottom line, the STB Library necessarily would impose a huge burden on the STB and the railroads.

And, establishing the STB Library would have little to no countervailing benefit. Consider the fact that NS did not have to litigate a SAC Case to completion for ten years from 2004 to 2014. It is ludicrous, and a sheer waste of both the STB's and the railroads' limited resources, to ask the railroads to provide, and have the STB maintain, complex documents and massive data on an ongoing basis.

#### **4. *Software Disclosures***

NS does not believe that there is any issue demanding STB resolution related to “software that is not available to the general public.”<sup>132</sup> To the best of NS's knowledge, Rail Traffic Controller, MultiRail, and most other software that would be used in a SAC Case are available to the general public—albeit, for a fee.

Additionally, it is not feasible to “requir[e] the disclosure by each party of any such software [the party] intends to use in its evidentiary submission by, for example, the close of discovery.”<sup>133</sup> For example in *DuPont*, as discussed above, DuPont submitted a fundamentally flawed Operating Plan that did not account for each carload of traffic to ensure that it moved from its specific origin, through the rail network and necessary yards, to its specific destination. Thus, NS was forced to develop a carload operating plan from scratch using MultiRail. Although DuPont then complained about NS's use of MultiRail, the operative fact is that NS did not know it would need to use MultiRail until it saw DuPont's flawed Operating Plan. NS could not have foreseen this fundamental flaw by the close of discovery.

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<sup>132</sup> See ANPRM at 4.

<sup>133</sup> See ANPRM at 4.

## 5. *Limits on Requests*

As discussed above in Part I.E, NS encourages the STB to experiment with presumptive limits and proportionality standards for additional discovery requests beyond the initial requests.

## 6. *Requests for Admissions*

NS believes there could be value in encouraging the use of requests for admissions to “narrow the scope of contested issues and to avoid the unnecessary presentation of evidence.”<sup>134</sup> However, NS caveats that requests for admissions in the context of SAC Cases should be a limited voluntary device. The STB should reiterate that matter(s) admitted in a particular SAC Case will not be afforded any precedential value in future SAC Cases.<sup>135</sup>

Certain modifications to 49 C.F.R. § 1114.27 also may be necessary in the context of SAC Cases in order for requests for admissions to expedite such cases without compromising accurate decisionmaking. First, the STB could follow the approach of the FRCP and limit requests for admissions to “facts, the application of law to fact, or opinions about either” and the “genuineness of any described documents.”<sup>136</sup> Evidentiary development of a SAC Case should not be subject to requests for admission. For example in *DuPont*, DuPont served three requests for admissions related to market dominance on NS, two of which improperly required “NS to perform a special study.” Second, the STB should continue to permit withdrawal or amendment of a prior admission for good cause,<sup>137</sup> and good cause should exist if withdrawal or amendment

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<sup>134</sup> See ANPRM at 5.

<sup>135</sup> See 49 C.F.R. § 1114.27(b).

<sup>136</sup> FED. R. CIV. P. 36(a)(1). Compare § 1114.27(a) (permitting requests for admissions of the truth of any matters, not privileged, which are relevant to the subject matter of the proceeding, including the genuineness of any documents).

<sup>137</sup> See 49 C.F.R. § 1114.27(b).

would promote “the presentation of the merits of the action” without undue prejudice to the other party.<sup>138</sup>

NS also cautions against the STB’s proposal to impose costs on parties who “den[y] a request for admission with no basis for doing so.”<sup>139</sup> Although the STB has the authority to impose “the reasonable expenses incurred” pursuant to 49 C.F.R. § 1114.31(c),<sup>140</sup> this authority does not include attorneys’ fees. “In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser” (the “American Rule”).<sup>141</sup> Exceptions to the American Rule generally exist only with “explicit congressional authorization.”<sup>142</sup> No statute authorizes the STB to shift attorneys’ fees. In fact, the STB itself has acknowledged that it “does not have the authority to award attorneys’ fees.”<sup>143</sup>

## 7. *Clarifying Key Terms*

### a. “To The Present”

NS strongly endorses the STB’s idea to define “to the present.”<sup>144</sup> This phrase is critical to permit the railroad to collect data for the proper time period. And, there is no reason that this term cannot be defined. For example in *DuPont and SunBelt Chlor Alkali Partnership v. Norfolk Southern Ry. Co.*, STB Docket No. NOR 42130, the parties defined “to the present” to mean the

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<sup>138</sup> See FED. R. CIV. P. 36(b).

<sup>139</sup> See ANPRM at 5.

<sup>140</sup> See ANPRM at 5.

<sup>141</sup> *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975).

<sup>142</sup> *Key Tronic Corp. v. United States*, 511 U.S. 809, 814-15 (1994).

<sup>143</sup> *Burlington Northern, Inc. – Control and Merger – St. Louis-San Francisco Ry. Co.*, FD No. 28583 (Sub-No. 25), 1990 ICC LEXIS 20, at \*13-15 (ICC served Jan. 18, 1990) (noting that any exceptions to the American Rule for bad faith or willful disobedience “are unquestionably assertions of inherent power in the courts” as opposed to the agency).

<sup>144</sup> See ANPRM at 5.

end of the quarter in which the complaint was filed. That definition worked largely because, in both *DuPont* and *SunBelt*, discovery was only served in the quarter after the quarter in which the complaint was filed. Absent these circumstances, which would not exist if the STB adopts a requirement for discovery to be served on the railroad concurrently with the filing of the complaint, NS believes it makes more sense to define “to the present” to mean the date of the filing of the complaint.

#### **b. Security Sensitive Information**

The STB could considerably streamline the discovery process by clarifying that any disclosure of Security Sensitive Information (“SSI”) therein does not violate applicable Department of Homeland Security (“DHS”) and Federal Railroad Administration (“FRA”) regulations.<sup>145</sup> When this novel issue arose in *DuPont*, it resulted in a 90-day delay of the discovery process, as shown in Chart 3 in Exhibit A.<sup>146</sup> And, 90 days accounts for about 18.5% of the New STB Schedule. NS understands that the issue of disclosing SSI may have been resolved with the FRA,<sup>147</sup> but it is not clear to NS that it has been resolved with DHS.

#### **8. *Conferring on Motions To Compel***

NS supports the STB’s proposal to require parties to meet and confer regarding discovery issues prior to filing motions to compel. However, given that parties to SAC Cases today often

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<sup>145</sup> DHS and FRA regulations made clear that railroads could be fined or otherwise punished for disclosing SSI, to include disclosing SSI during discovery in a SAC Case.

<sup>146</sup> Although NS was willing to disclose relevant and responsive information that had been deemed SSI, NS did not want to risk sanctions by DHS and FRA.

<sup>147</sup> See *Authorization To Share Sensitive Security Information (SSI) With Complainants and Other Parties Involved in Surface Transportation Board (STB) Administrative Proceedings*, 15(e) Memorandum, FEDERAL RAILROAD ADMINISTRATION (July 29, 2011), available at [https://www.stb.dot.gov/stb/docs/Economic%20Data/SSI%20order%20and%20memo%20-%20STB%20proceedings07292011\\_0000.pdf](https://www.stb.dot.gov/stb/docs/Economic%20Data/SSI%20order%20and%20memo%20-%20STB%20proceedings07292011_0000.pdf).

confer prior to filing a motion to compel, NS wonders whether such a proposal would yield any tangible benefits in streamlining discovery and expediting rate cases.

The STB may see more tangible benefits from converting into a requirement what is currently an option under 49 C.F.R. § 1114.31(c) for STB staff to “convene a conference with the parties to discuss” a motion to compel. As discussed above in Parts I.B and I.E, case management conferences have been used by courts to streamline discovery by managing the scope and timing of discovery, narrowing the issues in controversy, and identifying possible matters for admissions. The key to a successful case management conference in the context of civil litigation is active judicial control. A similar tack should be adopted in the context of rate cases. At any conference between STB staff and the parties regarding a motion to compel, the STB should take an active role in brokering the disputed discovery issue<sup>148</sup> and managing the overall scope and timing of discovery in the SAC Case. As noted above, this is consistent with the STB’s promise in 2003 to prevent discovery abuses by “increase[ing] Board participation at the early stages of discovery, which we will do.”<sup>149</sup>

This requirement for active STB control should apply equally to requests to modify the procedural schedule or other procedural issues,<sup>150</sup> as discussed above in Parts I.C and I.D.

### **C. Evidentiary Standardization**

NS steadfastly opposes the Board’s suggestion for standardization of evidence in several areas.<sup>151</sup> In 2003, the STB actually rejected proposals to standardize evidence because “these

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<sup>148</sup> NS notes that the governing standard for a motion to compel is that the moving party must “demonstrate a real, practical need for the information” requested. *E.g., Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, STB Docket No. NOR 42121, at 2 (STB served Nov. 24, 2010).

<sup>149</sup> *Procedures To Expedite.*

<sup>150</sup> *See ANPRM at 5.*

proposals are beyond the procedural focus of this proceeding.”<sup>152</sup> In 2016, such proposals are similarly beyond the scope of this proceeding, pursuant to Section 11(c) of the Act.<sup>153</sup>

NS agrees with the STB that such standardization could “favor one side or the other.”<sup>154</sup> NS further notes that such standardization would not yield appreciable time savings. The items proposed for standardization do not dictate the time required to litigate a SAC Case; rather, these items are calculated in parallel with the other components which have longer lead times and ultimately can dictate the time required to litigate a SAC Case (*e.g.*, operating plan).

There also is a larger concern. Standardization does not comport with the sound economic principles of the SAC Test. As a general matter, reliance on R-1 or Uniform Railroad Costing System data risks converting the SAC Test from a methodology rightly premised on replacement costs to one premised on historical costs.<sup>155</sup> And, the STB should not open the

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<sup>151</sup> See ANPRM at 5-6.

<sup>152</sup> *Procedures To Expedite*.

<sup>153</sup> The STB “shall initiate a proceeding to assess *procedures that are available to parties in litigation before courts to expedite such litigation and the potential application of any such procedures to rate cases*” (emphasis added).

<sup>154</sup> ANPRM at 5.

<sup>155</sup> See, *e.g.*, Ioannis N. Kessides and Robert D. Willig, *Restructuring Regulation of the Rail Industry for the Public Interest*, Policy Research Working Paper, THE WORLD BANK 29 (Sept. 1995), available at [http://www-wds.worldbank.org/servlet/WDSContentServer/IW3P/IB/1995/09/01/000009265\\_3961019143124/Rendered/PDF/multi\\_page.pdf](http://www-wds.worldbank.org/servlet/WDSContentServer/IW3P/IB/1995/09/01/000009265_3961019143124/Rendered/PDF/multi_page.pdf) (noting that “the stand-alone cost of any facility used by a shipper includes only the (replacement) cost of those facilities . . .”); J. Gregory Sidak and Daniel F. Spulber, *The Tragedy of the Telecommons: Government Pricing of Unbundled Network Elements Under the Telecommunications Act of 1996*, 97 COLUM. L. REV. 1081, 1092 (May 1997) (“The cash flows of a regulated firm must allow it to recover its capital costs on a going-forward basis – that is, not just on an historic basis. In other words, the regulated firm’s cash flows must be large enough for the firm to replace its capital over time. Thus, a regulated firm’s rates of return and depreciation are adjusted so that its cash flows approximately equal those that would result from the use of replacement costs rather than book costs for its invested capital. Of course, replacement costs may vary from book costs because of inflation, changes in relative input prices (for example, rising wage rates or falling capital costs), and changes in technology.”).

floodgates to short-cut, formulaic approaches in SAC Cases. Such approaches should be strictly limited to the SSAC Test and 3-B Test.

However, NS would not oppose allowing parties to a particular SAC Case to agree to use some or all of the STB's suggested standardizations, similar to the option for parties to litigation to elect into expedited civil action programs.<sup>156</sup> For example in *SunBelt*, the parties agreed to use data from NS's Wage Forms A & B to calculate salaries for non-executive personnel.<sup>157</sup> NS underscores that any creation and use of this standardized pathway should be purely optional, conditioned upon the mutual agreement of the parties, and assigned zero precedential value.

In sum, NS does not support any standardization of evidence that compromises the sound economic principles underlying the SAC Test. As such standardization would not appreciably reduce the time to resolve a SAC Case, it is not worth an economically inaccurate decision. And, it is fundamentally at odds with the STB's statutory mandate to "allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates."<sup>158</sup>

#### **D. Other Evidentiary Issues**

##### **1. Interim Rulings**

As discussed above in Parts I.A and I.B, NS supports an enhanced use of technical conferences and interim rulings to avoid a compounding effect of evidentiary misalignment that unnecessarily delays and complicates SAC Cases.<sup>159</sup>

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<sup>156</sup> See generally *A Summary of the Short, Summary, and Expedited Civil Action Programs Around the Country*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (Mar. 2, 2015), available at [http://iaals.du.edu/sites/default/files/documents/publications/summary\\_chart\\_of\\_current\\_sse\\_programs.pdf](http://iaals.du.edu/sites/default/files/documents/publications/summary_chart_of_current_sse_programs.pdf).

<sup>157</sup> 2014 STB LEXIS 150, at \*133 (STB served June 20, 2014).

<sup>158</sup> 49 U.S.C. § 10101(1).

<sup>159</sup> See ANPRM at 6.

However, NS would like to elaborate on the example provided in the ANPRM. The STB suggests that “if the railroad believes a complainant’s operating plan cannot be corrected, the Board could require the railroad to file a motion to dismiss rather than submitting a reply based on a different operating plan in order to avoid the problem of misaligned evidentiary submissions. In other words, the Board could determine that a railroad may not submit an entirely new operating plan in its reply.”<sup>160</sup> In order for this concept to work, as discussed above in Part I.F, the STB must be willing to actually *dismiss* the fundamentally flawed complaint on motion. And, the STB must do so promptly and sufficiently in advance of the due date for the railroad’s reply evidence. Otherwise, the railroad has no incentive to use motions to dismiss as a valuable case management tool.

## 2. *Managing Motions*

As discussed above in Part I.F, NS agrees that motions to strike/dismiss should be leveraged by the STB to manage the “scope and timing” of rate cases.<sup>161</sup>

However, NS cautions against the STB’s proposal for an assignment of attorneys’ fees or an “extension of rate prescriptions” to discourage frivolous or bad faith motions to dismiss. First, as discussed above, the STB is not authorized by statute to assign attorneys’ fees.<sup>162</sup> Second, an extension of rate prescriptions would undermine the sound economic principles underlying the SAC Test. In *Major Issues*, the STB instilled a greater level of “certainty into our ratemaking process” by clarifying that any rate prescription resulting from a SAC Case will last

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<sup>160</sup> ANPRM at 6.

<sup>161</sup> See ANPRM at 6.

<sup>162</sup> See *supra* note 72.

no longer than 10 years.<sup>163</sup> The STB explained that 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.”<sup>164</sup> Second, it would be wildly disproportionate to sanction even an erroneous motion to dismiss with an extended period for any rate prescription. Such a sanction likely would have the unintended chilling effect of discouraging *all* motions to dismiss, thus preventing the STB from realizing the value of this case management tool.

### 3. *Rebuttal Standard*

NS agrees that the STB should “more strictly enforce” the limits on rebuttal evidence, as set forth in *Duke Energy Corp. v. Norfolk Southern Ry. Co.*, 7 S.T.B. 89, 100 (2003), which “requires that the complainant ‘must present its full case-in-chief in its opening evidence,’ in conjunction with consideration of motions to strike inappropriate rebuttal evidence.”<sup>165</sup> The trend for complainants to game presentations of evidence has only grown worse since *Duke Energy*.<sup>166</sup> Promptly granting motions to strike inappropriate rebuttal evidence would help to reverse this trend.

The STB also could more strictly enforce the *Duke Energy* limits on rebuttal evidence by imposing additional sanctions beyond promptly granting appropriate motions to strike. For example, the STB could require the violating party to compensate the other party for the

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<sup>163</sup> STB Ex Parte No. 657 (Sub-No. 1), 2006 STB LEXIS 663, at \*145-46 (STB served Oct. 30, 2006) (noting that a 10-year analysis period “covers an average business cycle but removes unreliable distant forecasts from our core analysis”).

<sup>164</sup> *Id.* at \*146-47.

<sup>165</sup> ANPRM at 6.

<sup>166</sup> *See, e.g., SunBelt*, 2014 STB LEXIS 150, at \*18 (STB served June 20, 2014) (granting a motion to strike SunBelt’s crew deadheading evidence which was raised for the first time on rebuttal)

unnecessary expenses incurred, not including attorneys' fees, as the result of the *Duke Energy* violation. As another example, in cases where the complainant has entirely failed to present its full case-in-chief in its opening evidence, the STB could impose a terminating sanction entering full or partial judgment in favor of the defendant. Because the complainant has failed to make a *prima facie* case in these circumstances, this terminating sanction would not compromise accurate decisionmaking.

NS generally does not support the imposition of page limits on rebuttal evidence, as it is difficult to anticipate the number and complexity of issues appropriate for rebuttal in any particular SAC Case.

#### **4. *Content of Final Briefs***

NS does agree with the STB that final briefs could be limited to “subjects on which the STB would like further information”<sup>167</sup> However, NS notes that the STB would benefit from building in some flexibility for the parties to highlight issues which they believe are important.

#### **5. *Software Licenses***

NS does not agree that a party to a SAC Case should be prohibited from using software in its evidence “unless it provides a temporary license to the opposing party.”<sup>168</sup> STB precedent is informative on this point. In January 2013, NS filed a petition asking the STB to clarify that NS was not obligated to bear the costs of providing DuPont and SunBelt (“Complainants”) with certain licenses or training for MultiRail, as NS had arranged for the Complainants to have cost-

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<sup>167</sup> ANPRM at 6.

<sup>168</sup> See ANPRM at 6-7.

free access to a read-only version of the software.<sup>169</sup> Although the question ultimately was rendered moot,<sup>170</sup> the Board issued the following advice:

The parties are reminded that rate proceedings before the Board involve an adjudicatory process in which the Board relies on each party to make its own case and critique the other party's case. Should the Board decide to rely on a certain type of evidence—an issue we are not deciding at this time—the fact that the Board does not have a particular software program does not mean we would be unable to evaluate that evidence. For example, the Board could decide to further evaluate MultiRail blocking and train service evidence by convening a technical conference with Board staff and all parties present.<sup>171</sup>

Thus, rather than prohibiting a party from using certain software unless the opposing party also receives a temporary license, the STB could simply convene a technical conference to evaluate the software. However, parties could be encouraged to provide cost-free access to a read-only version of such software—as NS provided in *DuPont* and *SunBelt*.

## 6. *Staggering Evidence*

NS does not oppose the STB's proposal to "stagger[] the filing of public and highly confidential versions of their parties' pleadings."<sup>172</sup> However, NS does note that this proposal likely would do more to ensure proper redactions than to expedite rate cases.

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<sup>169</sup> *E.I. DuPont de Nemours & Co. v. Norfolk Southern Ry. Co.; SunBelt Chlor Alkali Partnership v. Norfolk Southern Ry. Co.*, STB Docket No. NOR 42125, STB Docket No. NOR 42130, 2013 STB LEXIS 96, at \*2 (STB served Mar. 27, 2013).

<sup>170</sup> Due to the Antideficiency Act and recordkeeping concerns, "the Board will not accept any MultiRail software or training at [NS's] expense. Complainants' position—that they should receive the same package provided to the Board—therefore must mean that they are not requesting any MultiRail package from [NS] at this point beyond the read-only version they have already been given. Accordingly, the question presented in [NS's] petition requires no clarification, and the petition will be denied as moot." *Id.* at \*4.

<sup>171</sup> *Id.* at \*5.

<sup>172</sup> See ANPRM at 7.

### III. CONCLUSION

In conclusion, the Act clearly directs the STB to examine the procedures used by courts to expedite litigation and to determine whether any of those procedures could be applied to expedite rate cases. The Act does not direct the STB to modify the SAC Test or to undermine the sound economic principles of the SAC Test.

NS recommends various ways for the STB to expedite rate cases without eroding the sound economic principles that must remain the foundation for the STB's rate regulatory regime. NS's recommendations are largely informed by its extensive research into judicial best practices and by its experience in *DuPont*, which remains one of the most complex SAC Cases decided by the STB to date. NS's recommendations relate to: triaging issues within SAC Cases to promote evidentiary alignment between the parties; triaging proceedings on the STB docket to include expanding exemptions; using intermediate technical conferences to narrow the issues in controversy; adopting procedural schedules consistent with 49 C.F.R. § 1111.8 and § 1111.9, as applicable, at the outset; enforcing procedural schedules through sanctions and greater scrutiny of requests for extensions; streamlining discovery by requiring initial standardized requests from both parties and initial market dominance disclosures from the complainant, experimenting with presumptive limits and proportionality standards, and codifying standards to compel discovery; and leveraging motions to strike and motions to dismiss by ruling promptly on such motions.

In addition, NS responds directly to the various concepts raised by the STB in the ANPRM. In addition to the recommendations listed above (namely, promoting evidentiary alignment, encouraging technical conferences, standardizing initial discovery requests for both parties, standardizing initial market dominance disclosures for the complainant, experimenting

with discovery limits, leveraging motions to strike/dismiss, and expediting motions practice), NS supports the concepts related to promoting a voluntary use of requests for admissions; defining “to the present” in the discovery context; clarifying the legality of SSI disclosures; requiring parties and STB staff to confer on discovery and other procedural issues prior to filing a motion to compel; strictly enforcing the *Duke Energy* rebuttal standard; limiting the content of final briefs, with some flexibility; and staggering the filings of public and highly confidential versions.

However, NS strongly objects to the STB’s proposal to collect data on an ongoing basis as this would create an unreasonable burden for both the STB and railroads in conflict with the Paperwork Reduction Act and would not serve any useful purpose for rate cases. NS also strongly objects to the STB’s proposal related to evidentiary standardization as this would tilt the playing field for one party, undermine the sound economic principles of the SAC Test, and contravene the statutory directive for the STB to look to court procedures to expedite rate cases.

NS looks forward to working with the STB in this proceeding.

Respectfully submitted,



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Railway Co.*

**Dated: August 1, 2016**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**STB Ex Parte No. 733**

***EXPEDITING RATE CASES***

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**COMMENTS OF  
NORFOLK SOUTHERN RAILWAY COMPANY**

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**EXHIBIT A**

## PROCEDURAL SCHEDULE – *DuPont v. NS*

For purposes of exploring ways to expedite rate reasonableness cases under the stand-alone cost test (“SAC Cases”), enclosed are three charts analyzing the various procedural schedules adopted in *E.I. DuPont de Nemours and Co. v. Norfolk Southern Ry. Co.*, STB Docket No. NOR 42125.

The first chart provides a high-level comparison of the original DuPont procedural schedule adopted by the STB on February 24, 2011 (“Original DuPont Schedule”), the final DuPont procedural schedule adopted by the STB on March 8, 2013 (“Final DuPont Schedule”), and the procedural schedule for SAC Cases set forth in 49 C.F.R. § 1111.8, both prior to its amendment by The Surface Transportation Board Reauthorization Act of 2015 (“Old STB Schedule”) and after its amendment (“New STB Schedule”).<sup>1</sup> ***To summarize, the Original DuPont Schedule was 475 days longer than the Old STB Schedule and 350 days longer than the New STB Schedule; and, the Final DuPont Schedule was 776 days longer than the Old STB Schedule and 651 days longer than the New STB Schedule.***

The second chart provides more detail on why the Original DuPont Schedule was approximately triple the length of the Old STB Schedule and double the length of the New STB Schedule. DuPont proposed substantial extensions in all phases of the schedule, largely because it shared counsel with Total Petrochemicals USA, Inc. (“TPI”) and M&G Polymers USA, LLC (“M&G Polymers”) and coordinated procedural schedules across these three contemporaneous SAC Cases. All such proposed extensions were granted for the entire length of time requested.

The third chart provides more detail on why the Final DuPont Schedule was 130% longer than the Original DuPont Schedule. The Original DuPont Schedule was modified five times: DuPont requested five extensions to conduct discovery and file evidence and final briefs; and NS requested two extensions in response to DuPont’s late-filed errata and flawed Operating Plan. All such requests for extensions were granted for the entire length of time requested.

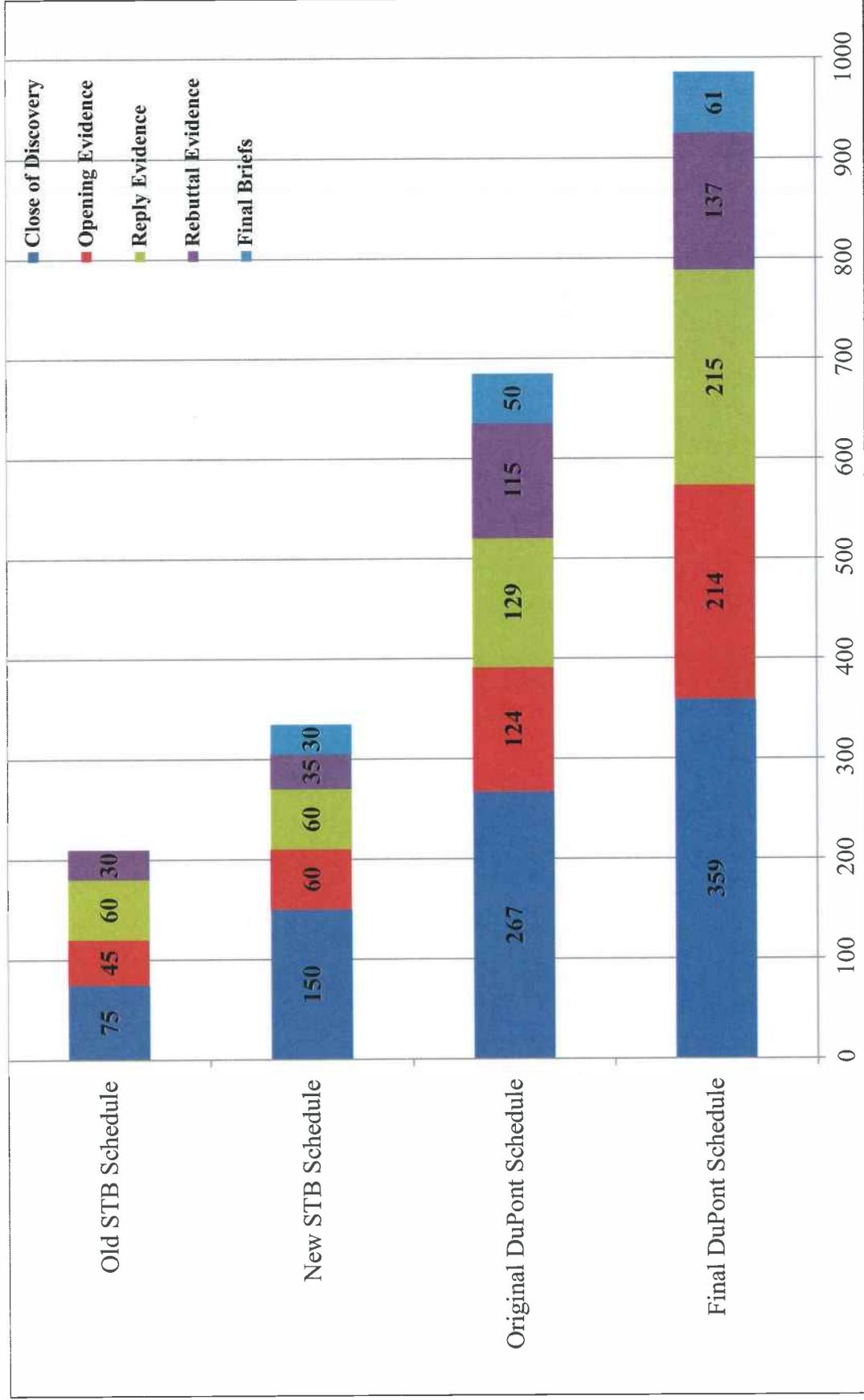
Thus, these three charts suggest that SAC Cases could be expedited by adopting procedural schedules consistent with § 1111.8 and applying greater scrutiny to requests for extensions, as discussed in more detail above in Parts I.C and I.D.

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<sup>1</sup> These charts address only the following procedural phases of SAC Cases: (1) close of discovery; (2) filing of opening evidence; (3) filing of reply evidence; (4) filing of rebuttal evidence; and (5) submission of final briefs, which are the five phases most within the control of the parties.

# COLOR

DuPont Schedule in Detail: Comparison to STB Schedules  
*(in days from filing of Complaint)*



# COLOR

DuPont Schedule in Detail: Extension from STB Schedules  
*(in days from filing of Complaint)*

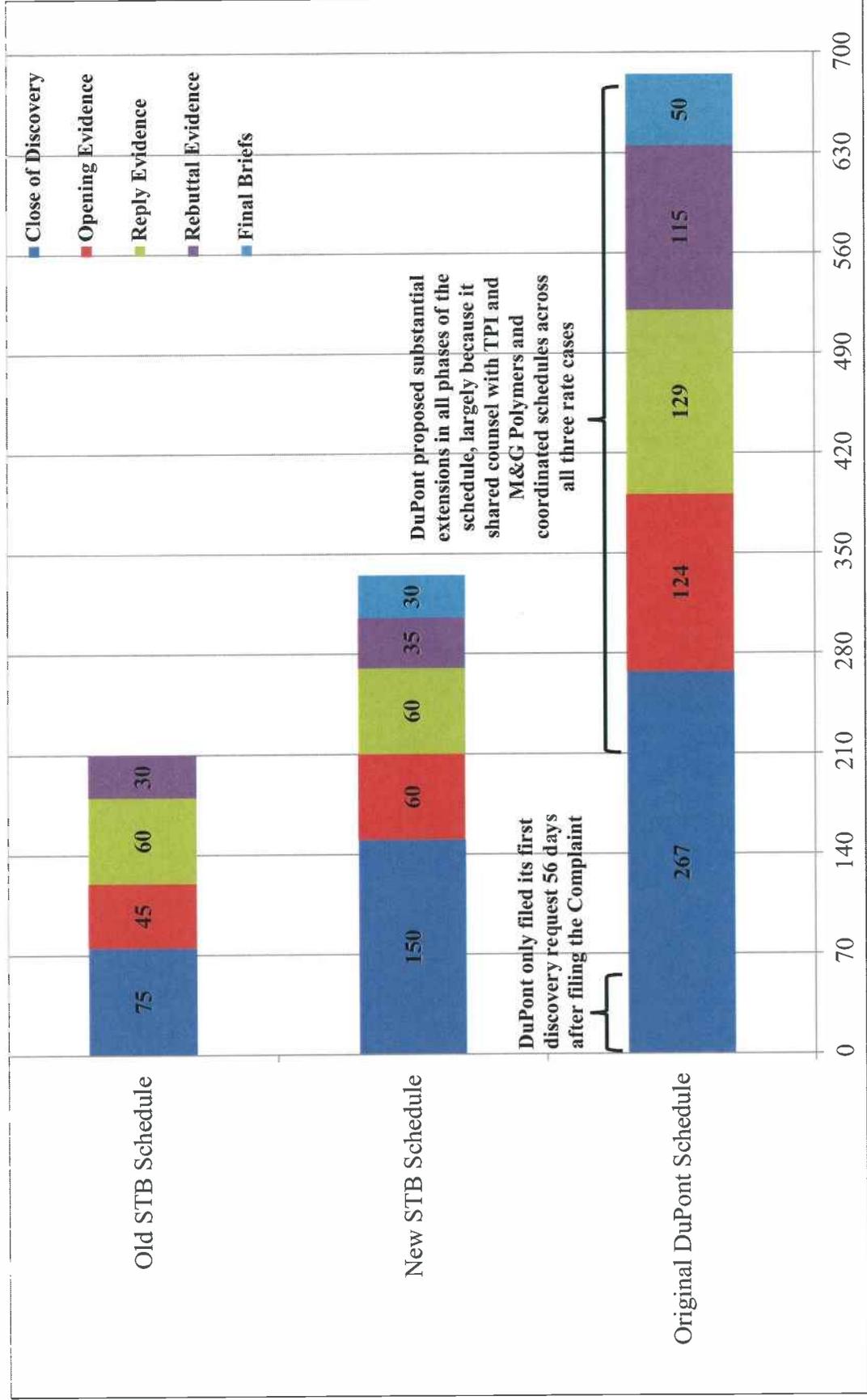


Chart 2 of 3

# COLOR

**DuPont Schedule in Detail: Extensions from Original Schedule**  
*(in days from filing of Complaint)*

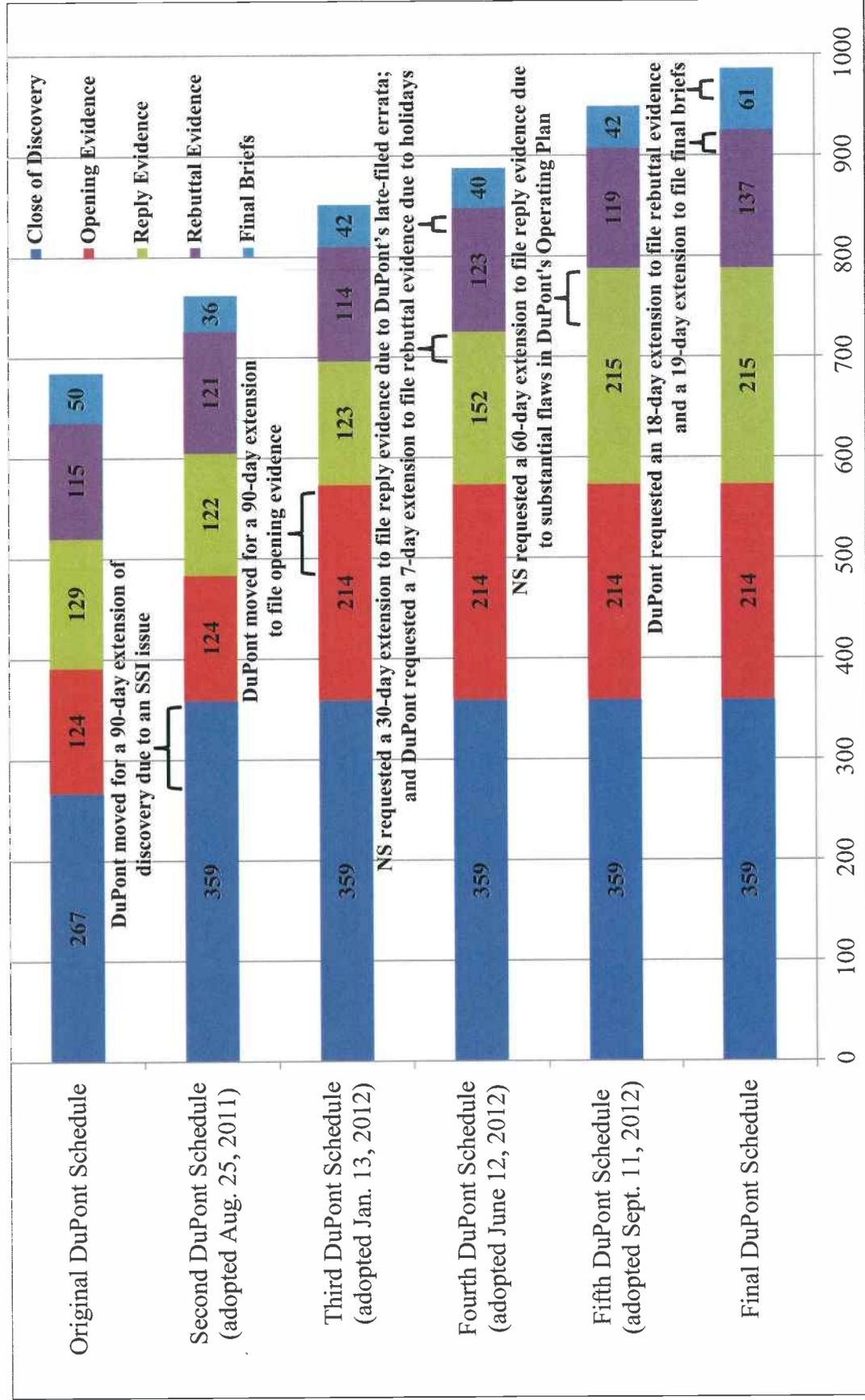


Chart 3 of 3

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**STB Ex Parte No. 733**

*EXPEDITING RATE CASES*

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**COMMENTS OF  
NORFOLK SOUTHERN RAILWAY COMPANY**

---

**EXHIBIT B**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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

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COMPLAINANT'S FIRST SET OF DISCOVERY REQUESTS  
TO DEFENDANT

Complainant E.I. DuPont De Nemours and Company ("DuPont"), pursuant to 49 U.S.C. §§ 10701, 10704, 10707, 11701 and 11704, and 49 C.F.R. Part 1114.30, hereby submits its First Set of Discovery Requests to Defendant, Norfolk Southern Railway Company ("NS").

Responses to "Complainant's First Set of Discovery Requests" should be delivered to the offices of Thompson Hine LLP, 1920 N Street, N.W., Washington, D.C. 20036, January 14, 2011, unless otherwise agreed by the parties. DuPont is prepared to cooperate with NS to facilitate the expeditious production of documents with the minimum practical burden.

## **I. DEFINITIONS**

The following defined terms are used herein:

1. "AB" means the Akron Barberton Cluster Railroad Company and/or its subsidiaries and affiliates.
2. "ABS" means the Alabama Southern Railroad and/or its subsidiaries and affiliates.
3. "ACWR" means the Aberdeen, Carolina & Western Railway Company Railroad and/or its subsidiaries and affiliates.
4. "AGR" means the Alabama & Gulf Coast Railway LLC and/or its subsidiaries and affiliates.
5. "ALS" means The Alton & Southern Railway Company and/or its subsidiaries and affiliates.
6. "And," "or," and/or "each" shall be construed in the disjunctive or conjunctive as necessary in order to bring within the scope of each Interrogatory or Request all responsive information or documents which otherwise might be construed as outside the scope of the Interrogatory or Request. All use of the masculine gender shall be deemed to include the feminine.
7. "ASRY" means the Ashland Railway Inc. (Ohio) and/or its subsidiaries and affiliates.

8. "ATN" means the Alabama & Tennessee River Railway LLC and/or its subsidiaries and affiliates.

9. "Auto Rack Car(s)" means a flat car with fixed steel racks for transporting set-up automobiles and light trucks. Racks have either two or three levels, and are equipped with tie-down devices. Two-level cars are often called "bi-level" auto racks and three-level cars are called "tri-level" auto racks.

10. "Automotive Distribution Facilities" means one or more of the four auto distribution Mixing Centers, 18 Norfolk Southern Auto Distribution Facilities and 20 Private Auto Distribution Facilities throughout the eastern U.S. as referred to in "NS\_auto\_distr.pdf" found at [www.nscorp.com/nscporta/nscorp/Customers/Automotive/Facilities](http://www.nscorp.com/nscporta/nscorp/Customers/Automotive/Facilities).

11. "Automotive Train" means a freight train that consists primarily of Auto Rack Cars.

12. "AVR" means the Allegheny Valley Railroad and/or its subsidiaries and affiliates.

13. "AWW" means the Algiers, Winslow & Western Railway and/or its subsidiaries and affiliates.

14. "BB" means the Buckingham Branch Railroad Company and/or its subsidiaries and affiliates.

15. “BDRV” means the Belvidere & Delaware River Railway and/or its subsidiaries and affiliates.
16. “BH” means the B&H Rail Corporation and/or its subsidiaries and affiliates.
17. “BLOL” means the Bloomer Shippers Connecting Railroad Co. and/or its subsidiaries and affiliates.
18. “BNSF” means the BNSF Railway Company and/or its subsidiaries and affiliates.
19. “BPRR” means the Buffalo & Pittsburgh Railroad and/or its subsidiaries and affiliates.
20. “BRC” means The Belt Railway Company of Chicago and/or its subsidiaries and affiliates.
21. “BRW” means the Black River & Western Railroad and/or its subsidiaries and affiliates.
22. “BS” means the Birmingham Southern Railroad Company and/or its subsidiaries and affiliates.
23. “BSDA” means the Bi-State Development Agency Railroad and/or its subsidiaries and affiliates.
24. “BSOR” means the Buffalo Southern Railroad, Inc. and/or its subsidiaries and affiliates.

25. "Bulk Transfer Facilities" means rail-truck transfer facilities marketed by NS which are described at [www.nscorp.com/nscportal/nscorp/Customers/Distribution%20Network/](http://www.nscorp.com/nscportal/nscorp/Customers/Distribution%20Network/) as being subdivided into three classifications including: 1) Thoroughbred Bulk Terminals; 2) Independent Bulk Terminals; and 3) Terminals on Connecting Railroads.

26. "BVRV" means the Brandywine Valley Railroad Company and/or its subsidiaries and affiliates.

27. "CCKY" means the Chattooga & Chickamauga Railway Company and/or its subsidiaries and affiliates.

28. "CCRA" means the Camp Chase Railroad Company and/or its subsidiaries and affiliates.

29. "CCRC" means the Cleveland Commercial Railroad Company LLC and/or its subsidiaries and affiliates.

30. "CFE" means the Chicago, Ft. Wayne & Eastern, A Division of Central Railroad of Indianapolis, Inc. and/or its subsidiaries and affiliates.

31. "CGR" means the CG Railway, Inc. and/or its subsidiaries and affiliates.

32. "Challenged Rate(s)" means the single line and AAR Accounting Rule 11 rate(s) for common carrier rail transportation service that are identified in Exhibits A and B (Parts 1-3) to DuPont's Verified Complaint in this proceeding.

33. "CIND" means the Central Railroad Company of Indiana and/or its subsidiaries and affiliates.

34. "CKIN" means the Chesapeake and Indiana Railroad Company Inc. and/or its subsidiaries and affiliates.

35. "CLP" means The Clarendon and Pittsford Railroad Company and/or its subsidiaries and affiliates.

36. "CMR" means the Central Midland Railway Company and/or its subsidiaries and affiliates.

37. "CNYK" means the Central New York Railroad Corporation and/or its subsidiaries and affiliates.

38. "Coal train" means any train that transports primarily loaded or empty coal cars, including a mine gathering or distribution run, a train carrying coal cars for more than one customer, and a train carrying coal cars from more than one origin to single or more than one destination on one bill of lading or other shipping document.

39. "COFC" means container on flat car.

40. "CSS" means the Chicago South Shore and South Bend Railroad and/or its subsidiaries and affiliates.

41. "CSXT" means CSX Transportation, Inc., and/or its subsidiaries and affiliates.

42. "CT" means City of Columbia d/b/a Columbia Terminal and/or its subsidiaries and affiliates.

43. "CUOH" means The Columbus & Ohio River R.R. Co. and/or its

subsidiaries and affiliates.

44. "CWRO" means the Cleveland Works Railway Company-Mittal Steel USA and/or its subsidiaries and affiliates.

45. "DCRR" means the Dubois County Railroad and/or its subsidiaries and affiliates.

46. "Destination(s)" means any of the rail stations or facilities where transportation of DuPont rail shipments under the Challenged Rates terminates. For example, if the Challenged Rate only covers transportation to a point of interchange with another carrier for continued movement towards the final destination, the interchange would be the Destination. If the Challenged Rate, however, includes all or any portion of the transportation over a connecting carrier, the Destination would be the point at which the Challenged Rate no longer applies.

47. "DGVR" means the Durbin & Greenbrier Valley Railroad Inc. and/or its subsidiaries and affiliates.

48. "Distributed power" means a train configuration in which one or more locomotives are positioned at the front of the train and one or more locomotives are positioned at an intermediate point in the train and/or at the rear of the train, with the intermediate or rear locomotives remotely controlled from the lead locomotive on the train.

49. "DL" means the Delaware-Lackawanna R.R. Co. Inc. and/or its subsidiaries

and affiliates.

50. "DLWR" means the Depew Lancaster & Western Railroad Co., Inc. and/or its subsidiaries and affiliates.

51. "Document(s)" means all writings or visual displays of any kind, whether generated by hand or mechanical means, including, without limitation, photographs, lists, memoranda, reports, notes, letters, electronic mail, phone logs, contracts, drafts, workpapers, computer print-outs, computer tapes, telecopies, telegrams, newsletters, notations, books, affidavits, statements (whether or not verified), speeches, summaries, opinions, studies, analyses, evaluations, statistical records, proposals, treatments, outlines, any electronic or mechanical records or representations (including physical things such as, but not limited to, computer disks), and all other materials of any tangible medium or expression, in NS' current or prior possession, custody or control. A draft or non-identical copy is a separate document within the meaning of this term.

52. "DT" means the Decatur Junction Railway Co. and/or its subsidiaries and affiliates.

53. "DuPont car(s)" or "DuPont service" means the cars containing commodities moving under Challenged Rates to and from Origins and Destinations over the DuPont route(s).

54. "DuPont route(s)" means the railroad line segments over which NS moves loaded and empty railcars between Origins and Destinations.

55. "DuPont shipment(s)" means the movements identified in Exhibits A and B (Parts 1-3) to DuPont's Verified Complaint.

56. "DuPont train(s)" means the trains containing loaded or empty railcars moving to and from Origins and Destinations over the DuPont route(s).

57. "ECTB" means the East Chattanooga Belt Railway Company and/or its subsidiaries and affiliates.

58. "ESPN" means the East Penn Railroad, LLC and/or its subsidiaries and affiliates.

59. "ETRY" means the East Tennessee Railway LP and/or its subsidiaries and affiliates.

60. "EV" means The Everett Railroad Company and/or its subsidiaries and affiliates.

61. "FC" means the Fulton County Railroad, Inc. and/or its subsidiaries and affiliates.

62. "FIR" means the Flats Industrial Railroad Co. and/or its subsidiaries and affiliates.

63. "GC" means the Georgia Central Railway LP and/or its subsidiaries and affiliates.

64. "Geocoded" means process or object data associated to an entity which is linked to a specific location or an array of locations on the Earth's surface through a

standard geographic coordinate system.

65. “Geographic Coordinates” means latitude and longitude coordinates (in decimal values, with no decimal value truncation) associated to a named and standard geographic coordinate system, such as “North American Datum of 1927.”

66. “GET” means the Gettysburg & Northern Railroad Co. and/or its subsidiaries and affiliates.

67. “GMR” means the Georgia Midland Railroad, Inc. and/or its subsidiaries and affiliates.

68. “GNRR” means the Georgia Northeastern Railroad Company, Inc. and/or its subsidiaries and affiliates.

69. “GRW” means Gary Railway Company and/or its subsidiaries and affiliates.

70. “GS” means the Georgia Southern Railway Co. and/or its subsidiaries and affiliates.

71. “GSWR” means the Georgia Southwestern Railroad Company, Inc. and/or its subsidiaries and affiliates.

72. “HMCR” means The Hunstville and Madison County Railroad Authority and/or its subsidiaries and affiliates.

73. “HOG” means the Heart of Georgia Railroad, Inc. and/or its subsidiaries and affiliates.

74. "HPTD" means the High Point, Thomasville & Denton Railroad Company and/or its subsidiaries and affiliates.

75. "HR" means the Heritage Railroad Corp. and/or its subsidiaries and affiliates.

76. "HRS" means the Hollidaysburg and Roaring Spring Railroad and/or its subsidiaries and affiliates.

77. "HRT" means the Hartwell Railroad Company and/or its subsidiaries and affiliates.

78. "Identify," when referring to a document, means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and/or recipient(s).

79. "Identify," when referring to information, means to list or produce documents containing the specified information.

80. "IHB" means the Indiana Harbor Belt Railroad Company and/or its subsidiaries and affiliates.

81. "IMRR" means the Illinois & Midland Railroad, Inc. and/or its subsidiaries and affiliates.

82. "INRD" means The Indiana Rail Road Company and/or its subsidiaries and affiliates.

83. "Intermodal Train" means a freight train that consists of any combination of roadrailer equipment, double-stack or pedestal flat cars, and flat cars equipped for TOFC, COFC, multi-level auto-rack or auto frames.

84. "IORY" means the Indiana & Ohio Rail System and/or its subsidiaries and affiliates.

85. "IR" means the Illinois Railway and/or its subsidiaries and affiliates.

86. "ISRR" means the Indiana Southern Railroad, Inc. and/or its subsidiaries and affiliates.

87. "JEFW" means the Jefferson Warrior Railroad Company and/or its subsidiaries and affiliates.

88. "JVRR" means the Juniata Valley Railroad Company and/or its subsidiaries and affiliates.

89. "KBSR" means the Kankakee, Beaverville, and Southern Railroad Company and/or its subsidiaries and affiliates.

90. "KCS" means the Kansas City Southern Railway Co. and/or its subsidiaries and affiliates.

91. "KT" means the Kentucky and Tennessee Railway Company and/or its subsidiaries and affiliates.

92. "KXHR" means the Knoxville & Holston River Railroad Company, Inc. and/or its subsidiaries and affiliates.

93. "LC" means the Lancaster and Chester Railway Company and/or its subsidiaries and affiliates.
94. "LER" means The Logansport & Eel River Short-Line Company, Inc. and/or its subsidiaries and affiliates.
95. "LIRC" means the Louisville & Indiana Railroad Company and/or its subsidiaries and affiliates.
96. "LNAL" means the Louisville, New Albany & Corydon Railroad and/or its subsidiaries and affiliates.
97. "Local Train" means "Way train" as used in NS' R-1 Annual Report to the STB.
98. "LRWY" means the Lehigh Railway, LLC and/or its subsidiaries and affiliates.
99. "LS" means the Luzerne & Susquehanna Railway Co. and/or its subsidiaries and affiliates.
100. "LT" means The Lake Terminal Railroad Company and/or its subsidiaries and affiliates.
101. "LVRB" means the Lehigh Valley Rail Mgmt. LLC - Bethlehem Division and/or its subsidiaries and affiliates.
102. "LVRJ" means the Lehigh Valley Rail Mgmt. LLC-Johnstown Division and/or its subsidiaries and affiliates.

103. "LW" means the Louisville and Wadley Railway Company and/or its subsidiaries and affiliates.

104. "MAW" means the Maumee & Western Railroad Corp. and/or its subsidiaries and affiliates.

105. "MDS" means the Meridian Southern Railway, LLC and/or its subsidiaries and affiliates.

106. "MIDH" means the Middletown & Hummelstown Railroad Company and/or its subsidiaries and affiliates.

107. "MNBR" means the M&B Railroad LLC and/or its subsidiaries and affiliates.

108. "MOC" means the Missouri Central Railroad and/or its subsidiaries and affiliates.

109. "MRS" means the Manufacturers Railway Company and/or its subsidiaries and affiliates.

110. "MSCI" means the Mississippi Central Railroad Company and/or its subsidiaries and affiliates.

111. "MSF" means the Mississippi Export Railroad Company and/or its subsidiaries and affiliates.

112. "MTNR" means the Mississippi Tennessee Railroad Company and/or its subsidiaries and affiliates.

113. "NBER" means the Nittany & Bald Eagle Railroad Company and/or its subsidiaries and affiliates.

114. "NCIR" means the New Castle Industrial Railroad and/or its subsidiaries and affiliates.

115. "NCRL" means the NC Railroad, Inc. and/or its subsidiaries and affiliates.

116. "NHRR" means the New Hope & Ivyland Rail Road and/or its subsidiaries and affiliates.

117. "NOGC" means the New Orleans & Gulf Coast Railway Co., Inc. and/or its subsidiaries and affiliates.

118. "NOPB" means the New Orleans Public Belt Railroad and/or its subsidiaries and affiliates.

119. "NOW" means the Northern Ohio & Western Railway, LLC and/or its subsidiaries and affiliates.

120. "NS" means Norfolk Southern Railway Company, its present or former employees, agents, counsel, officers, directors, advisors, consultants, divisions, departments, predecessors, parent and/or holding companies, all subsidiaries and affiliates identified on page 4 of NS' 2009 Annual Report Form R-1 that provide transportation and/or terminal services in the SARR States, or any of them, and all other persons acting (or who have acted) on its behalf.

121. "NS Corp" means the Norfolk Southern Corporation, parent company to

NS.

122. "NSHR" means the North Shore Railroad Company and/or its subsidiaries and affiliates.

123. "NSR" means the Newburgh & South Shore Railroad, LLC and/or its subsidiaries and affiliates.

124. "NYLE" means the New York & Lake Erie Railroad and/or its subsidiaries and affiliates.

125. "NYSW" means The New York, Susquehanna & Western Ry. Corp. and/or its subsidiaries and affiliates.

126. "OHPA" means the Ohio & Pennsylvania R.R. Co. and/or its subsidiaries and affiliates.

127. "OHRy" means the Owego & Harford Railway, Inc. and/or its subsidiaries and affiliates.

128. "Origin(s)" means any of the rail stations or facilities where DuPont originates rail shipments of the commodities moving under the Challenged Rates or where NS receives DuPont shipments in interchange from another carrier.

129. "PAL" means the Paducah & Louisville Railway, Inc. and/or its subsidiaries and affiliates.

130. "PAM" means the Pittsburgh, Allegheny & McKees Rocks Railroad Company and/or its subsidiaries and affiliates.

131. "PAS" means the Pan Am Southern, LLC and/or its subsidiaries and affiliates.

132. "PBL" means The Philadelphia Belt Line Railroad Company and/or its subsidiaries and affiliates.

133. "Person(s)" means natural persons, corporations, institutions, partnerships, firms, joint ventures, associations, political subdivisions or other legal entities, as the case may be.

134. "PICK" means The Pickens Railway Company and/or its subsidiaries and affiliates.

135. "PKHP" means The Pickens Railway Company - Honea Path Division and/or its subsidiaries and affiliates.

136. "POHC" means the Pittsburgh & Ohio Central Railroad Company and/or its subsidiaries and affiliates.

137. "Possession, custody, or control" refers to and includes documents actually within the possession, custody or control of NS or any other person acting for or in concert with NS; and refers to and includes documents prepared by, obtained, or placed in the possession, custody, or control of any such person within the scope of his or her duties or relationship to NS; and further refers to and includes documents having been placed in the temporary possession, custody, or control of any third party by any of the foregoing or NS. Documents are deemed to be in the possession, custody, or control of NS if NS has

the right to secure the document, or a copy thereof, from another person or entity, whether public or private, having such actual physical possession, custody, or control thereof.

138. "Price" or "prices" mean the price per railcar or other unit of measure, and whether it is f.o.b. or f.a.s. a railroad car, vessel, destination, port or other conveyance.

139. "PRL" means the Penn Eastern Rail Lines, Inc. and/or its subsidiaries and affiliates.

140. "PRV" means the Pearl River Valley Railroad Company and/or its subsidiaries and affiliates.

141. "Rail yard" or "yard" means a railroad facility where a yard crew and/or locomotive has been assigned.

142. "RBMN" means the Reading Blue Mountain and Northern Railroad Company and/or its subsidiaries and affiliates.

143. "Related," "related to," and "relating to" mean and include making a statement discussing, describing, referring to, reflecting, explaining, analyzing, or in any way pertaining to, in whole or in part, the subject matter of the Interrogatory or Request.

144. "RJCC" means the R. J. Corman Railroad Co./Central Kentucky Lines and/or its subsidiaries and affiliates.

145. "RJCP" means the RJ Corman Railroad Company/Pennsylvania Lines, Inc. and/or its subsidiaries and affiliates.

146. "Road Train" means "Through train" as used in NS' R-1 Annual Report to the STB.

147. "RRC" means the Redmont Railway Company and/or its subsidiaries and affiliates.

148. "RSM" means the Railroad Switching Service of Missouri Inc. and/or its subsidiaries and affiliates.

149. "RSR" means the Rochester & Southern Railroad and/or its subsidiaries and affiliates.

150. "SAN" means the Sandersville Railroad Company and/or its subsidiaries and affiliates.

151. "SARR States" means the States of Alabama, Delaware, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia and West Virginia.

152. "SB" means the South Buffalo Railway Company and/or its subsidiaries and affiliates.

153. "SCIH" means the South Chicago and Indiana Harbor Railway Company and/or its subsidiaries and affiliates.

154. "SH" means the Steelton & Highspire Railroad Company and/or its subsidiaries and affiliates.

155. "SLRS" means the SMS Rail Service Inc. and/or its subsidiaries and affiliates.
156. "SPLC" means Standard Point Location Code.
157. "SQVR" means the Sequatchie Valley Railroad Co. and/or its subsidiaries and affiliates.
158. "SRNJ" means the Southern Railroad Company of New Jersey and/or its subsidiaries and affiliates.
159. "ST" means the Springfield Terminal Railway Company and/or its subsidiaries and affiliates.
160. "STB" means the Surface Transportation Board.
161. "SVRR" means the Shamokin Valley Railroad Company and/or its subsidiaries and affiliates.
162. "SWP" means the Southwest Pennsylvania Railroad and/or its subsidiaries and affiliates.
163. "TASD" means the Terminal Railway Alabama State Docks and/or its subsidiaries and affiliates.
164. "TCKR" means the Turtle Creek Industrial Railroad, Inc. and/or its subsidiaries and affiliates.
165. "TCS" means Triple Crown Services and/or its subsidiaries and affiliates.

166. "TDIS" means Thoroughbred Direct Intermodal Services and/or its subsidiaries and affiliates.

167. "TISH" means the Tishomingo Railroad Company, Inc. and/or its subsidiaries and affiliates.

168. "TOFC" means Trailer on Flat Car.

169. "TPW" means the Toledo, Peoria and Western Railway Corporation and/or its subsidiaries and affiliates.

170. "Transworks" means Transworks, Inc., Transworks Company and Transworks of Indiana, Inc. and/or the subsidiaries and affiliates of these companies.

171. "TRRA" means the Terminal Railroad Association of St. Louis and/or their subsidiaries and affiliates.

172. "TYBR" means the Tyburn Railroad Company and/or its subsidiaries and affiliates.

173. "URR" means the Union Railroad Company and/or its subsidiaries and affiliates.

174. "USRP" means the U.S Rail Corporation LLC and/or its subsidiaries and affiliates.

175. "VSRR" means the Virginia Southern Division and/or its subsidiaries and affiliates.

176. "VVR" means the Vermillion Valley Railroad Company, Inc. and/or its subsidiaries and affiliates.

177. "WCR" means the Wellsboro & Corning Railroad and/or its subsidiaries and affiliates.

178. "WE" means the Wheeling & Lake Erie Railway Company and/or its subsidiaries and affiliates.

179. "WNYP" means the Western New York & Pennsylvania Railroad, LLC and/or its subsidiaries and affiliates.

180. "WSRY" means the Winamac Southern Railway Company and/or its subsidiaries and affiliates.

181. "WSS" means the Winston-Salem Southbound Railway Company and/or its subsidiaries and affiliates.

182. "WTNN" means the West Tennessee Railroad, LLC and/or its subsidiaries and affiliates.

183. "WTRY" means The Warren & Trumbull Railroad Company and/or its subsidiaries and affiliates.

184. "WW" means the Winchester & Western Railroad Company and/or its subsidiaries and affiliates.

185. "YRC" means the York Railway Company and/or its subsidiaries and affiliates.

186. "YSRR" means the Youngstown & Southwestern Railroad Company Inc. and/or its subsidiaries and affiliates.

## **II. INSTRUCTIONS**

NS is requested to conform to the following instructions in responding to these Requests and Interrogatories.

1. These Interrogatories and Document Requests call for all information, including information contained in documents that are in the possession, custody, or control of NS.
2. Each paragraph shall operate and be construed independently. Unless otherwise indicated, no paragraph limits the scope of any other paragraph.
3. Where these discovery requests seek data in a computer-readable format, machine-readable format, or in its native format, this data is defined as an electronic file which contains structured, relational data, and is managed within a commercially available and relational database system (for example Microsoft, Oracle, IBM) and is readable via commercially available and standard Microsoft Windows software API (Application Programming Interfaces) methods to include Open Database Connectivity (ODBC) implementations thereby making the data accessible independent of the host system.

If the source table is stored within a non-relational system, such as a 'flat file', or a

custom system (not commercially available) provide the data in standard sequential or delimited text files. The text files will be MS-DOS or MS-Windows compatible text formats.

- a. For each computer file supplied provide:
  - i. The name and description of the source database or other file from which the records in the computer file were selected (stating whether the file is an original extract from a line of business transactional or data warehouse computer system, or if the provided file is an extract, or report, created specifically for this request) including a graphic or textural representation of the database relational model for each system to include all named tables of data within the system's relational model, and for every table provide a list of fields, primary keys, foreign keys, list relational links to other tables and fields, and filters, if any, associated to the relational links. Include all related tables, and all fields within each included table. List the fields which define a unique record (row) for each table, or state if the table does not require unique row differentiators or primary keys. For code tables, provide the code, and associated data elements in a discreet list (no duplicates);
  - ii. A description of how the records in the file produced were selected;
  - iii. The original table names (no aliases), original field names, to match the provided systems' data structures within each computer program (in native software and text file) and intermediate file used in deriving the files produced if the files produced are flat files. If the files produced are commercially available relational database files, provide the method used and code (if code was created) used to export the data to this relational format, including the operating system and version under which the final text files or relational tables were produced; and
  - iv. A relational diagram defining relationships between tables,

with all fields, listing primary keys, foreign keys, with each table or file provided as listed in the relational diagram. Also provide all table indexes, and index files, which define the index to be clustered or non-clustered.

- b. For each field in each computer database file provide a complete, standard data structure, including:
  - i. The name of the field including its source table name, and if different from the LOB (line of business) or off-line analytical system field name, provide all field name incarnations so that there is a linkage between the provided fieldname and the original source fieldname and source table, and source application/system. Also provide the "Synonymous Name", that being a single word or multiple words that differ from the fieldname, but represents the same data element using alternative or more descriptive terminology. Also provide the "Context", that being a designation or description of the application environment in which the data item (or field) is applied or from which it is originally derived (its origin);
  - ii. The starting and ending positions of the field if the file is a non-delimited flat file, or if the file is delimited, verify that the delimiter is inserted at the end of each field and the delimiter is not contained, as data, within any data cell (provide row terminators and line feed codes), otherwise, if the provided data set is a relational database "table", export the table structure into a separate ANSI SQL 92 code or text file;
  - iii. A detailed definition of the field and whether this field is the record's (or row's) unique identifier, or it is one of many fields which create a unique row (list them);
  - iv. A detailed description of the data in the field, including an explanation of what they are used for and also provide all related index files in SQL code format or text files, if any;
  - v. The type of data in the field, i.e., whether numeric, character, alphanumeric, number of digits, number of significant digits,

whether signed or unsigned (i.e., negatives allowed) and whether this field is Unicode, or contains any constraints, or requirements to be Non-Null, or non-blank;

- vi. If the values in a field are terms or abbreviations, a list of all terms or abbreviations used with detailed definitions of each and provide the approved domain (range of values if indeterminate) or list of values permitted if determinate. Also provide minimum and maximum values, including whether the values are Null, hidden, or specific ASCII or ISO codes. Include the character encoding or software vendor's code page, for each table if any;
- vii. An indication of whether the data in the field are packed or compressed; and
- viii. If the data in the field are packed or compressed, the type of packing or compression:
  - (1) Zoned with low-order sign;
  - (2) Binary with LSB first;
  - (3) Binary with MSB first;
  - (4) Packed with high-order sign;
  - (5) Packed with low-order sign;
  - (6) Packed with no sign; and
  - (7) Other (specify and provide detailed instructions for unpacking).
- ix. If the data files and tables originate on a non-Microsoft Windows operating system, state the original operating system and convert to Microsoft Windows format.
- x. For data or other electronic information submissions where the source system does not have a 32-bit operating system, verify that all data and files are computer-readable on a 32-bit operating system.

4. If an answer or the production of any responsive document is withheld under 49 C.F.R. § 1114.30(a)(1) on the basis of a claimed privilege or attorney work

product, then for each such answer or document, provide the following information: its date, type (e.g., letter, meeting, notes, memo, etc.), author (note if author is an attorney), addressee(s)/recipient(s) (note if addressee(s) or recipient(s) is an attorney), general subject matter, and basis for withholding the information.

5. If the answer to any Interrogatory or the production of any responsive document is withheld on claimed grounds other than privilege or attorney work product, state with specificity the basis for such withholding.

6. NS is requested to supplement its production in the manner provided in 49 C.F.R. Part 1114.29.

7. If a responsive document was, but is no longer in NS' possession, custody, or control, describe what disposition was made of it.

8. Where knowledge or information in the possession, custody, or control of NS is requested, such request includes knowledge or information in the possession, custody, or control of its employees, agents, representatives, and consultants.

9. Words in the singular include plural and vice versa

10. Dates are inclusive unless otherwise stated.

11. References to the present tense shall be construed to include the past tense, and references to the past tense shall include the present tense, as necessary to bring within the scope of each Interrogatory or Request For Production all knowledge or

information that might otherwise be construed to be outside the scope of the Interrogatory or Request For Production.

12. All documents should be produced or made available for inspection in the form in which they are retained by NS in its usual course of business (e.g., if the documents are in a file, the file containing the documents should be produced), unless otherwise agreed by DuPont and NS. All files containing responsive documents should be identified by the file name and number.

13. All documents produced should be organized and numbered in such a manner that DuPont may readily determine which documents are being produced in response to each specific Request for Production. If no document is produced in response to any specific Request, please so indicate in the response.

14. If NS believes that any Interrogatory, Request For Production, definition, or instruction is ambiguous, NS should set forth the language that it believes is ambiguous and the interpretation that it is using in responding to the Interrogatory or Request For Production.

15. If NS cannot answer any part of any Interrogatory or Request For Production in full, after exercising due diligence to secure the information to do so, NS should so state and answer to the extent possible, specifying its inability to answer the remainder and stating whatever information or knowledge it has regarding each unanswered part.

16. DuPont reserves the right to file supplemental and/or follow-up Interrogatories, Requests for Production, and other discovery, as necessary or appropriate.

### **III. REQUESTS FOR ADMISSIONS**

#### **REQUEST FOR ADMISSION NO. 1**

Separately for each of the Challenged Rates identified in Exhibits A and B (Parts 1-3) to DuPont's Verified Complaint, admit that each such Challenged Rate exceeds 180 percent of the variable costs of providing the transportation to which the Challenged Rates apply.

#### **REQUEST FOR ADMISSION NO. 2**

Separately for each of the movements identified in Exhibits A and B (Parts 1-3) to DuPont's Verified Complaint, admit that NS faces no effective rail competition for the transportation of commodities under the Challenged Rates from Origins to Destinations.

#### **REQUEST FOR ADMISSION NO. 3**

Separately for each of the movements identified in Exhibits A and B (Parts 1-3) to DuPont's Verified Complaint, admit that NS faces no effective competition from other surface modes (e.g. truck, barge, pipeline) for the transportation of commodities under the Challenged Rates from Origins to Destinations.

#### **IV. INTERROGATORIES**

##### **INTERROGATORY NO. 1**

If your response to Request for Admission No. 1 was anything other than an unqualified admission for each Challenged Rate in Exhibits A and B (Parts 1-3) to DuPont's Verified Complaint, please explain in detail the legal basis for your response, provide the revenue-to-variable cost percentage that NS claims each such Challenged Rate produces, and identify all documents that support your response.

##### **INTERROGATORY NO. 2**

If your response to Request for Admission No. 2 was anything other than an unqualified admission for each movement in Exhibits A and B (Parts 1-3) to DuPont's Verified Complaint, for any such movement for which your response was not an unqualified admission, please identify the specific movement; identify the rail carrier(s) that provide effective rail competition; and describe the effective rail competition that NS claims exists for the transportation to which the Challenged Rate applies, the annual volume subject to such competition, and how and why such competition is effective.

##### **INTERROGATORY NO. 3**

If your response to Request for Admission No. 3 was anything other than an unqualified admission for each movement in Exhibits A and B (Parts 1-3) to DuPont's Verified Complaint, for any such movement for which your response was not an unqualified admission, please identify the specific movement; identify any carriers that

NS contends provide effective competition; and describe the effective competition from other surface modes that NS claims exists for the transportation to which the Challenged Rate applies, the annual volume subject to such competition, and how and why such competition is effective.

INTERROGATORY NO. 4

Please identify, by name, title and address, the person(s) who prepared each answer to these Interrogatories and each response to the foregoing Requests for Admissions, and who reviewed and selected the documents to be produced in response to each of the following Requests for Production.

INTERROGATORY NO. 5

Please provide a complete description of each DuPont movement identified on Exhibits A and B (Parts 1-3) to DuPont's Verified Complaint by NS from Origin to Destination and from Destination to Origin, including, but not limited to, (a) a description of all transportation-related activities at Origin, at Destination, and at all intermediate stations or other points between Origin and Destination; (b) the route(s) used; (c) the railroads involved in each route; and (d) the miles for each route separated by railroad.

INTERROGATORY NO. 6

Please describe the arrangements between NS and each railroad identified in part "F" of Interrogatory No. 6 regarding all movements handled in whole or in part by NS, including:

- a. Whether NS sets all rates, fees and surcharges, including the portion of the movement handled by each railroad identified in part “f” of this Interrogatory No. 6, and if not, identify who sets the rates, fees, and surcharges;
- b. Whether the NS revenues reported in the traffic and revenue data provided in response to Request for Production No. 20 include or exclude the monies paid to each railroad identified in part “f” of this Interrogatory No. 6 as compensation for its portion of each movement;
- c. Whether a physical interchange of traffic takes place between NS and each railroad identified in part “f” of this Interrogatory No. 6, and if so, identify the interchange location(s);
- d. Whether each railroad identified in part “f” of this Interrogatory No. 6 provides its own locomotive power for its portion of each movement or if NS power is used; and
- e. Whether each railroad identified in part “f” of this Interrogatory No. 6 provides its own train crew personnel for its portion of each movement or if NS train crew personnel are used.
- f. AB, ABS, ACWR, AGR, ALS, ASRY, ATN, AVR, AWW, BB, BDRV, BH, BLOL, BPRR, BRC, BRW, BS, BSDA, BSOR, BVRY, CCKY, CCRA, CCRL, CFE, CGR, CIND, CKIN, CLP, CMR, CNYK, CSS, CT, CUOH, CWRO, DCCR, DGVR, DL, DLWR, DT, ECTB, ESPN, ETRY, EV, FC, FIR, GC, GET, GMR, GNRR, GRW, GS, GSWR, HMCR, HOG, HPTD, HR, HRS, HRT, IHB, IMRR, INRD, IORY, IR, ISRR, JEFW, JVRR, KBSR, KT, KXHR, LC, LER, LIRC, LNAL, LRWY, LS, LT, LVRB, LVRJ, LW, MAW, MDS, MIDH, MNBR, MOC, MRS, MSCI, MSE, MTNR, NBER, NCIR, NCRL, NHRR, NOGC, NOPB, NOW, NSHR, NSR, NYLE, NYSW, OHPA, OHRY, PAL, PAM, PAS, PBL, PICK, PKHP, POHC, PRL, PRV, RBMN, RJCC, RJCP, RRC, RSM, RSR, SAN, SB, SCIH, SH, SLRS, SQVR, SRNJ, ST, SVRR, SWP, TASD, TCKR, TISH, TPW, TRRA, TYBR, URR, USRP, VSRR, VVRR, WCOR, WE, WNYP, WSRY, WSS, WTNN, WTRY, WW, YRC and YSRR.

#### INTERROGATORY NO. 7

Interrogatory No. 7 refers to the NS rail yards located in the SARR States.

- a. For each of the yards, identify the type of yard, i.e., electronically controlled hump yard or flat switch yard. Also identify the number of shifts operated at each hump yard, and the average number of cars handled over each hump yard per day;

- b. For each of the yards, describe the yard layout, yard signaling, yard switching, and the yard connection to mainline track;
- c. For each of the yards which are hump yards, identify the average number of hazardous material cars handled at each yard on a daily basis that by-pass the hump;
- d. For each of the NS rail yards, identify the scheduled switch crew assignments on a daily basis (including the name or designation of each assignment) and the respective duties of each assignment, e.g., switching job, bowl job, hump job, industrial job, etc.;
- e. For each of the switch assignments identified in response to part d. above, please identify the typical number of switch crew members and the number and type of locomotives assigned to each switch service; and
- f. For each of the switch assignments identified in response to part d. above, please state the typical number of hours worked by switch crews in performing their assigned tasks.
- g. For each individual industrial switch job identified in response to part d, above, please identify the following information:
- i. The name or designation of each individual industrial switch job;
  - ii. The typical number of crew members assigned to each identified industrial switch job;
  - iii. Typical number and type of locomotives assigned to each identified industrial switch job;
  - iv. The industries served by each identified industrial switch job; and
  - v. The frequency of service of each identified industrial switch job.
- h. Please identify each of the Local Trains that originate or terminate in each of the yards and for each Local Train please identify the following information:
- i. NS' train identification or designation of each Local Train;
  - ii. Typical number of crew members assigned to each identified Local Train;

- iii. Typical number of loaded and empty cars assigned to each Local Train;
- iv. Typical trailing length of each identified Local Train;
- v. Typical trailing weight of each identified Local Train;
- vi. Typical number and type of locomotives assigned to each Local Train;
- vii. The route of service for each identified Local Train, and whether the Local Train is a turn crew or straight-away crew;
- viii. The industries served by each identified Local Train; and
- ix. The frequency of service of each Local Train.

i. Please describe the security procedures employed at each of the NS rail yards.

#### INTERROGATORY NO. 8

Please describe how hazardous materials are handled by NS in each of the yards identified in response to Interrogatory No. 7, and specifically describe the procedures used by NS to classify railcars containing hazardous materials and if such classification occurs in a separately designated portion of the yards.

#### INTERROGATORY NO. 9

Please provide the maximum permissible gross weight on rail ("GWR") per railcar for each NS line segment in the SARR States. For all segments having a GWR less than 286,000 lbs. per railcar, please indicate the items and factors that limit the GWR for the identified segments.

#### INTERROGATORY NO. 10

Please identify any computer programs or models that are currently being or have been used by NS in the past three years to simulate a locomotive's and/or a train's

performance while moving over a particular route. For all programs and models, identify all the necessary inputs required to run the program.

INTERROGATORY NO. 11

Please identify any computer programs or models that are currently being used or have been used by NS in the past three years to (a) download locomotive event or similar data from locomotives along any line segment in the SARR States, and/or (b) process locomotive event data for purposes of determining locomotive throttle position and/or fuel consumption.

INTERROGATORY NO. 12

Please identify each scheduled Road Train operating in the SARR states and for each of the identified Road Trains, please identify the following:

- a. NS' train identifier or designation of each identified Road Train and the beginning and end points served by each of the identified Road Trains;
- b. State whether the crews are assigned or in pool service. Identify home and away-from-home terminals for each crew district;
- c. The scheduled on-duty and off-duty locations for each crew assigned to the identified Road Trains;
- d. The number of crew members typically assigned per shift to each of the identified Road Trains;
- e. The number and type of locomotives typically assigned to each of the Road Trains;
- f. The number and type of loaded and empty cars typically assigned to each of the Road Trains;

- g. The trailing length for each of the identified Road Trains;
- h. The trailing weight for each of the identified Road Trains;
- i. The scheduled frequency of service for each identified Road Train; and
- j. The scheduled time of departure and arrival at stations served by each of the identified Road Trains.

INTERROGATORY NO. 13

Please identify the location and name of each intermodal terminal or yard located on NS' rail lines in the SARR States, and provide the following information for each identified terminal or yard:

- a. Please describe the services NS provides at each intermodal terminal or yard identified in response to this interrogatory;
- b. For each terminal or yard, describe the yard and track layout, yard and track signaling, yard switching, and the track connection(s) to mainline track;
- c. If NS does not provide services at any of the intermodal terminals or yards, please identify the entity that provides services at each intermodal terminal or yard;
- d. State whether the loading and unloading facilities are owned and/or operated by NS and its personnel or by an outside contractor at each facility. If owned or operated by a contractor, please identify lift and other charges contained in contracts for services provided by the contractor(s);
- e. Please describe all NS operations at each intermodal terminal or yard, including but not limited to:
  - i. A description of each job assignment at each identified intermodal terminal or yard;
  - ii. The number of shifts assigned per day for each job assignment;
  - iii. The number of train crews assigned at each intermodal terminal or yard including a description of the services provided by each train crew, and;

iv. The number of annual lifts performed at each intermodal terminal or yard.

f. Please describe the security procedures employed at each intermodal terminal or yard located on NS rail lines in the SARR States.

INTERROGATORY NO. 14

Please identify each scheduled Intermodal Train operating in the SARR states and for each of the identified Intermodal Trains, please identify the following:

- a. NS' train identifier or designation of each identified Intermodal Train and the beginning and end points served by each of the identified Intermodal Trains;
- b. The scheduled on-duty and off-duty locations for each crew assigned to the identified Intermodal Trains;
- c. The number of crew members typically assigned per shift to each of the identified Intermodal Trains;
- d. The number and type of locomotives typically assigned to each of the Intermodal Trains;
- e. The number and type of loaded and empty cars typically assigned to each of the Intermodal Trains;
- f. The trailing length for each of the identified Intermodal Trains;
- g. The trailing weight for each of the identified Intermodal Trains;
- h. The scheduled frequency of service for each identified Intermodal Train; and
- i. The scheduled time of departure from the initial terminal to scheduled time of arrival at final terminal destination on NS for each of the identified Intermodal Trains.

INTERROGATORY NO. 15

Please identify the location and name of each Automotive Distribution Facility located on NS' rail lines in the SARR States, and provide the following information for each identified Automotive Distribution Facility:

- a. Please describe the services NS provides at each Automotive Distribution Facility identified in response to this interrogatory;
- b. If NS does not provide services at any of the Automotive Distribution Facilities, please identify the entity that provides services at each Automotive Distribution Facility;
- c. Please describe NS operations at each Automotive Distribution Facility, including but not limited to:
  - i. A description of each job assignment at each Automotive Distribution Facility;
  - ii. The number of shifts assigned per day for each job assignment, and;
  - iii. The number of train crews assigned at each Automotive Distribution Facility including a description of the services provided by each train crew.
- d. Please describe the security procedures employed by NS at each of the Automotive Distribution Facilities.

INTERROGATORY NO. 16

Please identify each scheduled Automotive Train operating in the SARR states and for each of the identified Automotive Trains, please identify the following:

- a. NS' train identifier or designation of each identified Automotive Train and the beginning and end points served by each of the identified Automotive Trains;
- b. The scheduled on-duty and off-duty locations for each crew assigned to the identified Automotive Trains;

- c. The number of crew members typically assigned per shift to each of the identified Automotive Trains;
- d. The number and type of locomotives typically assigned to each of the Automotive Trains;
- e. The number and type of loaded and empty cars typically assigned to each of the Automotive Trains;
- f. The trailing length for each of the identified Automotive Trains;
- g. The trailing weight for each of the identified Automotive Trains;
- h. The scheduled frequency of service for each identified Automotive Train; and
- i. The scheduled time of departure and arrival at stations served by each of the identified Automotive Trains.

INTERROGATORY NO. 17

Please identify the locations and names of each Bulk Transfer Facility located on NS' rail lines in the SARR States, and provide the following information for each identified Bulk Transfer Facility:

- a. Please describe the services NS provides at each Bulk Transfer Facility;
- b. If NS does not provide services at any Bulk Transfer Facility, please identify the entity that provides services at each Bulk Transfer Facility;
- c. Please describe NS operations at each of the Bulk Transfer Facility, including but not limited to:
  - i. A description of each job assignment at each Bulk Transfer Facility;
  - ii. The number of shifts assigned per day for each job assignment, and;
  - iii. The number of train crews assigned at each Bulk Transfer Facility including a description of the services provided by each train crew.

d. For each Bulk Transfer Facility, please state if it is located in a NS yard, and if so, please state if the Bulk Transfer Facility is located in a distinct section of the yard and if it is serviced by NS yard locomotives;

e. Please identify each Road Train by train identifier or train designation which serves each Bulk Transfer Facility and the frequency of the service provided by each Road Train; and

f. Please identify the security procedures employed by NS at each Bulk Transfer Facility.

INTERROGATORY NO. 18

Please identify any company other than NS that provides for the development, implementation and/or maintenance of computer systems, software and associated documentations for the day-to-day operations of NS.

INTERROGATORY NO. 19

For each company identified in response to Interrogatory No. 18 that is a subsidiary or affiliate of NS Corp, or a joint venture involving NS Corp, please describe the services provided by the company and state if that company outsources any portion of its program development, computer program maintenance and/or other computer related activities. If so, please identify each company providing the outsourced services and describe the services outsourced.

INTERROGATORY NO. 20

Please describe the NS personnel, processes, utilization, computer programs, computer models and electronic data that is utilized by NS when developing or implementing GE Transportation's "RailEdge Movement Planner" for improving NS' operating performance.

INTERROGATORY NO. 21

Please describe the NS personnel, processes, utilization, computer programs, computer models and electronic data (both input data and output data) associated with each of the following models or tools used by NS to facilitate commercial and operational planning:

1. Rail Traffic Controller ("RTC");
2. Algorithmic Blocking and Classification System ("ABC")
3. Crew Transportation Services System ("TSS")
4. Locomotive Assignment and Routing System ("LARS")
5. Operating Plan Developer ("OPD")
6. Optimized Train Control ("OTC")
7. Locomotive Engineer Assist Display and Event Recorder ("LEADER")
8. Thoroughbred Yard Enterprise System ("TYES")
9. Thoroughbred Locomotive Management System ("TLMS")

10. Thoroughbred Operating Plan (“TOP”)
11. Operating Plan Adherence (“OPA”)
12. Local Operating Plan Adherence (“LOPA”)
13. Unified Train Control System (“UTCS”)
14. Wireless Locomotive Information System (“WiLIS”)
15. Wireless Event Recorder Information System (“WERIS”)
16. Crew Management System (“CMS”)
17. Digital Mapping Index (“DMI”)

NS’ detailed explanation should include a description of how each of these models/tools are utilized internally by NS alone or in conjunction with other models/tools.

INTERROGATORY NO. 22

Please describe in detail the computer program or processes used by NS to create and/or update the following:

- a. Track Charts
- b. Valuation Maps
- c. Other Engineering and track design elements, including but not limited to
  - i. Track geometry measurement data;
  - ii. Geospatial or geographical data (“GIS”);
  - iii. System track data by mile post, latitude and longitude including elevation, curves, turnouts, switches, signals, grade crossings, bridges, tunnels and other track data; and
  - iv. Track measurements.

INTERROGATORY NO. 23

Please describe the services, if any, that TDIS and/or TCS provides at each intermodal terminal or yard identified in NS' response to Interrogatory No. 13.

INTERROGATORY NO. 24

Please state whether or not NS has information and/or data in a computer-readable format or in its native format for the following items (each subpart cross-references a Request for Production and/or Interrogatory included herein):

- a. Operating Timetables (or the data identified in the timetables) [RFP #13]
- b. Station Lists [RFP #13]
- c. Station Books [RFP #13]
- d. Track Charts (or the data contained on the track charts) [RFP #13]
- e. Schematics of trackage at Origins [RFP #13]
- f. Schematics of trackage at Destinations [RFP #13]
- g. Mileage between railroad stations [RFP #13 and #27]
- h. Number of feet between mileposts [RFP #13]
- i. Operating Statistics and Density Data (including but not limited to train miles, train hours, locomotive unit miles, loaded car-miles, empty car-miles, net ton-miles, gross ton-miles (both including and excluding locomotives), number of trains, etc.) [RFP #18]
- j. Density [RFP #19]
- k. Rail line elevation [RFP #39]
- l. Curves [RFP #39]
- m. Communications signals [RFP #40]
- n. Yards [RFP #41]
- o. Track Input files for the RTC Model [RFP #43]
- p. Train Input files for the RTC Model [RFP #43]
- q. Form A and Form B files for the RTC Model [RFP #43]
- r. Output files for the RTC Model [RFP #43]
- s. Cycle times and movement data [RFP #44]
- t. Cycle times (including actual, projected, standard, expected and/or contractual) [RFP #45]

- u. Locomotives [RFP #52]
- v. Locomotive fuel consumption [RFP #56]
- w. Locomotive utilization and performance (including unit-miles, hours running, hours switching, hours out-of-service for repairs and hours stored useable) [RFP #59]
- x. Crew districts (including “from” and “to” stations, route miles and number of locomotives per train by train type) [RFP #65]
- y. Train dispatch priority and methodology for scheduling trains [RFP #72]
- z. End-of-train telemetry devices [RFP #76]
- aa. NS freight cars [RFP #77]
- bb. NS trailers and/or containers [RFP #78]
- cc. TDIS or TCS trailers and/or containers [RFP #79]
- dd. Auto rack cars [RFP #81]
- ee. Rail car repair and maintenance [RFP #82]
- ff. Rail car miles [RFP #82]
- gg. Shipper-owned and shipper-leased rail cars [RFP #83]
- hh. Intermodal and automotive railcars provided by a third party [RFP #83]
- ii. Locomotive repair and maintenance [RFP #85]
- jj. Locomotive unit-miles [RFP #85]
- kk. Number of shifts worked per year, years of employment and annual compensation for individual locomotive engineers, conductors, dispatchers and equipment inspectors [RFP #91]
- ll. Culverts [RFP #123]
- mm. Tunnels [RFP #127]
- nn. Bridges [RFP #129]
- oo. Highway Crossings [RFP #134]
- pp. Fences [RFP #142]
- qq. Geographic/Geospatial Information System (“GIS”) [RFP #147 and Interrogatory #22]
- rr. Track chart and engineering information [Interrogatory #22]

INTERROGATORY NO. 25

For each DuPont Shipment in Exhibits A and B of DuPont’s Verified Complaint, identify any other railroads that NS contends are necessary parties to this litigation; describe the relationship between NS and each railroad that NS has identified as a

necessary party; identify all agreements between NS and each railroad for handling and/or pricing the DuPont Shipments; and identify all agreements between NS and each railroad that restrict or limit the ability of each railroad to negotiate separately with DuPont for tariff and/or contract rates.

## **V. DOCUMENT PRODUCTION REQUESTS**

### **REQUEST FOR PRODUCTION NO. 1**

Please produce all documents related to the preparation of the single line and AAR Accounting Rule 11 rates for DuPont shipments identified on Exhibits A and B (Parts 1-3) to DuPont's Verified Complaint, and all predecessor publications thereto, including but not limited to all documents used and/or relied upon in determining the formula for calculating the rates.

### **REQUEST FOR PRODUCTION NO. 2**

Please produce all studies and analyses conducted by or for NS from January 1, 2003 to date related to (a) the profitability of NS' traffic by traffic group; and (b) the profitability of transportation service provided by NS for the account of DuPont.

### **REQUEST FOR PRODUCTION NO. 3**

For each DuPont Shipment, either individually or aggregated in any form with other NS movements, produce all documents, including but not limited to any studies or other analyses, that refer or relate to actual or potential competition to NS from other rail

carriers or transportation modes, or to transportation alternatives that are or might be available to DuPont for such movements.

REQUEST FOR PRODUCTION NO. 4

For each of the commodities identified in Exhibits A and B (Parts 1-3) to DuPont's Verified Complaint, either individually or aggregated in any form with other commodities, produce all documents, including but not limited to any studies or other analyses, that refer or relate to actual or potential competition to NS from other rail carriers or transportation modes for the transportation of such commodities, or to transportation alternatives that are or might be available for the movement of such commodities by rail.

REQUEST FOR PRODUCTION NO. 5

Produce all documents, including but not limited to any studies or other analyses, that refer or relate to actual or potential competition to NS from other rail carriers or transportation modes for transportation for the account of DuPont, or to transportation alternatives that are or might be available to DuPont for any of the DuPont Shipments, either individually or aggregated in any form with other NS movements or other commodities.

REQUEST FOR PRODUCTION NO. 6

For each DuPont Shipment, either individually or aggregated in any form with other NS movements, produce all documents, including but not limited to any studies or

other analyses, that refer or relate to: (a) the price that would or might be charged by other carriers or modes of transportation for transportation from Origin to Destination; and (b) the cost(s) that would or might be incurred by other carriers or modes of transportation for the transportation from Origin to Destination.

REQUEST FOR PRODUCTION NO. 7

For each of the commodities identified in Exhibits A and B (Parts 1-3) to DuPont's Verified Complaint, either individually or aggregated in any form with other commodities, produce all documents, including but not limited to any studies or other analyses, that refer or relate to: (a) the price that would or might be charged by other carriers or modes of transportation for the transportation of such commodities; and, (b) the cost(s) that would or might be incurred by other carriers or modes of transportation for the transportation of such commodities.

REQUEST FOR PRODUCTION NO. 8

For each of the commodities identified in Exhibits A and B (Parts 1-3) to DuPont's Verified Complaint, either individually or aggregated in any form with other commodities, produce all documents, including but not limited to any studies or other analyses, that refer or relate to the physical characteristics of such commodities and the effect of those physical characteristics on the ability to transport such commodities via modes other than rail.

REQUEST FOR PRODUCTION NO. 9

Produce all documents created, reviewed or referred to by NS, from January 1, 2006 through the present, to assess the market for transportation of each DuPont Shipment and to set rates on each DuPont Shipment, including but not limited to any competitive alternatives to NS rail transportation.

REQUEST FOR PRODUCTION NO. 10

Produce all documents created, reviewed or referred to by NS, from January 1, 2006 through the present, to assess the market for transportation of each commodity in Exhibits A and B (Parts 1-3) to DuPont's Verified Complaint and to set rates on the movement of such commodities, including but not limited to any competitive alternatives to NS rail transportation.

REQUEST FOR PRODUCTION NO. 11

Produce all documents created, reviewed or referred to by NS, from January 1, 2006 through the present, to assess the market for transportation in any of the SARR States for each movement and commodity in Exhibits A and B (Parts 1-3) to DuPont's Verified Complaint and to set rates on the movement of such commodities, including but not limited to any competitive alternatives to NS rail transportation.

REQUEST FOR PRODUCTION NO. 12

Please produce for each NS territory or division located in the SARR States, organization charts which show each NS management and/or supervisory position, the

number of personnel in each position and the relationship or reporting authority and relative rank of each position. Please include organizational charts which include, but are not limited to, positions related to train operations, yard operations, maintenance of way, maintenance of equipment, engineering, and general and administrative functions. Also, include the relationship and reporting authority from each NS territory or division to NS senior management.

#### REQUEST FOR PRODUCTION NO. 13

Please produce current operating timetables (including special instructions and/or operating rule books), station lists, station books, track charts and "condensed profiles" (including schematics which identify the division, subdivision, and ownership status (*i.e.*, whether railroad-owned or privately-owned) of the tracks at the Origins and Destinations), and any other document containing mileage figures and/or the feet between mileposts, which are applicable to NS lines in the SARR States. Please provide the requested data in their native formats to the extent available (including all necessary documentation). If current versions of any of the requested documents are not available, please produce the most recent versions that are available.

#### REQUEST FOR PRODUCTION NO. 14

For each Intermodal terminal or yard, Automotive Distribution Facility and Bulk Transfer Facility located in the SARR states, please provide documents showing the track

layout, the length of each track, the ownership of each track and descriptions of the existing facilities.

REQUEST FOR PRODUCTION NO. 15

For all locations in the SARR States where NS interchanges railcars and/or trains with another railroad, please provide documents that: (a) describe the interchange procedures at each location; (b) identify the tracks (and length of each track) used for interchange purposes; and (c) identify the ownership of each track used for interchange purposes.

REQUEST FOR PRODUCTION NO. 16

Please provide documents setting forth NS' policy on the construction of industrial tracks to serve customers, including, but not limited to, construction specifications and how costs for all track construction from the connection to NS track to the industry (including all turnouts ) are allocated between NS and the customer.

REQUEST FOR PRODUCTION NO. 17

Please produce copies of all documents, including agreements and/or understandings and all amendments and supplements thereto between NS and each railroad identified in Interrogatory No. 6, part "f", that refer or relate to the pricing and handling of all commodities, including but not limited to:

- a. Agreements or understandings pertaining to NS' payments to any of the identified railroads of a revenue factor, division, flat rate or other type of compensation for the railroad's portion of a movement;

- b. Locomotive run-through power or power sharing agreements or arrangements;
- c. Train crew run-through or train crew sharing agreements or arrangements;
- d. Any other agreements or arrangements pertaining to rates, surcharges, revenue sharing or operations;
- e. Any operating timetables (including special instructions and/or operating rule books), station lists, station books, track charts and "condensed profiles" for any of the above listed railroads; and
- f. Copies of all bills or invoices from 2008 to the present (including all supporting documents and data) rendered between NS and any of the identified railroads pursuant to each of the agreements and/or understandings produced in response to this Request for Production No. 17.

REQUEST FOR PRODUCTION NO. 18

For each NS line segment in the SARR States, please produce documents, in a computer-readable format to the extent available, which contain operating statistics and density data (including but not limited to train miles, train hours, locomotive unit miles, loaded car-miles, empty car-miles, net ton-miles, gross ton-miles (both including and excluding locomotives), number of trains, etc.) for all traffic by commodity for each year or partial year 2008 to the present.

REQUEST FOR PRODUCTION NO. 19

Please provide the following density information for NS' entire system for each year or partial year 2008 to the present in its native format (computer readable), including all record layouts, field descriptions, data definitions and data dictionaries/decoders

required to use the data. The density database or spreadsheet should include, at a minimum, the following data:

- a. Identification of the unique railroad divisions, subdivisions, and individual line segments for each unique density segment;
- b. Station name and SPLC at the beginning of a unique density segment and at the end of a unique density segment;
- c. Beginning and ending milepost for each unique density segment;
- d. Rail and track mileage for each unique density segment;
- e. ( i ) Total density (both directions including empty and loaded trains) by segment expressed in net ton-miles; or in the alternate, (ii) total density (both directions including empty and loaded trains) by segment expressed in gross ton-miles plus appropriate factors that can be used to convert gross ton-miles to net ton-miles on each unique density segment; and
- f. Density information (i) for segments that NS utilizes via trackage rights (a joint facility or other joint use agreement) on another railroad and (ii) for segments where other railroads operate by trackage rights (a joint facility or other joint use agreement) over NS segments and (iii) an identification of such densities in (i) and (ii) that are included in the total densities provided in response to subpart e. above.

REQUEST FOR PRODUCTION NO. 20

Please produce the data bases, data warehouses and computer programs (with all documentation related to these data bases and computer programs), in a computer-readable format, that include the information listed below for each movement handled by NS as originating, terminating, overhead or single-line carrier that traveled in any of the SARR States for each year or partial year 2008 to the present:

- a. Commodity (seven-digit Standard Transportation Commodity Code "STCC");
- b. Origin station and state;
- c. Destination station and state;
- d. The name of the customer, consignee, payee and shipper for each shipment record;
- e. For shipments that originated on NS' system, the date and time the shipment was originated;
- f. For shipments NS received in interchange, the on-junction station, state and SPLC;
- g. For shipments NS received in interchange, the road received from;
- h. For shipments NS received in interchange, the date and time the shipment was interchanged;
- i. For shipments given in interchange, off-junction station, state and SPLC;
- j. For shipments given in interchange, the road to which they were given;
- k. For shipments given in interchange, the date and time the shipment was interchanged;
- l. For shipments terminated on NS' system, the date and time the shipment was terminated;
- m. Origin Freight Station Accounting Code ("FSAC");
- n. Destination FSAC;
- o. Origin SPLC;
- p. Destination SPLC;

- q. Number of railcars;
- r. Number of intermodal containers/trailers
- s. Tons (Net);
- t. Railcar tare weight;
- u. Intermodal container/trailer tare weight;
- v. Total freight revenues from origin to destination, including any adjustments thereto, along with a description of the adjustment (i.e., add to or subtract from gross revenue);
- w. NS' share or division of the total freight revenues, including any adjustments thereto;
- x. Total revenues from surcharges (including but not limited to fuel surcharges), and whether such revenue from surcharges is included in the total freight revenues and NS' division thereof provided in response to Subparts (v) and (w) above;
- y. The contract, agreement, tariff, pricing authority, etc. that the shipment is billed under, including the amendment and item numbers;
- z. Waybill number and date;
- aa. TOFC/COFC plan;
- bb. Car/trailer/container initial for each car/trailer/container used to move the shipment (for intermodal movements provide both the railcar and container/trailer initials);
- cc. Car/trailer/container number for each car/trailer/container used to move the shipment (for intermodal movements provide both the railcar and container/trailer number);
- dd. The train identification number of all trains used to move the shipment;

- ee. The number of locomotives, by train identification, by segment, used to move the shipment;
- ff. The total horsepower, by train identification, by line segment, used to move the shipment;
- gg. The total gross trailing tons, by train identification, by line segment, for all trains used to move the shipment;
- hh. The station, state and SPLC where the traffic was interchanged between trains;
- ii. Total loaded movement miles;
- jj. The predominant route of movement for each shipment on NS' system that is associated with the loaded movement miles;
- kk. Total empty movement miles;
- ll. Miles used to derive applicable fuel surcharges;
- mm. Applicable fuel surcharge rate;
- nn. Total loaded miles on NS' system;
- oo. Total empty miles on NS' system;
- pp. AAR car-type code;
- qq. Provider of car and trailer/container (NS-owned, NS-leased, shipper, or foreign road);
- rr. Provide the intermodal service plan code and the intermodal line of business code for each intermodal shipment;
- ss. Provide the length, width and height for each car/container/trailer used to move the shipment; and
- tt. Provide the number of articulated wells included (where applicable) in an individual railcar used to move an intermodal (or other) shipment.

REQUEST FOR PRODUCTION NO. 21

Please produce documents, in a computer readable format to the extent available, which contain complete information (including all events) tracking and describing car, locomotive and train movements for each car, locomotive, and train moving on NS lines to, from, or through the SARR States for each year or partial year 2008 to the present. Provide location information by station, state and SPLC.

REQUEST FOR PRODUCTION NO. 22

Please provide copies of the NS train dispatcher sheets (and the data recorded in such sheets in a computer readable format, to the extent available), or other documents (*e.g.*, conductor wheel reports) that record train movement data in a computer readable format to the extent available, for all car and train movements and yard and hub operations on NS to, from or through the SARR States for each year or partial year 2008 to the present.

REQUEST FOR PRODUCTION NO. 23

Please provide all documents, including programs, decoders, and instructions, necessary to utilize, evaluate and link the data produced in response to Request for Production Nos. 20, 21, and 22. Please include with this production a description of the relationship between the databases (*e.g.*, whether there is a 1:1 ratio between databases, or whether one can expect to link 100% of the records in one file to another file). Please

also indicate which data fields are common (and may be used to link) to the provided databases.

REQUEST FOR PRODUCTION NO. 24

Please produce all studies, analyses, reports, or other documents that evaluate or report on any NS internal company program for improving operating performance of the railroad and driving greater network efficiencies.

REQUEST FOR PRODUCTION NO. 25

Please produce all studies, analyses, reports, or other documents that evaluate or report on any NS internal company program for better aligning NS' operating capabilities with its customer demand.

REQUEST FOR PRODUCTION NO. 26

Please provide NS' geographic information system ("GIS") that captures, stores, analyzes, manages and presents NS data that are linked by locations across the NS rail system.

REQUEST FOR PRODUCTION NO. 27

Please provide the NS mileage chart and/or table-based mileage matrix and/or routing table that identifies the NS rail mileage between any two points on the NS rail system based upon a predominant or expected route of movement.

REQUEST FOR PRODUCTION NO. 28

Please provide working copies of the following analytical models or tools (including all necessary input data files) defined in Interrogatory No. 21 and utilized by NS to develop commercial and operational plans for NS:

1. RTC;
2. ABC;
3. TSS;
4. LARS;
5. OPD;
6. OTC;
7. LEADER;
8. TYES;
9. TLMS;
10. TOP;
11. OPA;
12. LPOA;
13. UTCS;
14. WILIS;
15. WERIS;
16. CMS; and
17. DMI.

REQUEST FOR PRODUCTION NO. 29

Please produce all transportation contracts, including all amendments and supplements thereto (or letters of understanding with appendices or attachments), and all tariffs, common carrier pricing authorities or other documents containing common carrier rate and service terms (collectively "pricing authorities") entered into, agreed to, established, or provided by NS which govern shipments handled by NS as originating, terminating, overhead, or single-line carrier to, from, or through any of the SARR States

in any of the years 2008 and beyond. For each pricing authority, please provide the traffic volumes and revenues associated with the movement of traffic under each pricing authority by traffic group (e.g., coal, ag, intermodal, etc.) and year for 2008 through the present.

REQUEST FOR PRODUCTION NO. 30

Please produce all forecasts and all documents related to forecasts or projections prepared by or for NS from 2008 through the present, or in NS' possession, of future traffic volumes and/or revenues for freight traffic by traffic group (including any breakdowns of any such forecasts or projections whether by commodity classification, geographic region, line segment, or any other category) moving over any portion of the NS system located in any of the SARR States. Documents responsive to this request include, but are not limited to, traffic projections prepared in connection with engineering studies, authorization for expenditures, marketing studies, operating expense budgets, capital budgets or mergers with or acquisitions of other carriers.

REQUEST FOR PRODUCTION NO. 31

Please produce all inflation and/or rail cost adjustment estimates or calculations in NS' possession or that NS prepared or caused to be prepared or purchased for each year or partial year 2008 to the present, including, but not limited to, any estimates relating to:

- a. The cost of acquiring equity;
- b. The cost of acquiring debt;

- c. General expenses, including, but not limited to, asset, equipment, materials and supplies, fuel and labor expense;
- d. Railroad productivity, including but not limited to commodity-specific productivity, asset productivity and expense productivity;
- e. Gross Domestic Product/Implicit Price Deflator;
- f. Producer Price Index - All Commodities;
- g. The U.S. Department of Energy's U.S. average price of West Texas Intermediate Crude Oil; and
- h. Land values along or adjacent to NS' right of way in the SARR states.

REQUEST FOR PRODUCTION NO. 32

Please produce all documents that relate to the development of the methodology for the calculation and imposition of the "fuel surcharges" described in NS' Freight Tariff NS 8003 and Freight Tariff NS 8004 and all predecessor documents, including but not limited to:

- a. Documents related to the determination to calculate the surcharge based upon a percentage of the amount of revenue of a line-haul movement;
- b. Documents related to the selection of the West Texas Intermediate Crude Oil average price as the benchmark for the calculation of the surcharge; and
- c. All analyses, studies or other documents which address the relationship, if any, between the revenues from the surcharge to any specific movement(s) or group of movement(s) and changes in the actual cost to NS of the fuel consumed by the locomotives used in that (those) movement(s).

REQUEST FOR PRODUCTION NO. 33

To the extent not produced in response to Request for Production No. 32, please produce all documents that relate to the consideration of other fuel surcharge methodologies that would be alternative to the methodologies described in NS' Freight Tariff NS 8003 and Freight Tariff NS 8004, and/or to the consideration of prospective changes or amendments to the methodologies described in said publications.

REQUEST FOR PRODUCTION NO. 34

Please produce the databases, data warehouses, and computer programs (with all documentation related to these databases and computer programs), in a computer readable format, sufficient to show all the data requested in DuPont's Request for Production No. 20 for each trailer, container, Auto Rack Car or freight car (used for a TDIS or TCS shipment) handled by NS, including but not limited to revenue received from TCS and/or TDIS customers.

REQUEST FOR PRODUCTION NO. 35

Please provide documents and data sufficient to link data records for trailer, container, Auto Rack Car and/or freight cars (used for a TDIS or TCS shipment) that NS will produce in response to Request for Production No. 34 to the corresponding data records appearing in the NS waybill/car movement/train movement records or files that NS will produce in response to DuPont's Request for Production Nos. 20, 21, and 22. If there are no records for NS flat cars, Auto Rack Cars or freight cars (used for a TDIS or

TCS shipment) in the NS files that NS will produce in response to DuPont's Request for Production Nos. 20, 21, and 22, please identify or produce documents sufficient to show the authority used by NS and/or TCS or TDIS to move flat cars with TCS and/or TDIS trailers or containers, Auto Rack Cars, and/or freight cars that move over NS lines (in both directions) in the SARR States.

REQUEST FOR PRODUCTION NO. 36

Please produce the databases, data warehouses, and computer programs (with all documentation related to these data bases, data warehouses, and computer programs), in a (computer readable) format, sufficient to show all of the data requested in DuPont's Request for Production No. 20, including but not limited to revenue that TDIS received from its customers ("freight revenue"), in connection with traffic described in DuPont's Request for Production No. 20, for each year or partial year 2008 to the present.

REQUEST FOR PRODUCTION NO. 37

Please produce documents which contain the following information for all coal mines that NS served or from which NS transported coal as an originating, intermediate, or terminating carrier that moved in one or more of the SARR States for each year or partial year 2008 to the present:

- a. Geographic location, *i.e.*, city, county and state;
- b. Railroad location, *i.e.*, railroad station name, SPLC, and milepost;

- c. Railroad mine identification number corresponding to the identification numbers contained in NS' computerized traffic data, *e.g.*, SPLC, FSAC or any other numbering system NS uses;
- d. Annual tonnages that NS transported from that mine;
- e. Track capacity in feet at each location separated between track owned by NS and track not owned by NS;
- f. The track configuration at each mine, with both the track that NS or another rail carrier owns (or jointly owns) and the mine-owned track clearly identified;
- g. Annual weeks of mine operation;
- h. Average tons per car loaded;
- i. Loading capacity (tons per hour); and
- j. If the mine has closed or ceased shipping coal, the date of such closure or of the last shipment.

REQUEST FOR PRODUCTION NO. 38

Please produce any studies, simulations, analyses and other documents in NS' possession from January 1, 2003 to present analyzing or related to the transportation of shipments to Destinations from Origins (a) by a rail carrier other than NS, and (b) by any mode of transportation other than rail. If no such documents exist, please confirm the same in the response to this Request.

REQUEST FOR PRODUCTION NO. 39

Please produce the following documents (in a computer-readable format to the extent available)

- a. Documents that show the rail line elevation and provide all information maintained by NS pertaining to those elevations including, but not limited to, division, subdivision, beginning milepost, ending milepost and elevation in feet above sea level for all NS line segments in the SARR states.
- b. Documents that identify all curves on the NS line segments in the SARR states and provide all information maintained by NS pertaining to those curves including, but not limited to, division, subdivision, beginning milepost, ending milepost and degree of curvature.

REQUEST FOR PRODUCTION NO. 40

Please produce documents (in computer readable format to the extent available) that identify and list the location and type of communications and signals used for train operations by milepost, division, and subdivision on all NS line segments in the SARR states.

REQUEST FOR PRODUCTION NO. 41

Please produce documents (in computer readable format to the extent available) that depict individual tracks, connections to the main line, turnouts, communications, signals and elevations for all yards on the NS system which are located in the SARR states.

REQUEST FOR PRODUCTION NO. 42

Please produce all documents related to unplanned track-related and operating-related incidents or outages that affected train operations from 2008 to the present in the SARR States. If the information requested would require a special study, please produce

random failure, outage or incident reports or similar documents, as kept in the ordinary course of business by NS, from which the requested data could be extracted.

REQUEST FOR PRODUCTION NO. 43

Please produce any studies or analyses currently being conducted, or that have been conducted since January 1, 2000, which model and evaluate rail operations over the entire NS rail system or any portion of the NS system that are based on the Rail Traffic Controller (“RTC”) model. In addition to the results of such studies or analyses, please provide the following RTC model information:

- a. Identify the version of the RTC computer model used in each study or analysis;
- b. Provide all electronic input files required to run the RTC model including, but not limited to, track input files, train input files, Form A and Form B files;
- c. Provide all electronic files generated as output from the RTC model for each study or analysis; and
- d. Provide track input files, train input files, Form A and Form B files, and required system files that develop the track layout of the entire or a majority of CSXT’s rail system. Specific RTC files to produce include:
  1. DIVISION
  2. ENVIRONMENT
  3. EQUATION
  4. EZONE
  5. LABEL
  6. LINE
  7. LINK
  8. NODE
  9. PERMIT
  10. SIGNAL

11. TOC
12. WORKSTATION
13. TRAIN
14. FORM\_A
15. FORM\_B
16. INPUT
17. OPTION

To the extent that you withhold any responsive files, documents, or information, please identify the withheld files, documents, and/or information, and describe the privilege or other reason for withholding.

REQUEST FOR PRODUCTION NO. 44

Please produce documents related to the measurement and/or analysis of cycle and/or transit times for all NS movements originating, terminating or passing through any of the SARR States for each year or partial year from 2008 to the present. Included in this Request are documents containing the following information for each movement, in a computerized format to the extent available.

- a. Waybill number and date;
- b. Car/trailer initial and number;
- c. Origin location, *i.e.*, station, state, milepost, FSAC and SPLC;
- d. Destination location, *i.e.*, station, state, milepost, FSAC and SPLC;
- e. Cycle and/or transit time from origin to destination;
- f. Location (*i.e.*, station, state, milepost, FSAC and SPLC) where each shipment enters into or originates in the SARR States;

- g. Location (*i.e.*, station, state, milepost, FSAC and SPLC) where each shipment departs from or terminates in the SARR States; and
- h. Cycle and/or transit time while movement is within the SARR States.

REQUEST FOR PRODUCTION NO. 45

Please provide documents, in a computer-readable format to the extent available, sufficient to show the projected and actual cycle times, and the standard or expected or contractual cycle time for each movement originating, terminating or passing through any of the SARR States for each year or partial year 2008 to the present.

REQUEST FOR PRODUCTION NO. 46

Please produce the computer model, supporting databases and supporting manuals that are used by NS to calculate the expected cycle time for a movement, including all necessary inputs required to run the model for each movement originating, terminating, or passing through any of the SARR States for each year or partial year 2008 to the present.

REQUEST FOR PRODUCTION NO. 47

Please produce documents that contain the following information for each year or partial year 2008 to present:

- a. The location(s) where car inspectors inspect trains in the SARR States;
- b. A description of the procedures followed by the car inspectors in preparing for and inspecting the trains;
- c. The total number of car inspections per tour of duty (by day of the week) and the total number of trains inspected per tour of duty (by day of the week), separated between trainload and unit trains and other than trainload or unit trains, for each location identified in response to (a) above;

- d. The number of car inspectors inspecting each train at each location identified in response to (a) above and the time spent by each inspector during each inspection;
- e. The daily or hourly rates of pay, including all additives, for the inspectors identified in response to (d) above;
- f. The number of trains that each car inspector at each location identified in response to (a) above inspects during his tour of duty;
- g. The other duties performed by the car inspectors identified in response to (d) above while on duty and not inspecting trains;
- h. The percentage of time the car inspectors identified in response to (d) above spend inspecting trains versus other assignments during their tour of duty;
- i. The materials and supplies used by the car inspectors at each of the locations identified in response to (a) above;
- j. The purchase price of each item identified in response to (i) above; and
- k. The total number of trains and cars inspected at each location identified in response to (a) above.

REQUEST FOR PRODUCTION NO. 48

For each car inspection location identified in response to Request for Production No. 47, subpart a., please produce documents that demonstrate for each year or partial year 2008 to the present:

- a. The number of cars inspected;
- b. The number of cars which are considered "bad ordered" and sent to a repair track in the vicinity of the inspection location;
- c. The number of cars which are considered "bad ordered" and required to be moved to a car repair facility; and

d. The time required to perform each inspection.

REQUEST FOR PRODUCTION NO. 49

Please produce copies of all contracts/agreements with third parties (including but not limited to shippers or receivers) related to the performance of car inspection functions with respect to all trains traversing any portion of the SARR States during each year or partial year 2008 to the present.

REQUEST FOR PRODUCTION NO. 50

Please produce any computer programs or models NS uses or has used in the past five years to determine the number and types of railcars required to move its normally expected traffic volumes and the incremental or above-normal volumes moving in peak periods.

REQUEST FOR PRODUCTION NO. 51

Please produce documents for each year or partial year 2008 to the present which list by initial and unit number: (a) locomotives used in the SARR States; and (b) if such locomotives listed in response to (a) above were drawn from a pool, all the locomotives in the pool from which the locomotives were drawn.

REQUEST FOR PRODUCTION NO. 52

Please produce documents, in a computer-readable format to the extent available, which provide the following information for each of the locomotives contained in each of the listings produced in response to Request for Production No. 51:

- a. The locomotive initial and number;
- b. The manufacturer, if purchased;
- c. The lessor, if leased or rented;
- d. Model or type (e.g., SD-40-2);
- e. Horsepower;
- f. Capacity of its fuel tanks (gallons);
- g. Weight;
- h. Date of purchase or lease;
- i. Date first placed into service;
- j. The original cost plus the cost of any additions and betterments;
- k. Financing vehicle (e.g., equipment trust);
- l. Debt rate as a percent;
- m. Financing terms (in years);
- n. Annual depreciation;
- o. Annual depreciation as a percent;
- p. Current salvage value as a percent;
- q. Accrued depreciation;
- r. If leased, the type of lease (i.e., capital, operating, "power by the hour", etc.);
- s. If a capital lease, the capitalized value of the lease by locomotive or group of locomotives (if a group of locomotives, the number of locomotives (by initial and number) and aggregate dollars);

- t. If an operating lease, the quarterly, semi-annual, etc., lease payment by locomotive or group of locomotives covering the term of the lease (if a group of locomotives, the number of locomotives (by initial and number) and aggregate dollars);
- u. If leased or rented under a short-term or "power by the hour" agreement, the minimum annual fixed payment and the use payment (e.g., per kilowatt/hour, per diesel unit mile, etc.) per locomotive, the average annual payment per locomotive, and the annual locomotive unit-miles for each such locomotive, stated separately for coal service and other service; and
- v. The diesel unit-miles traveled each year or partial year from 2008 to the present in all types of service.

REQUEST FOR PRODUCTION NO. 53

Please produce all lease or rental agreements, including all amendments and supplements and copies of all billings, applicable to each leased or rented locomotive identified in response to Request for Production Nos. 51 and 52.

REQUEST FOR PRODUCTION NO. 54

Please produce documents which provide the following information for all NS helper services operated in the SARR States, separately for each helper service location, for each year or partial year 2008 to the present:

- a. "From" and "To" stations, SPLC's and mileposts where trains are actually helped;
- b. Number and type of locomotives (model and horsepower) involved per help;
- c. Round-trip mileage each locomotive travels per help;
- d. Number of total trains helped per crew assignment;

- e. Minimum train size/weight requiring helper service; and
- f. Crew size per crew assignment.

REQUEST FOR PRODUCTION NO. 55

Please produce documents sufficient to show the following information:

- a. The location(s) where locomotives are fueled in the SARR States;
- b. The actual amount of fuel used by the locomotives identified in response to Request for Production No. 51, either by individual locomotive, or collectively, for the most recent 12 months or calendar year;
- c. The total number of diesel unit miles generated by the locomotives for which fuel consumption data was provided in response to (b) above during the same time period used in response to (b) above.
- d. The method by which NS accounts for or records fuel usage for locomotives;
- e. Computer-readable versions (both compiled and non-compiled), including all supporting databases and necessary documentation, of any and all computer programs in NS' possession used to estimate the fuel usage of locomotives; and
- f. The same information for all road locomotives on the NS system in the same format as that given in the responses to (b), (c), and (e) above.

REQUEST FOR PRODUCTION NO. 56

Please produce all studies, analyses and related documents (including summaries, computer programs and all supporting databases and data), in a computer-readable format to the extent available, pertaining to the fuel consumption or the measurement of the fuel

consumption by NS trains (or the locomotives used on NS trains) moving through any portion of the SARR States for each year or partial year 2008 to the present.

REQUEST FOR PRODUCTION NO. 57

Please produce the train list(s) and train profile(s) showing the scheduled horsepower per ton ("HPT") for all trains operating to, from or within the SARR States. If the train list(s) or train profile(s) are not available, please provide other documents sufficient to show the scheduled HPT for the trains identified above.

REQUEST FOR PRODUCTION NO. 58

Please produce copies of the following documents:

- a. Documents which identify the locomotive tonnage ratings (*e.g.* horsepower per trailing ton) by line segment for NS' lines in the SARR States; and
- b. Tractive effort tables or other documents sufficient to show the tractive effort produced by the locomotives used to transport trains through any portion of the SARR States.

REQUEST FOR PRODUCTION NO. 59

Please produce documents, in a computer readable format to the extent available, which show locomotive utilization and locomotive performance (*e.g.*, locomotive unit-miles, locomotive hours running, locomotive hours switching, locomotive hours out-of-service for repairs and locomotive hours stored useable) for each locomotive that NS owned or leased for each year or partial year 2008 to the present and that NS used in providing transportation service in the SARR States.

REQUEST FOR PRODUCTION NO. 60

Please produce documents which describe and explain how NS assigns locomotives to each train on NS' system. If NS uses a computer model for this purpose, please produce the model and all supporting data bases and operating manuals necessary to operate the model.

REQUEST FOR PRODUCTION NO. 61

Please produce any studies performed by or for NS from January 1, 2003, to the present related to the increase in locomotives required to handle shipments during seasonal peak traffic periods. In addition, please provide the underlying databases that were used to perform each study.

REQUEST FOR PRODUCTION NO. 62

Please produce any studies performed by or for NS from January 1, 2003, to the present related to the increase in the number of railcars required to handle shipments during seasonal peak traffic periods. In addition, please provide the underlying databases that were used to perform each study.

REQUEST FOR PRODUCTION NO. 63

Please produce any locomotive spare margin study performed by NS from January 1, 2003, to date that includes (in whole or in part) locomotives used (a) in coal service and/or (b) in other service to, from or through the SARR States. In addition, please produce the underlying databases that were used to perform each study.

REQUEST FOR PRODUCTION NO. 64

Please produce any railcar spare margin study performed by or for NS from January 1, 2003, to the present that includes (in whole or in part) railcars used: (a) in coal service; and/or (b) in other service to, from or through the SARR states. In addition, please produce the databases that were used to perform each study.

REQUEST FOR PRODUCTION NO. 65

Please produce documents or data, in a computer-readable format to the extent available, which provide the following information for each crew district in the SARR States:

- a. Each crew district identified by "from" and "to" stations;
- b. The route miles in each such crew district; and
- c. The number of locomotive units per train by train type (i.e., coal, general freight, automotive, intermodal, etc.) and the extent to which the locomotive units are in a distributed power train configuration;

REQUEST FOR PRODUCTION NO. 66

Please identify all origins where NS pays an outside contractor or third party to load coal trains, and with respect to each such origin, please produce the following for each year 2008 to the present:

- a. Copies of all third party loading crew contracts/agreements, including negotiated rates and associated rate escalation clauses and operating provisions, as well as a description of the service performed by the contractor; and

- b. All records in NS' or its loading contractor's possession relating to the contractor's handling of the trains, including but not limited to the time when each train was in the possession or under the control of the loading contractor.

REQUEST FOR PRODUCTION NO. 67

Please provide a copy of any NS operating rules related to the special handling of hazardous materials (provide the requested information by class of hazardous material), including, but not limited to, rules related to:

- a. Placement of cars containing hazardous materials in a train;
- b. The number and location of buffer cars required, if any, when handling hazardous materials in trains; and
- c. Special routing instructions for trains containing hazardous materials.

REQUEST FOR PRODUCTION NO. 68

For each NS rail yard referred to in Interrogatory No. 7, please produce documents sufficient to identify switch crew assignments, hump crew assignments, Local Train assignments, the number of cars handled over each hump yard per day and the number of hazardous material cars handled at each hump yard per day which by-pass the hump operation at each yard.

REQUEST FOR PRODUCTION NO. 69

Please produce documents that contain the information requested by Interrogatory No. 8.

REQUEST FOR PRODUCTION NO. 70

Please produce copies of any documents, reports, analyses or studies provided to any Federal or state agencies which discuss or describe NS' compliance with regulations for handling, routing or proposed routing of hazardous materials.

REQUEST FOR PRODUCTION NO. 71

Please produce a copy of NS' rules pertaining to train handling, including but not limited to measures for conserving fuel.

REQUEST FOR PRODUCTION NO. 72

Please produce documents, in a computer-readable format to the extent available, which describe (a) how NS determines the dispatch priority given to each train type (*e.g.*, doublestack, priority intermodal, through, general freight, unit coal, *etc.*); and (b) NS' methodology for scheduling all trains by train type.

REQUEST FOR PRODUCTION NO. 73

Please produce all agreements between NS and CSXT or their affiliates, and any amendments thereto, implementing the grant to NS of equal access to the MGA coal region in connection with the Conrail control transaction approved by STB in Finance Docket No. 33388 (Decision No. 89, Ordering Paragraph 26), including, but not limited to, agreements governing NS' and CSXT's operations on the MGA lines and any payments made between NS and CSXT related to capital improvements, maintenance expenses and/or operating expenses on the MGA lines.

REQUEST FOR PRODUCTION NO. 74

Please produce all documents prepared from January 1, 2003, to date related to any planned capacity enhancements or capital improvements on NS rail lines in the SARR States, including, but not limited, to documents containing estimated or actual construction costs and documents related to changes in rail rates or rail pricing strategy, in connection with any such plans.

REQUEST FOR PRODUCTION NO. 75

Please produce the following for all joint facility or joint use agreements (including, but not limited, to trackage rights agreements, joint or common ownership agreements and lease agreements and any amendments thereto) between NS and any other rail carrier or other entity applicable to any of the railroad lines and/or facilities in the SARR States:

- a. Copies of all agreements (including all amendments and supplements);
- b. Copies of all bills from 2008 to the present (including all supporting documentation and data);
- c. The NS density over the joint facility for each year or partial year 2008 to the present; and,
- d. The density of all other rail carriers or entities over the joint facility for each year or partial year 2008 to the present.

REQUEST FOR PRODUCTION NO. 76

For each year or partial year 2006 to the present, please produce documents that contain the following information, in a computer-readable format to the extent available, for each of the end-of-train telemetry devices ("EOTD") used on any trains that traverse any portion of the SARR States:

- a. The date of purchase;
- b. The original cost and the cost of any additions and betterments;
- c. The debt rate as a percent;
- d. The financing terms (in years);
- e. The annual depreciation;
- f. The annual depreciation rate as a percent;
- g. The salvage value as a percent; and
- h. The accumulated depreciation.

REQUEST FOR PRODUCTION NO. 77

Please produce documents for each year or partial year 2006 to the present that contain the following, in a computer readable format, for each freight car purchased or leased by NS (including freight cars currently on order and privately-owned freight cars leased by NS that maintain the private owner=s car initial and number):

- a. Initial and number;
- b. Manufacturer;

- c. Lessor, if leased;
- d. AAR car type;
- e. Tare weight;
- f. Purchase or order date, if purchased;
- g. Lease or order date, if leased;
- h. Total purchase price, if purchased;
- i. If leased, the type of lease (e.g., capital, operating, etc.) and term;
- j. If leased, the amount and frequency of lease payments;
- k. If purchased, the AFE applicable to each purchased freight car; and
- l. If leased, the lease agreement including all supplements, amendments, exhibits and applicable schedules.

REQUEST FOR PRODUCTION NO. 78

Please produce documents for each year or partial year 2006 to the present that contain the following, in a computer readable format, for each trailer (chassis) or container purchased or leased by NS (including trailers/containers currently on order and privately-owned trailers and containers leased by NS):

- a. Initial and number;
- b. Lessor, if leased;
- c. Tare weight;
- d. Purchase or order date, if purchased;
- e. Lease or order date, if leased;

- f. Total purchase price, if purchased;
- g. If leased, the type of lease (e.g., capital, operating, etc.) and term;
- h. If leased, the amount and frequency of lease payments;
- i. If purchased, the AFE applicable to each purchased trailer or container; and
- j. If leased, the lease agreement including all supplements, amendments, exhibits and applicable schedules.

REQUEST FOR PRODUCTION NO. 79

Please produce documents for each year or partial year 2006 to the present, that contain the following, in a computer readable format if available, for each trailer (chassis) or container purchased or leased by TCS and/or TDIS (including privately-owned trailers or containers leased by TCS and/or TDIS and trailers or containers currently on order):

- a. Initial and number;
- b. Lessor, if leased;
- c. Tare weight;
- d. Purchase or order date, if purchased;
- e. Lease or order date, if leased;
- f. Total purchase price, if purchased;
- g. If leased, the type of lease (e.g., capital, operating, etc.) and term;
- h. If leased, the amount and frequency of lease payments;
- i. If purchased, the AFE applicable to each purchased trailer or container; and

j. If leased, the lease agreement including all supplements, amendments, exhibits and applicable schedules.

REQUEST FOR PRODUCTION NO. 80

Please produce documents sufficient to describe, in detail, all facilities, equipment, infrastructure or other physical assets of any kind, other than those that are described in Request for Production Nos. 77, 78, and 79, that are or have been owned or leased by NS, TCS and/or TDIS, and used by TCS and/or TDIS in connection with the provision of services for which it receives revenue, for each year or partial year 2006 to the present.

REQUEST FOR PRODUCTION NO. 81

Please produce documents for each year or partial year 2006 to the present, that contain the following, in a computer readable format if available, for each Auto Rack Car and/or Auto Rack which attaches to a flat car purchased or leased by NS (including privately-owned Auto Rack Cars leased by NS and Auto Rack Cars currently on order):

- a. Initial and number;
- b. Lessor, if leased;
- c. Tare weight;
- d. Purchase or order date, if purchased;
- e. Lease or order date, if leased;
- f. Total purchase price, if purchased;
- g. If leased, the type of lease (e.g., capital, operating, etc.) and term;

- h. If leased, the amount and frequency of lease payments;
- i. If purchased, the AFE applicable to each purchased trailer or container; and
- j. If leased, the lease agreement including all supplements, amendments, exhibits and applicable schedules.

REQUEST FOR PRODUCTION NO. 82

Please produce all railcar repair and maintenance records, reports, databases and related documents which include or record rail car repair and maintenance expenses for each year or partial year 2008 to the present, including but not limited to all input data to Schedules 415 and 755 of NS' R-1, and the total rail car-miles corresponding to these repair and maintenance expenses, in a computer readable format to the extent possible, for all freight cars in the NS system. To the extent that these records, reports and databases do not include all car repair and maintenance amounts reported in R-1 Schedule 410, please identify the expenses that are excluded.

REQUEST FOR PRODUCTION NO. 83

For each year or partial year 2008 to the present, please produce documents which contain the following information (in a computer-readable format, if available) with respect to each shipper-owned and shipper-leased railcar and each intermodal and automotive railcar provided by a third party moving over any part of the NS system located in the SARR States:

- a. Initial and number of the car;

- b. The AAR car type;
- c. The length, tare weight, load capacity (number of containers, trailers or automobiles) and load limit (tons) of the car (for intermodal and automotive cars only);
- d. The cost to NS for use of the car;
- e. The terms of any mileage allowance agreement covering the car;
- f. Whether the car is subject to a zero-based mileage agreement;
- g. Whether the car hire paid on the car is subject to refund of the payments under certain contractual conditions; and
- h. The year of manufacture of the car.

REQUEST FOR PRODUCTION NO. 84

Please produce all railcar maintenance agreements with outside contractors, including all supplements, attachments, exhibits and schedules, for each year or partial year 2006 to the present, for all the cars on NS' system. Also provide the documents identifying: (a) the dollar amount paid for each service performed under the agreement by individual car or by car type; and (b) the number of car-miles corresponding to the amounts referenced in Request for Production No. 84, subpart a.

REQUEST FOR PRODUCTION NO. 85

Please produce all NS locomotive maintenance and repair records and/or reports and related documents for each year or partial year 2006 to the present, which provide locomotive maintenance, repair and overhaul expenses by locomotive or locomotive type or series (or by other basis in which records are kept) and the total locomotive unit-miles

corresponding to these maintenance, repair and overhaul expenses for the locomotives identified in response to Request for Production No. 52 above. To the extent that these records and/or reports do not include all locomotive repair, maintenance, and overhaul amounts reported in R-1 Schedule 410, please identify those expenses that are not included.

REQUEST FOR PRODUCTION NO. 86

Please produce all locomotive maintenance agreements, including all supplements, attachments, exhibits and schedules, with outside contractors and provide, for each year or partial year 2006 to the present for all locomotives in the NS fleet under such maintenance agreements: (a) the amount paid for each locomotive or by locomotive type in total and broken down by each service performed under the agreement; and (b) the number of locomotive unit miles corresponding to the amounts listed above.

REQUEST FOR PRODUCTION NO. 87

Please produce documents that show in detail all items of expense and the associated dollar amount of each expense item included in NS' R-1 Annual Report to the STB Schedule 410, Column (c), Lines 202, 403, and 411, for years 2008 and 2009.

REQUEST FOR PRODUCTION NO. 88

Please identify all locations in the SARR States where NS or a third party/contractor acting for or on behalf of NS performs fueling of locomotives, and

produce documents sufficient to show the following information with respect to

locomotive fueling at each location:

- a. The source(s) of the fuel, including the name and location of the vendor(s) who provide the fuel to NS and the refinery(ies) or other location from which the fuel is obtained;
- b. The method and cost of transporting and dispensing the fuel from the refinery(ies) or other locations from which the fuel is obtained to the location where the fueling of locomotives is performed;
- c. The method by which fuel is dispensed into locomotives, *i.e.*, from fixed fueling platforms or by direct-to-locomotive (tanker truck) service; and
- d. A description of the facilities and equipment (including but not limited to fuel storage tanks) at each location where NS has fixed fueling platforms.

REQUEST FOR PRODUCTION NO. 89

Please produce copies of all contracts/agreements with third parties related to the performance of locomotive fueling functions for all locomotives that are used on any portion of the NS system located in the SARR States.

REQUEST FOR PRODUCTION NO. 90

For each year or partial year 2008 to the present, please produce the detailed annual and quarterly Wage Forms A and B that support the summary Wage Forms A and B provided to the STB.

REQUEST FOR PRODUCTION NO. 91

Please produce for each year or partial year 2008 to the present documents (in a computer readable format) which show for each NS individual locomotive engineer,

conductor, dispatcher and equipment inspector, the number of shifts worked per year, length of employment, and annual compensation.

REQUEST FOR PRODUCTION No. 92

Please produce documents sufficient to show the applicable wage rates for NS' maintenance of way employees by job classification for each year 2008 to the present.

REQUEST FOR PRODUCTION NO. 93

Please produce documents showing the amount(s) paid by NS to a recruitment firm or firms for executive search service in each of the years 2006 to the present. The documents should include the amount paid by individual, the position of the individual hired, and the basis for the recruitment firm's fee schedule. As used in this Request, the term "executive" means those employees so defined or grouped in NS' Wage Forms A and B.

REQUEST FOR PRODUCTION NO. 94

Please provide documents sufficient to show NS' existing maintenance-of way plan and staffing in the SARR States including the maintenance-of-way districts and/or crews employed by NS to maintain the (a) track, (b) signals and communications facilities, (c) bridges, and (d) all other facilities and structures in the SARR States, the number of NS employees by job classification presently assigned to each maintenance-of-way district or crew on both a permanent and a seasonal basis, and any changes in the

maintenance districts, crews, and number and classification of employees that have occurred since January 1, 2003.

REQUEST FOR PRODUCTION NO. 95

For maintenance of way (including inspection of bridges, tunnels and highway crossings) and/or construction of or on NS lines in the SARR States performed by contractors for the period from 2007 to the present, please produce copies of all bills for services, documents which contain a description of the line location of the contract inspection, repairs (including vegetation control, rail grinding and other maintenance items) and/or construction, and the details of the work performed, including labor and materials. If NS does not maintain copies of any of these documents, produce whatever documents NS does maintain or has available to it describing the costs incurred by NS and the details of the work performed, in a computer readable form if applicable (including all necessary documentation).

REQUEST FOR PRODUCTION NO. 96

Please provide documents showing the amounts paid by NS for training employees by year from 2007 to the present and the number of employees trained including, but not limited to, training employees hired for each of the following positions:

- a. Experienced locomotive engineers;
- b. Experienced locomotive conductors;
- c. Locomotive conductors training to become engineers;
- d. Novice conductors;

- e. Train dispatchers;
- f. Information technology programmers;
- g. Supervisors of maintenance operations;
- h. Maintenance crew members; and
- i. Equipment inspectors.

The amounts paid by NS for training employees should include, but not be limited to, wages paid per employee during classroom training, wages paid per employee during field or on the job training, fringe benefits paid during classroom training, fringe benefits paid during field or on the job training, costs for classroom training per employee, costs for on the job training or field training per employee, expenses for room and board during classroom training and during field training per employee. Also please provide the number of weeks of classroom training required for each type of employee and the number of weeks of on the job or field training required for each type of employee.

REQUEST FOR PRODUCTION NO. 97

Please produce documents showing the ad valorem taxes that NS paid for each year 2008 to the present to each of the SARR States, together with documents showing the total route-miles and total track-miles NS owned or owns in the SARR States for each year 2008 to the present. Also, produce documents showing how the amount of ad valorem taxes due were calculated by state in each year.

REQUEST FOR PRODUCTION NO. 98

Please provide documents for each year or partial year 2008 to the present which provide NS' loss and damage costs separately for all commodities NS carries on a system-wide basis.

REQUEST FOR PRODUCTION NO. 99

Please provide information related to any liability expense incurred as a result of NS' handling hazardous materials for each year 2007 to the present. For each liability expense incurred, please provide the following:

- a. The total amount of the liability expense;
- b. The STCC of hazardous material involved with the incurrence of the expense;
- c. The number of rail cars involved with the incurrence of the expense; and
- d. Any reimbursement of all or a portion of the liability expense, or other reimbursement which offset all or a portion of the liability expense received by NS from any third party.

REQUEST FOR PRODUCTION NO. 100

Please provide information related to any additional operating or administrative expenses incurred by NS for each year from 2007 to the present as a result of handling hazardous materials, including, but not limited to, items such as switching expenses, insurance expenses, station clerical, car cleaning expenses, accident clean-up expenses and/or billing expenses. For each expense identified, please provide:

- a. The total amount of the annual expense for each year;

- b. The class or classes of hazardous material to which the expense applies; and
- c. The number of annual carloads handled each year to which the expense applies.

REQUEST FOR PRODUCTION NO. 101

Please provide documents identifying the maintenance-of-way equipment owned or leased by NS that is assigned to the maintenance-of-way districts identified in response to Request for Production No. 94. For each piece of owned equipment, please provide the original cost and the year purchased. For each piece of leased equipment, please provide a copy of the lease and the lease payment schedule. For each piece of equipment, either leased or owned, please provide documents that show the annual cost of maintenance and fueling.

REQUEST FOR PRODUCTION NO. 102

Please produce any and all agreements between NS and NS Corp related to the "fee for management services" that NS Corp charges NS for services and the "revenue-based licensing fee" that NS Corp charges NS for use of certain intangible assets owned by NS Corp as described in NS' 2009 Class I Annual Report Form R-1, page 10.

REQUEST FOR PRODUCTION NO. 103

Please produce documents identifying and explaining for each year or partial year 2008 to the present:

a. The procedures by which NS Corp develops bills or invoices to NS for the "fee for management service it performs for NS Rail" and the "revenue-based licensing fee" referenced in NS' 2009 Class I Annual Report Form R-1, page 10; and

b. The STB account(s) in which NS records the payments made to NS Corp for the "fee for management services" and "revenue-based licensing fee" referenced in NS' 2009 Class I Annual Report Form R-1, page 10.

REQUEST FOR PRODUCTION NO. 104

Please produce documents identifying and explaining the procedures by which NS develops the bills or invoices to TCS and TDIS for rail-related transportation services. For each component of each NS bill or invoice, please identify and produce documents identifying the STB accounts in which NS records the payments received from TCS and TDIS, as well as the following information for TCS and TDIS for each year or partial year 2008 to the present:

- a. Total revenues;
- b. Amounts received to cover transloading costs;
- c. Amounts received to cover payments for costs associated with other transportation modes, e.g., over-highway truck costs, water vessel costs, etc.;
- d. Amounts paid to NS;
- e. Overhead and administrative costs; and
- f. Margin or profit.

REQUEST FOR PRODUCTION NO. 105

Please provide documents sufficient to show the following for each intermodal yard or terminal served by TDIS or TCS in the SARR States:

- a. Each asset owned or leased by NS;
- b. Each asset owned or leased by TCS;
- c. Each asset owned or leased by TDIS;
- d. Each asset owned or leased by an entity other than NS, TCS or TDIS; and
- e. All acquisition information and lease or other use payment information for each year or partial year 2008 to the present.

REQUEST FOR PRODUCTION NO. 106

Please provide documents sufficient to show the following for each Automotive

Distribution Facility served by NS in the SARR States:

- a. Each asset owned or leased by NS;
- b. Each asset owned or leased by an entity other than NS; and
- c. All acquisition information and lease or other use payment information for each year or partial year 2008 to the present.

REQUEST FOR PRODUCTION NO. 107

Please provide documents sufficient to show the following for each Bulk Transfer

Facility served by NS in the SARR States:

- a. Each asset owned or leased by NS;
- b. Each asset owned or leased by an entity other than NS; and
- c. All acquisition information and lease or other use payment information for each year or partial year 2008 to the present.

REQUEST FOR PRODUCTION NO. 108

Please produce documents sufficient to show the location, size (including square footage, number and lengths of tracks, capacity, etc.), components (such as equipment and machinery), original cost and year built for each facility located on any portion of NS' system in the SARR States that falls within each of the following categories of facilities:

- a. Roadway maintenance facilities;
- b. Locomotive maintenance facilities;
- c. Locomotive servicing facilities;
- d. Administrative facilities;
- e. Rail yards;
- f. Dispatch centers;
- g. Freight car repair and maintenance facilities;
- h. Scales;
- i. Wastewater treatment plants;
- j. Snowshed facilities;
- k. Train, yard and engineman facilities;
- l. Automotive Distribution Facilities;
- m. Intermodal terminals and yards;
- n. Bulk Transfer Facilities;

- o. River transload facilities; and
- p. Lake transload facilities.

REQUEST FOR PRODUCTION NO. 109

Please provide for each year 2008 to the present for each facility identified in response to Request For Production No. 108, subparts (l), (m), (n), (o) and (p):

- a. The annual costs to operate each facility separated by function; and
- b. The annual throughput of each facility (e.g., automobiles, containers, trailers, carloads, etc.).

REQUEST FOR PRODUCTION NO. 110

Please produce documents supporting the security procedures at each location identified in response to Interrogatory Nos. 7 (i), 13 (f), 15 (d) and 17 (f) including, but not limited to, the following for each year or partial year 2006 to the present:

- a. Staffing requirements by job classification;
- b. Material requirements;
- c. Transportation requirements;
- d. Facility requirements;
- e. Other requirements not included in a, b, c or d above;
- f. The annual costs incurred for the security at each location broken down by category of expense, e.g., labor, materials, purchased services, etc.;
- g. The entity responsible for paying the annual security costs at each location, e.g., NS Corp, NS, TCS, TDIS, Transworks, etc., and the portion paid by each entity in dollars or percentages; and
- h. The STB accounts where any costs incurred by NS are recorded.

REQUEST FOR PRODUCTION NO. 111

Please produce documents sufficient to describe, in detail, all personnel employed by TCS and TDIS in connection with the provision of services for which each receives freight revenue, for each year or partial year 2008 to the present, including but not limited to each employee's position and responsibilities; annual compensation (including all benefits); and for employees who do not dedicate 100% of their on-duty time to the provision of services described herein, the percentage of each such employee's time that is so dedicated.

REQUEST FOR PRODUCTION NO. 112

Please produce documents sufficient to describe, in detail, all services purchased by NS, TCS and/or TDIS from third parties that are necessary or incidental to the provision of services by each for which each receives revenue, including but not limited to all amounts paid for such third party services and the contracts and/or agreements governing the amounts paid, for each year or partial year 2008 to the present.

REQUEST FOR PRODUCTION NO. 113

For each company identified as providing outsourced services in response to Interrogatory No. 18, please provide documents which describe the services outsourced, the fees paid for the outsourced services, and the analyses which developed the estimated and/or actual savings realized by NS and each of its subsidiaries from such outsourcing.

REQUEST FOR PRODUCTION NO. 114

Please produce all documents relating to any contribution or payment by any governmental or quasi-governmental entity (including, without limitation, AMTRAK) for construction, upgrading and/or maintenance of any NS track, facility or structure (including bridges, at-grade highway crossings and grade separated crossings) and/or operating expenses on any of NS' lines located in the SARR States.

REQUEST FOR PRODUCTION NO. 115

Please provide documents containing the following information separately for ultrasonic rail testing and track geometry testing:

- a. The cost per mile, or other applicable unit of measure, for each year or partial year 2008 to the present; and
- b. NS' specifications for the frequency of such testing.

REQUEST FOR PRODUCTION NO. 116

Please produce copies of the most current land valuation maps for NS rail lines located in the SARR States, and all documents (including but not limited to deeds or other instruments of grant or conveyance) related to the parcels identified on those maps.

REQUEST FOR PRODUCTION NO. 117

Please produce documents identifying all donated rights of way and/or land grants (including easements) obtained by NS or NS' predecessors in connection with the construction of any rail lines or facilities located in the SARR States. The documents provided should include the following for each donated or easement land parcel:

- a. The NS parcel number;
- b. The exact location of the parcel, including county and state;
- c. Valuation section and map number;
- d. Original railroad acquiring the parcel;
- e. Type of instrument and/or title, e.g. easement, right-of-way deed, quit claim deed, condemnation, grant, etc.
- f. The size of the parcel in square feet or acres;
- g. The date of the transaction;
- h. The names of the parties to the transaction; and
- i. Any dollar amount associated with the transaction.

REQUEST FOR PRODUCTION NO. 118

Please produce all documents related to any sale, appraisal, abandonment or acquisition of land (improved and unimproved) that NS completed in the SARR States, in each year 2007 to the present, including but not limited to documents showing the location of the parcel, size of the parcel, the valuation of the parcel by NS, the sale or acquisition price, a description of any improvements to the parcel, the value of any improvements, the date of sale, and any characteristics of the parcel such as land use, utilities, access and topography.

REQUEST FOR PRODUCTION NO. 119

Please produce documents sufficient to show the following for construction projects that NS has undertaken since January 1, 2007:

- a. Construction standards, details and project specifications, including but not limited to: track structures and designs; bridges; culverts; yard and roadway buildings; fueling facilities; maintenance facilities and waste water treatment facilities;
- b. Whether or not the project was performed “under traffic”, i.e., traffic continued to move through the construction area;
- c. Estimating procedures for track construction projects; and
- d. Estimating procedures for non-track construction projects.

REQUEST FOR PRODUCTION NO. 120

Please produce all of NS’ price list books governing prices for construction and maintenance materials (including but not limited to weights of rail from 115 lb to 141 lb, turnouts, ties, fasteners, lubricators, plant and field welds, fencing, roadway signs, track geometry cars, hot bearing and dragging equipment detectors, and related tools), or other documents utilized by NS’ engineering personnel for estimating costs of maintenance and construction projects for each year or partial year 2007 to the present. To the extent that the charges for transportation and delivery of materials are not included in the prices shown, please produce documents sufficient to show such charges for all materials.

REQUEST FOR PRODUCTION NO. 121

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

- a. Number of cubic yards of excavation of:
  - i. Common earth;
  - ii. Loose rock;
  - iii. Solid rock; and
  - iv. Unclassified material;
  
- b. Number of cubic yards of embankment of:
  - i. Common earth;
  - ii. Loose rock;
  - iii. Solid rock; and
  - iv. Unclassified material;
  
- c. Number of cubic yards of borrow of:
  - i. Common earth;
  - ii. Loose rock;
  - iii. Solid rock; and
  - iv. Unclassified material;
  
- d. Grading construction data for each construction specification measured by NS including without limitation, roadbed width, side slope ratio, track center distance, presence of access roads, impact of grading activities on right-of-way width, use of geotextiles, use of water, soil stabilization, and width and depth of side ditches;
  
- e. Number of route miles, separated between single track main, double track main, triple track main, etc., corresponding to the cubic yard information described in paragraphs (i) through (iv) of Subparts (a), (b) and (c) of this Request;
  
- f. Number of track-miles corresponding to the cubic yards in paragraphs (i) through (iv) of Subparts (a), (b) and (c) of this Request;

- g. All of the different types of equipment (and the associated tasks) used to:
  - i. Excavate common earth;
  - ii. Excavate loose rock;
  - iii. Excavate solid rock;
  - iv. Excavate unclassified material; and
  - v. Obtain borrow material;
- h. Linear feet of pipe installed for lateral drainage;
- i. Number of cubic yards of rip rap placed for the protection of the roadway;
- j. Location, type and quantity of retaining walls;
- k. Construction method, including but not limited to the number of cubic yards of masonry or other similar material, used for retaining walls;
- l. Number of acres cleared;
- m. Number of acres grubbed; and
- n. Number of acres seeded.

REQUEST FOR PRODUCTION NO. 122

To the extent NS incurred any of the following expenses during the years 2007 to the present, please produce documents sufficient to show the costs NS incurred during each year for the following:

- a. Cost per cubic yard of excavation for:
  - i. Common earth;
  - ii. Loose rock;
  - iii. Solid rock; and
  - iv. Unclassified material;
- b. Cost per cubic yard of embankment for:
  - i. Common earth;
  - ii. Loose rock;

- iii. Solid rock; and
- iv. Unclassified material;
- c. Cost per cubic yard of borrow for:
  - i. Common earth;
  - ii. Loose rock;
  - iii. Solid rock; and
  - iv. Unclassified material;
- d. Cost per cubic yard of rip rap (installed), separated between material and labor;
- e. Unit cost for each material type used for retaining walls, separated between material and labor;
- f. Cost per acre for clearing timber and any credits reflecting the sale of timber;
- g. Cost per acre for grubbing;
- h. Cost per acre for seeding;
- i. Cost per acre for weed spray (including necessary chemicals);
- j. Cost per acre or per mile for brush cutting; and
- k. Cost per square yard for geotextile fabric.

REQUEST FOR PRODUCTION NO. 123

Please produce documents sufficient to show culvert/drainage pipe locations (*i.e.*, railroad milepost), size (diameter), length, height of cover, number of tracks crossed, type, and cost of material and installation for each, for NS' lines located in the SARR States.

REQUEST FOR PRODUCTION NO. 124

Please produce documents sufficient to show the following information with respect to ballast and sub-ballast used on NS' system during each of the years 2007 to the present:

- a. The average cost per cubic yard for ballast, by type;
- b. The average cost per cubic yard for the transportation and handling of ballast;
- c. The average length of haul represented by the value(s) in subpart (b) above;
- d. The average cost per cubic yard for sub-ballast, by type;
- e. The average cost per cubic yard for transportation and handling of sub-ballast;
- f. The average length of haul represented by the value(s) in Subpart (e) above;
- g. The names and locations of all quarries supplying such ballast or sub-ballast; and
- h. The unit prices from all quarries listed in response to Subpart (g).

REQUEST FOR PRODUCTION NO. 125

Please produce documents sufficient to show the following for each construction and rehabilitation project which exceeded \$500,000 in cost and was completed by NS, or an outside contractor acting on NS' behalf, since January 1, 2007:

- a. The date the project was started;
- b. The date the project was completed;
- c. Whether the project was new construction or rehabilitation;

- d. Whether or not the project was performed “under traffic”, i.e., traffic continued to move through the construction area;
- e. A complete copy of the Authorization for Expenditure ("AFE") and description of all columns and data contained with the AFEs;
- f. A complete copy of the Roadway Completion Report or any successor document; and
- g. All invoices underlying each AFE and/or Roadway Completion Report.

REQUEST FOR PRODUCTION NO. 126

Please produce documents, including but not limited to AFEs, construction plans, engineering estimates, bid tabs, contractor invoices, and construction specifications for any projects that a carrier other than NS has undertaken in the SARR States since January 1, 2007, for which NS paid for some or all of the project, including, but not limited to, any construction within the boundaries of Conrail Shared Assets Areas.

REQUEST FOR PRODUCTION NO. 127

Please produce documents sufficient to show the following information for each tunnel located on any portion of the NS system in the SARR States:

- a. Location, i.e., line segment name and number;
- b. Beginning and ending mileposts;
- c. Length (in feet);
- d. Height above the rail (in feet);
- e. Number of tracks in the tunnel;

- f. Method, time period and cost of construction; and
- g. Maintenance costs for each year or partial year 2007 to the present.

REQUEST FOR PRODUCTION NO. 128

Please produce documents sufficient to show the tunnels or former tunnels located on NS' system in the SARR States that have been constructed or removed (by daylighting or other means) by NS since 2000, detailing location (line segment and milepost), length, number of tracks in the tunnel, method and time period of construction, and the cost per linear foot to construct or remove the tunnel. If no cost data is available for any such tunnels, please produce documents sufficient to show the cost per linear foot of any tunnel construction or removal performed anywhere on NS' system since 2000.

REQUEST FOR PRODUCTION NO. 129

Please produce bridge lists or other documents detailing the following information for all bridges located on NS' system in the SARR States:

- a. Location (milepost, division and subdivision);
- b. Type;
- c. Number of tracks;
- d. Total length;
- e. Number of spans;
- f. Type(s) of spans;

- g. Length of each span;
- h. Load rating;
- i. Clearances;
- j. Height;
- k. Skew;
- l. Curvature;
- m. A description of what is being crossed (e.g., name of body of water, highway or road (including name or number), navigable waterway, etc.);
- n. Whether or not it is a movable bridge; and
- o. Whether or not it is in service.

REQUEST FOR PRODUCTION NO. 130

Please produce documents sufficient to show the following information related to the construction or replacement, in part or in whole, of each bridge on NS' system in the SARR States from 2004 to the present:

- a. The location of the bridge, by line segment and milepost;
- b. The design for each bridge;
- c. An itemized listing of the bridge components being constructed or replaced (including quantities);
- d. The estimated cost, by component, for each of the components (identified in response to Subpart c. above) being constructed or replaced;

- e. The actual cost, by component, for each of the components (identified in response to Subpart c. above) being constructed or replaced;
- f. The total cost of the bridge;
- g. The total length of the bridge;
- h. Whether the project was new construction or rehabilitation;
- i. Whether or not the project was performed “under traffic”, i.e., traffic continued to move through the construction area;
- j. All costs incurred as a function of performing the project under traffic, e.g., flagging costs, temporary signal costs, realignments, delays and all other costs that would not be incurred if the bridge was new construction;
- k. The construction documents and contracts for the construction and/or rehabilitation; and
- l. Any cost sharing between NS and another entity.

REQUEST FOR PRODUCTION NO. 131

Please produce documents listing the items, the cost of each item and the quantity of each item installed on NS' system related to the construction and (during each of the years 2007 to the present) operation of the centralized traffic control signal system(s) or any other traffic control system in use on the NS system. Please indicate whether the costs include additional services such as installation, design planning, electrical drops for utilities, and/or transportation. If the costs for additional services are not included, please provide each cost separately for the additional services.

REQUEST FOR PRODUCTION NO. 132

Please produce documents containing the following information for each NS communications site (defined as a location with a microwave tower, a land mobile radio ("LMR") tower, a tower used for both purposes, or a location where communications equipment (microwave or LMR) is located that does not include a tower) located in the SARR States:

- a. The number of microwave towers, LMR towers, combined towers, or other communications equipment location (shown separately for each category);
- b. The latitude and longitude coordinates of each tower or other communications equipment location;
- c. The height of each tower in feet above the ground and also in feet above sea level;
- d. The number of microwave antennae on each tower and the status of each antenna (i.e., whether it is operational);
- e. The number of LMR antennae on each tower and the status of each antenna (i.e., whether it is operational);
- f. The latitude and longitude coordinates of other communications sites that can link via microwave or radio from this site or a topological map of the communication system; and
- g. The acres of land owned or leased by NS for these sites and the cost of purchase or lease.

REQUEST FOR PRODUCTION NO. 133

Please produce documents sufficient to show:

- a. NS' specifications for the construction of communications sites (as defined in Request for Production No. 132);
- b. Identification and total number of NS route miles in the SARR States that are covered by microwave communications;
- c. Identification and total number of NS route miles in the SARR States that are not covered by microwave communications;
- d. The cost, manufacturer and model number of each item and the quantities used for the construction and operation of the microwave radio and/or land mobile radio communications system on the NS system during each of the years 2007 to the present; and
- e. The annual spot maintenance costs incurred by NS for the microwave and/or land mobile radio tower communications system per tower and by device type, in the SARR States, as well as the overall spot maintenance costs systemwide.

REQUEST FOR PRODUCTION NO. 134

Please produce documents in a computer readable format, if available, containing the following information for each NS at-grade and grade-separated highway crossing on the NS system in the SARR States:

- a. Geographic location, *i.e.*, city, county and state;
- b. Rail location, *i.e.*, railroad, line name, division, subdivision and milepost;
- c. Whether public or private;
- d. Name of road being crossed;

- e. Width;
- f. Length;
- g. Type of construction;
- h. Number of tracks;
- i. Type of protective devices;
- j. Date of initial installation at the location;
- k. Total cost of the initial installation and the amount borne by NS, if any;  
and
- l. Identification of the party responsible for ongoing maintenance of any such structures.

REQUEST FOR PRODUCTION NO. 135

For each year 2007 to the present, please produce documents that contain the following information with regard to the NS system's highway and at-grade railroad crossings:

- a. The various sizes, compositions and costs per linear foot (installed) of a one-lane private road crossing over a single line of track;
- b. The various sizes, compositions and costs per linear foot (installed) of a two-lane public highway crossing over a single line of track;
- c. The various sizes, compositions and costs per linear foot (installed) of a four-lane public highway crossing over a single line of track;
- d. The installed cost of signs for a private road crossing (if necessary);

- e. The installed cost of signs for a public highway crossing;
- f. The installed cost of each of the different types of protective devices identified in the response to Subpart (i) of Request For Production No. 134;
- g. A list identifying each component required for an automatic type interlocking (assuming a diamond crossing);
- h. The cost of each of the components identified in response to Subpart (g) above and the cost of installation for each year or partial year 2007 to the present;
- i. The costs for a 16-foot and 24-foot cattle guard and the cost of installation for each year or partial year 2007 to the present; and
- j. Any additional costs incurred.

REQUEST FOR PRODUCTION NO. 136

For each highway crossing identified in response to Request for Production No. 134, please provide documents, for each year or partial year 2007 to the present, that show, separately for each crossing, any monies received by NS from any other party to compensate NS for the use of the crossing, including, but not limited to, monies for construction, maintenance and easement payments.

REQUEST FOR PRODUCTION NO. 137

Please produce documents containing the following information with regard to NS' hot bearing and dragging/failed equipment detectors ("FED"):

- a. The criteria for determining the appropriate spacing of the devices along NS' main lines;

- b. The location of FEDs for the portion of NS' system in the SARR States;  
and
- c. The cost of FEDs for each year 2007 to the present.

REQUEST FOR PRODUCTION NO. 138

Please produce documents sufficient to describe the specifications, functions, operation and costs, during each of the years 2007 to the present, of any communications system equipment other than microwave towers used to transmit data from devices such as mobile two-way radios, portable (hand-held) two-way radios, FEDs, AEI scanners and EOTDs across all or any part of the NS system.

REQUEST FOR PRODUCTION NO. 139

Please produce documents sufficient to show:

- a. The locations and quantities of fiber optic cabling installed on NS rights-of-way in the SARR States;
- b. The date and amount of initial payments made by NS for granting the use of NS' right of way for fiber optic cable installation and an identification of the NS line segments(s) by milepost covered by each payment;
- c. The amount of frequency of recurring payments made to NS for granting the use of NS' right of way for fiber optic cable installation and an identification of the NS line segments(s) by milepost covered by each payment;
- d. The bandwidth capacity of the fiber optic cabling identified in Subpart (a);

- e. The entity that owns and operates the fiber optic cabling identified in Subpart (a);
- f. The costs to NS, if any, for installing the fiber optic cable identified in Subpart (a);
- g. Whether NS is permitted to use any of the fiber optic cable identified in Subpart (a) and an identification of the sections used by NS; and
- h. The amount, if any, NS pays the carriers for use of the fiber optic cable identified in Subpart (g).

REQUEST FOR PRODUCTION NO. 140

If NS utilizes the fiber optic cable(s) identified in response to Request for

Production No.139, please provide documents sufficient to show:

- a. An identification, and the total number, of NS route miles in the SARR States that are covered by fiber optic backbone communications;
- b. The cost, manufacturer and model number of each item and the quantities used for the construction and operation of the fiber optic communications system on the NS system during each of the years 2007 to the present; and
- c. The annual spot maintenance costs incurred by NS for the fiber optic communications system and by device type, in the SARR States, as well as the overall spot maintenance costs systemwide for each of the years 2007 to the present.

REQUEST FOR PRODUCTION NO. 141

Please provide documents identifying each electrical connection in the SARR

States that is used to provide power to devices including, but not limited to, the CTC system and other signal devices, hot box detectors, failed equipment detectors, powered

road crossings, warning devices and power switches, and provide the following for each such connection:

- a. The location of the connection by line segment and milepost;
- b. The source of the electricity;
- c. The amount NS paid for each connection and the date; and
- d. NS costs for each billing period from 2008 to the present.

REQUEST FOR PRODUCTION NO. 142

Please produce documents sufficient to show the location, linear feet, type of fencing (*e.g.*, snow fence), cost per foot and year installed for all fencing currently in place on the portion of the NS system in the SARR States.

REQUEST FOR PRODUCTION NO. 143

Under *Alternative Methods of Accounting for Railroad Track Structures*, 367 I.C.C. 157, 180 (1983), NS is required to submit a standard "unit of property" that distinguishes between when a certain cost should be expensed or capitalized. Please produce NS' most recent, STB approved property "unit of property" and the supporting information and data for those units.

REQUEST FOR PRODUCTION NO. 144

Please produce an unredacted and fully executed copy of NS' Positive Train Control Implementation Plan filed with the Federal Railroad Administration as required by 49 CFR §236.1009(a) and §236.1011.

REQUEST FOR PRODUCTION NO. 145

Please provide all studies, analyses, detailed plans and estimates developing NS' estimated costs to design, install and maintain the Positive Train Control system detailed in NS' Positive Train Control Implementation Plan filed with the Federal Railroad Administration on April 16, 2010.

REQUEST FOR PRODUCTION NO. 146

Please provide documents related to the amount of Bonus Depreciation claimed by NS Corp separately for 2008 and 2009 on NS Corp's Federal Tax Returns in Schedule 4562. The amount should be separated by asset class and include the historical cost recorded for the assets related to the claimed bonus depreciation, including all schedules and worksheets showing the calculation and development of bonus depreciation allowed under the Economic Stimulus Act of 2008 and the American Reinvestment and Recovery Act.

REQUEST FOR PRODUCTION NO. 147

Please provide the following NS Geographic/Geospatial Information System ("GIS") data. The GIS data should be viewable, readable, and writable with no access

limitations. The GIS data should be able to be read using current off the shelf (COTS) software, using either ESRI ArcView (ArcGIS) or MapInfo Pro (MapInfo / PitneyBowes):

- a. Map Projections defined per layer;
- b. GIS files associated with and/or created by the GIS software system, to include:
  1. In their original vector, or other, file format to include file types such as:  
For ESRI application software:
    - a) .shp (shape files, feature geometry)
    - b) .shx (shape file indexes)
    - c) .dbf (attribute format)
    - d) .prj (projection format)
    - e) .sbn, .sbx (spatial indexes of features)
    - f) .fbn, .fbx (spatial index of features)
    - g) .ixs (geocoding indexes)
    - h) .mxs (geocoding indexes)
    - i) .atx (attribute index)
    - j) .shp.xml (metadata in xml)
    - k) .cpg (code page)
  2. For MapInfo application software:
    - a) .dat (attribute data)
    - b) .tab (MapInfo table, stores types of data)
    - c) .id (stores links to graphic and database information)
    - d) .map (stores graphic and geographic information)
    - e) .ind (index files)
  3. For other GIS systems: provide native files.
- c. Map data geocoded to a standard available coordinate system;
- d. Map data associated to latitude and longitude coordinates without limits placed on decimal accuracy; and

- e. Map Layers (either separate object layers, or in layers with each object having attributes defining the item's entity type and attributes)
  - 1. Track detail
    - a) Rail stations and/or nodes (an entity with all attributes)
    - b) Rail segments and/or links between nodes (an entity with all attributes )
    - c) Siding (an entity with all attributes )
    - d) Grade (an entity, or attributes associated to track)
    - e) Curves (an entity, or attributes associated to track)
    - f) Mileposts (an entity, with a unique identifier, milepost name, milepost code, latitude and longitude coordinates with no limits on geocoded coordinate decimal values) that match the mileposts in the transactional "Event" data provided in response to Request For Production Nos. 21 and 22
    - g) Elevation in feet above sea level per rail node/milepost
    - h) Time tables
    - i) Signals
  - 2. Mileage between track nodes;
  - 3. Land parcels; and
  - 4. Terminals (including, but not limited to, NS rail yards, Automotive Distribution Facilities, Bulk Transfer Facilities and intermodal facilities).

REQUEST FOR PRODUCTION NO. 148

For each subpart of Interrogatory No. 24 that NS answers in the affirmative, produce the related information and/or data in a computer-readable format or in its native format to the extent not already produced in that format in reply to any other Interrogatory or Request for Production.

REQUEST FOR PRODUCTION NO. 149

Please produce all transportation contracts, including all amendments and supplements thereto (or letters of understanding with appendices or attachments), tariffs, common carrier pricing authorities, or other documents containing common carrier rate and service terms (collectively “pricing authorities”), entered into, agreed to, established, or provided by TCS and/or TDIS that govern shipments handled by NS as originating, terminating, overhead, or single-line carrier to, from, or through any of the SARR States in any of the years 2008 and beyond. For each pricing authority, please provide the traffic volumes and revenues associated with the movement of traffic under each pricing authority by traffic group (e.g., coal, agricultural, intermodal, etc.) and year for 2008 through the present.

REQUEST FOR PRODUCTION NO. 150

Please produce all forecasts and all documents related to forecasts or projections prepared by or for TCS and/or TDIS from 2008 through the present, or in TCS’ and/or TDIS’ possession, of future traffic volumes and/or revenues for freight traffic by traffic group (including any breakdowns of any such forecasts or projections whether by commodity classification, geographic region, line segment, or any other category) moving over any portion of the NS system located in any of the SARR States. Documents responsive to this request include, but are not limited to, traffic projections prepared in

connection with engineering studies, authorization for expenditures, marketing studies, operating expense budgets, capital budgets, or mergers with or acquisitions of other carriers.

REQUEST FOR PRODUCTION NO. 151

Please produce copies of any documents, reports, analyses, or studies provided to any Federal or state agencies which discuss or describe TCS' and/or TDIS' compliance with regulations for handling, routing, or proposed routing of hazardous materials.

REQUEST FOR PRODUCTION NO. 152

Please produce all TCS and/or TDIS railcar maintenance agreements with outside contractors, including all supplements, attachments, exhibits, and schedules, for each year or partial year 2006 to the present, for all TCS and/or TDIS cars moving on NS' system. Also provide the documents identifying (a) the dollar amount paid for each service performed under the agreement by individual car or by car type; and (b) the number of car-miles corresponding to the amounts referenced in Request for Production No. 152, subpart a.

REQUEST FOR PRODUCTION NO. 153

Please provide information related to any liability expense incurred as a result of TCS' and/or TDIS' handling hazardous materials for each year or partial year 2007 to the present. For each liability expense incurred, please provide the following:

- a. The total amount of the liability expense;
- b. The STCC of hazardous material involved with the incurrence of the expense;
- c. The number of rail cars, containers, or trailers involved with the incurrence of the expense; and
- d. Any reimbursement of all or a portion of the liability expense, or other reimbursement which offset all or a portion of the liability expense received by TCS and/or TDIS from any third party.

REQUEST FOR PRODUCTION NO. 154

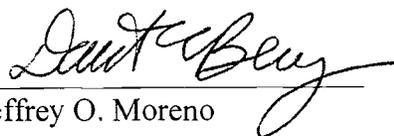
Please provide information related to any additional operating or administrative expenses incurred by TCS and/or TDIS for each year from 2008 to the present as a result of handling hazardous materials, including, but not limited to, items such as switching expenses, insurance expenses, station clerical, car, container or trailer cleaning expenses, accident clean-up expenses, and/or billing expenses. For each expense identified, please provide:

- a. The total amount of the annual expense for each year;
- b. The class or classes of hazardous material to which the expense applies; and
- c. The number of annual carloads handled each year to which the expense applies.

REQUEST FOR PRODUCTION NO. 155

Please provide copies of NS Corp's 2008 and 2009 state income tax returns for the SARR States, including all state tax credit worksheets.

E.I. DuPont De Nemours and Company



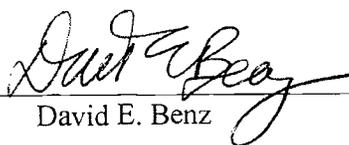
By: Jeffrey O. Moreno  
Sandra L. Brown  
David E. Benz  
Jason Tutrone  
Thompson Hine LLP  
1920 N Street, N.W., Suite 800  
Washington, D.C. 20036  
(202) 331-8800

Dated: December 2, 2010

**Certificate of Service**

I hereby certify that on this 2nd day of December, 2010, a copy of the foregoing Discovery Requests was served by electronic delivery on:

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

  
\_\_\_\_\_  
David E. Benz

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**STB Ex Parte No. 733**

***EXPEDITING RATE CASES***

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**COMMENTS OF  
NORFOLK SOUTHERN RAILWAY COMPANY**

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**EXHIBIT C**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

\_\_\_\_\_  
E.I. DUPONT DE NEMOURS & COMPANY )

Complainant )

v. )

NORFOLK SOUTHERN RAILWAY COMPANY )

Defendant )  
\_\_\_\_\_ )

) Docket No. NOR 42125

**DEFENDANT'S FIRST SET OF INTERROGATORIES AND  
REQUESTS FOR PRODUCTION OF DOCUMENTS**

Pursuant to 49 C.F.R. Part 1114, Defendant Norfolk Southern Railway Company ("NS") hereby submits its First Set of Interrogatories and Requests for Production of Documents ("Discovery Requests") to the Complainant E.I. DuPont de Nemours & Company ("DuPont"). DuPont's answers or responses to these Discovery Requests (including any objections) ("Responses") should be delivered to undersigned counsel at the offices of Sidley Austin LLP, 1501 K Street, N.W., Washington, D.C. 20005. Responses to the enclosed interrogatories should be served on NS on or before January 14, 2011, unless otherwise agreed by the parties.

NS is prepared to cooperate with DuPont to facilitate the expeditious production of documents and information responsive to these Discovery Requests with the minimum practicable burden. NS requests that DuPont promptly contact NS's counsel should there be any questions concerning the meaning or scope of any of the Discovery Requests, the nature of the information and documents responsive to them, or the procedure for producing responsive material.

The Definitions in Part I and the Instructions in Part II apply to the Discovery Requests in Part III.

## **I. DEFINITIONS**

The following definitions shall apply to these Discovery Requests:

1. "All" or "any" means each and every, whichever has the broadest scope and encompasses more documents, information or data.
2. "Alternative Transportation" means transportation of the Issue Movements by modes or methods of transportation other than (i) NS direct rail service, or (ii) joint-line rail service in which one of the participating carriers is NS. Alternative Transportation includes truck transportation; barge or vessel transportation; rail transportation by one or more rail carriers other than NS; intermodal transportation; movement of the Issue Commodities by pipeline; and any combination of the above (including truck/rail, truck/barge, barge/rail, barge/pipeline, or any other combination).
3. "Broker" means any intermediary or facilitator of transactions between buyer and seller, including without limitation, representative, buyer's and/or seller's agent, and distributor.
4. "Communication" means the transmittal or exchange of information of any kind regardless of form or format, including without limitation, transmittal, receipt or exchange of information or data, in oral, written, graphic, magnetic, audio, video or electronic form.
5. "Complaint" means the Complaint, filed by DuPont with the Surface Transportation Board in STB Docket Number NOR 42125, dated October 7, 2010.
6. "Document" is used in its broadest sense as defined by 49 C.F.R. § 1114.30(a)(1) and includes, without limitation, the following items, whether printed, or recorded, or reproduced by hand or any other mechanical, magnetic, or electronic process, and whether or not claimed to be privileged or confidential or personal: agreements; communications; correspondence; telegrams; e-mail; electronically stored information; computer disks or files; back-up computer disks or files; memoranda; summaries or records of telephone conversations; summaries or

records of personal conversations; diaries, forecasts, statistical statements; graphs; plans; drawings; samples; prototypes and tangible things; photographs, films, pictures and videotapes; minutes or records of conferences; expressions or statements of policy; lists of persons attending meetings or conferences; reports and/or summaries of interviews or investigations; opinions or reports of consultants; opinions of counsel; records, reports or summaries of negotiations; brochures; pamphlets; advertisements; circulars; trade letters; packaging material; press releases; things; original or preliminary notes and marginal comments appearing on any document. A comment or notation appearing on any document, and not a part of the original text, is to be considered a separate "document."

7. "DuPont" means Complainant E.I. DuPont de Nemours & Company, and any and all of its affiliates, subsidiaries, parents, predecessors and successors, and any and all of their present or former controlling shareholders, officers, directors, agents, counsel, employees, advisors, consultants, divisions, departments, representatives, subsidiaries and affiliates, or any of them, and all other persons acting (or who have acted) on behalf of any of them. All requests for DuPont documents encompass requests for documents in the possession, custody, or control of each of these entities and persons.

8. "DuPont Facility" means any plant or facility in the United States that (a) is owned in whole or in part and/or operated by DuPont or (b) produces product or products that are purchased, sold, transmitted, or otherwise used primarily by or on behalf of DuPont.

9. "Forecast" means any forecast, projection or estimate of the future level, change, or rate of change in an indicated measure, metric or data, including projections, studies, analyses, estimates, engineering studies, marketing studies, and any projections or estimates prepared in connection with testimonial or other public filings with governmental or regulatory authorities,

requests for or authorization for expenditures, capital or expense budgets, strategic or other business plans, or other business or corporate purposes.

10. "Identify" means:

- a) when used with respect to a natural person, to state the person's full name, present or last known home and business address, the person's present or last known home and business telephone number, the person's present or last known place of employment, position or business affiliation, and the person's present and former relationship to DuPont.
- b) when used with respect to a person other than a natural person, to state the entity's full business or organizational name, the address of entity's principal place of business, the entity's State of incorporation or formation, and the identity of person(s) who acted on behalf of the entity with respect to the subject matter of the requested document, information or thing.
- c) when used with respect to a document, either to produce the document itself or to state the name or title of the document, the type of document (*e.g.*, letter, memorandum, telegram, computer input or output, chart, etc., or other means of identifying it), the date of the document, the person(s) who authored the document, the person(s) who signed the document, the person(s) to whom the document was addressed, the person(s) to whom the document was sent, the person(s) who received the document, the general subject matter of the document, and the present location and present custodian of the document (if any such document was but is no longer in the possession, custody or control of DuPont, state what disposition was made of it and explain the circumstances surrounding, and the authorization for, such disposition, and state the date or approximate date of such disposition).
- d) when used with respect to a non-written communication, to state the identity of every natural person making or receiving the communication, such person's respective principal(s) or employer(s) at the time of the communication, the date, manner and place of the communication, and the topic or subject matter of the communication.
- e) when used with respect to an act, occurrence, decision, statement, review, inspection, negotiation, communication or other conduct (collectively, "act"), to state what transpired at or the events constituting the act, the subject matter of the act, the outcome, and the place and date thereof, and to identify the person(s) present and the person(s) involved.

11. "Including" means "including, but not limited to."

12. "Issue Commodities" means the commodities or products listed in the

"Commodity Description" column of Exhibits A and B to the Complaint.

13. “Issue Destinations” means the points at which the NS Rail service terminates for Issue Movements and listed in the Destination columns in Exhibits A and B to the Complaint.

14. “Issue Movements” means the movements whose rail transportation rates are challenged in DuPont’s Complaint, in STB Docket No. NOR 42125; specifically, the movements set forth in Exhibits A and B to the Complaint.

15. “Issue Origins” means the points at which the NS Rail service commences for Issue Movements and listed in the Origin columns in Exhibits A and B to the Complaint.

16. “Issue Rates” means the NS rates for rail transportation for the Issue Movements challenged in DuPont’s First Complaint.

17. “Issue Facility” means any DuPont Facility, or other facility or plant, that is either an origin or a destination for one or more of the Issue Movements.

18. “NS” means Norfolk Southern Railway Company, its present or former officers, directors, agents, counsel, employees, advisors, consultants, divisions, departments, subsidiaries and affiliates, or any of them, and all other persons acting (or who have acted) on behalf of any of them.

19. “Person” means any natural person, corporation, corporate division, partnership, association, cooperative, proprietorship, joint venture or trust, and any government entity, department, administration, agency, bureau or political subdivision thereof, and every other type of organization or entity.

20. “Relating to” means concerning, referring to, describing, evidencing, or constituting.

21. “You” and “your” refer to DuPont, as defined herein, including its agents, consultants and all others acting on DuPont’s behalf or at its direction.

## **II. INSTRUCTIONS**

### **A. Instructions For All Discovery Requests**

1. The Instructions in this Part II.A. apply to all Discovery Requests.
2. These Discovery Requests encompass all information and documents that are in your possession, custody, and control or that are available or accessible to you, including information and documents available to (1) all business entities you own or control; (2) any of your agents, consultants, attorneys (to the extent not privileged), experts, investigators, representatives, or any other person or persons acting for you or on your behalf; and (3) other third parties from which you may obtain such information.
3. The present tense shall be construed to include the past tense and the past tense shall be construed to include the present tense as necessary to bring within the scope of these Discovery Requests any information that might otherwise be construed to be outside of their scope.
4. The singular shall be construed to include the plural and the plural shall be construed to include the singular as necessary to bring within the scope of these Discovery Requests any information that might otherwise be construed to be outside their scope.
5. "And" or "or" shall be construed disjunctively or conjunctively as necessary to make these Discovery Requests inclusive rather than exclusive.
6. If DuPont contends that any of the following Discovery Requests are objectionable in whole or in part, DuPont shall state with particularity each objection, the basis for it and the categories of information and documents and things to which the objection applies, and DuPont shall respond to the Discovery Request insofar as it is not deemed objectionable. Any ground for objection not stated with particularity shall be deemed to have been waived.

7. If DuPont refuses to answer any portion of a Discovery Request on the ground that it requests disclosure of privileged information or is otherwise improper, DuPont is to answer so much of the Discovery Request as is believed proper and is further to state the basis for its contention that the remainder of the Discovery Request calls for privileged information or is improper.

8. If you refuse to answer any of the following Discovery Requests (including refusal to produce any responsive document or information) in whole or in part, based on a claim of privilege, you shall provide a statement, signed by an attorney representing you, setting forth as to each such Discovery Request the nature of the privileged information and the justification for the claim of privilege in sufficient detail to assess whether the assertion of privilege is valid. If you refuse to produce a responsive document because of an assertion of privilege or other protection from discovery, this statement from your attorney shall include, at a minimum, for each such withheld document: (1) the author or originator; (2) each addressee or recipient of the document or any copy thereof; (3) the date the document bears, or if it bears no date, the date on which it was made; (4) the title or subject matter of the document and a general description of its contents; (5) the nature of the document (*e.g.*, memorandum, email, chart, etc.); and (6) the basis for the claim of privilege.

9. If any document has been lost, destroyed, or discarded and that document would have provided information responsive to any Discovery Requests, please identify such document and set forth the circumstances of its loss or destruction including the identity of the person who lost or destroyed the document, the identity of any person who ordered or directed its destruction, the date and location of its destruction, and any policy or procedure which relates to, allows, or explains such destruction.

10. If you are unable to answer or respond fully to any Discovery Request, answer or respond to the extent possible and specify the reasons for your inability to answer or respond in full.

11. If you withhold or do not produce documents or information in your possession, custody, or control that are responsive to the Discovery Requests for any reason other than those specified in the preceding paragraphs, you shall state, expressly and with particularity, the basis upon which you are withholding (or otherwise not producing) the documents or information.

12. If precise data or information cannot be supplied in answering any Request that calls for a numerical response, DuPont should provide its best estimate of the data requested, indicate that this has been done by notation (“est.”) in conjunction with the response, and describe the basis on which the estimate was derived. In addition, DuPont should state where the precise underlying information can be found, including identification of each knowledgeable person and of all documents which contain the precise information or from which it can derived.

13. If in answering any of these Requests DuPont encounters any ambiguity in construing such Request, or a definition or instruction relevant to the inquiry contained within such Request, DuPont should set forth the matter deemed ambiguous and set forth the construction it has chosen or used in answering the Request.

14. These Discovery Requests, and your response obligations, are continuing in nature. Answers to these Discovery Requests are to be supplemented to the full extent required by 49 C.F.R. § 1114.29, and each Discovery Request shall be construed to encompass a

request for any supplemental information, knowledge, documents or data responsive to these Discovery Requests that later is discovered.

15. Unless otherwise indicated, the time period covered by these Discovery Requests includes the period from January 1, 2008 through the present.

**B. Instructions For Interrogatories**

16. Interrogatories are to be answered with reference to all information available to you, to any and all business entities you own or control, and to any of your employees, officers, directors, agents, consultants, attorneys (to the extent not privileged), experts, investigators, contractors, representatives, any other person or persons acting for you or on your behalf; or other third parties from which you may obtain such information.

17. If you cannot answer any Interrogatory in full, answer to the extent possible and specifically identify the reason for your inability to answer.

18. Whenever an Interrogatory calls for the identification or the identity of a person, the identification should include his or her full name and present or last known business address and current telephone number. If a business address is not known, provide a home address. The identification also should include the person's most recent known occupation (including title and job description) and most recent known employer. Whenever the person identified is a business entity or a governmental entity, state the full name of the entity or firm and the address of its principal place of business.

19. Whenever an Interrogatory calls for the identification of a document, the answer shall set forth its date, title, author, recipient and other information sufficient to identify the document.

20. Whenever an Interrogatory calls for the identification of a written communication, the answer shall set forth its date, the author, the recipient, and a description of

the content of the communication. Whenever an Interrogatory calls for the identification of an oral communication, the answer shall set forth its date, the speaker, the recipient, the persons present during the communication, a description of the content of the communication, and whether the communication is reflected in any document.

**C. Instructions For Requests for Production**

21. Each Request for Production calls for production of all Documents in the possession, custody or control of DuPont, including documents that DuPont (a) owns in whole or in part; (b) has a right by contract, statute or otherwise to use, inspect, examine, or copy on any terms; (c) has an understanding, express or implied, that it may use, inspect, examine or copy on any terms; or (d) has, as a practical matter, been able to use, inspect, examine or copy when it has sought to do so.

22. Documents shall be produced as they are kept in the usual course of business or shall be organized and labeled to correspond to the Request to which they are responsive.

23. Documents shall be produced in a manner that clearly indicates the source of the document and the custodian of the document.

24. If any Documents cannot be produced in full, produce to the extent possible and state the reason you are unable to produce the remainder.

25. Where DuPont has Documents responsive to these Requests for Production that are stored in any electronic format ("Electronically Stored Information"), such information should be produced in that format whether or not it also exists in paper or other non-electronic format. Responsive Electronically Stored Information shall be produced in a form or forms in which it is ordinarily maintained or in a reasonably usable form. Electronically Stored Information shall be produced with original metadata intact. If any instructions, codes, or

explanations are necessary for NS to access, understand, and interpret Electronically Stored Information (including but not limited to definitions and descriptions of database fields, files used to derive the produced data, record parameters, and instructions for unzipping or unpacking data), DuPont shall produce such instructions, codes, or explanations along with the Electronically Stored Information. NS reserves its right to request further instructions, codes, or explanations after reviewing any Electronically Stored Information produced by DuPont.

### **INTERROGATORIES**

**Interrogatory 1.** Identify all facts that support your allegation in ¶ 11 of the Complaint that “NS possesses market dominance over the movements in Exhibits A and B.”

**Interrogatory 2.** Identify all facts that support your allegation in ¶ 13 of the Complaint that “[t]here is a lack of effective competition from other rail carriers for each of the movements in Exhibits A and B because NS is the only rail carrier that provides service at either the origin or the destination.”

**Interrogatory 3.** Identify all facts that support your allegation in ¶ 13 of the Complaint that “[t]here is a lack of effective competition from non-rail modes for each of the movements in Exhibits A and B.”

**Interrogatory 4.** Identify and describe with specificity all Alternative Transportation available for each of the Issue Movements and the circumstances that DuPont contends makes this competition ineffective, including all your allegations, claims, or positions regarding the competition (or lack thereof) for transportation services offered by (or available from) any and all alternative carriers (other than NS), transportation modes, methods, sources, options, potential options or other alternatives for transportation services (including, without limitation, truck or water transportation).

**Interrogatory 5.** Identify and describe with specificity all Alternative Transportation that DuPont has considered, studied, analyzed, or is aware of, which it has used or might use to transport one or more of the Issue Commodities between the Issue Origins and the Issue Destinations (including intermodal or multimodal transportation, and including options that would or could require the construction of additional infrastructure or facilities such as truck transloading facilities or barge docks), and identify and describe with specificity any Document(s) and/or Communication(s) relating thereto.

**Interrogatory 6.** Identify and describe with specificity all transportation options other than rail service that DuPont has considered, analyzed, studied, reviewed, or is aware of, which it has used or might use to transport the Issue Commodities between any origin and any destination (whether or not such origins and destinations are Issue Origins or Issue Destinations).

**Interrogatory 7.** Identify all occasions since January 1, 2006 when DuPont has used a form of transportation other than rail service to transport one or more of the Issue Commodities between any origin and any destination (whether or not such origins and destinations are Issue Origins or Issue Destinations), including: the specific mode or type of transportation; the identity of the person or entity that provided that transportation; the date(s) DuPont used such other mode(s) of transportation; the circumstances or reasons surrounding the use of the other mode(s) of transportation; the rate charged to DuPont for that alternative transportation, and, if different, DuPont's net cost per ton for that alternative transportation; and whether or not such other mode of transportation is a competitive alternative to NS rail service (and if not, state specifically and in detail why not).

**Interrogatory 8.** Identify and describe with specificity all solicitations, requests for proposals, bids or offers, that DuPont has issued, published, solicited or otherwise communicated relating (in whole or in part) to transportation of the Issue Commodities.

**Interrogatory 9.** Identify and describe with specificity all solicitations, proposals, offers or bids received by or communicated to you relating to Alternative Transportation of all or any part of the Issue Movements (including the rate or price offered or proposed for such transportation and all other material terms of any such offer, proposal or bid).

**Interrogatory 10.** Identify and describe with specificity all studies, analyses, projections, communications, and documents relating to the potential to ship the Issue Commodities by truck, including references to any alleged obstacles to transporting the Issue Commodities by truck.

**Interrogatory 11.** Identify and describe with specificity all studies, analyses, projections, communications, and documents relating to the potential to ship the Issue Commodities via water transportation, including references to any real, potential, or alleged obstacles to transporting the Issue Commodities by barge, ship, or vessel.

**Interrogatory 12.** Identify and describe with specificity all studies, analyses, projections, communications, and documents relating to the potential to ship the Issue Movements by Alternative Transportation, including references to any real, potential, or alleged obstacles to transporting the Issue Movements by Alternative Transportation.

**Interrogatory 13.** Identify and describe with specificity all studies, analyses, projections, communications, and documents relating to DuPont customers who ultimately receive or originate the Issue Movements, including logistics infrastructure, total demand for the

Issue Commodities (including that received from other suppliers), transportation arrangements for the Issue Commodities, and sourcing for Issue Commodities.

**Interrogatory 14.** Identify every DuPont customer and/or supplier that receives or originates an Issue Movement.

**Interrogatory 15.** Identify and describe with specificity any discussions, negotiations, or other communications between DuPont and any rail carrier other than NS concerning or related to provision (or potential provision) of transportation service for the Issue Movements, including without limitation: possible options to “build-in” (or “build out”) a line of a railroad from another carrier’s rail line; or possible use of “trackage” or “haulage” rights or some other arrangement whereby another rail carrier would use NS’s rail line.

**Interrogatory 16.** For all Issue Movements that are joint moves involving NS and one or more other carriers, state whether DuPont has contracts or agreements with carriers other than NS for the non-NS segment of the move, and identify all such contracts or agreements.

**Interrogatory 17.** Do you contend that any of the Issue Rates materially affect the profitability of any DuPont Facility? If so, for each such DuPont Facility, provide financial information sufficient to show the financial condition of that DuPont Facility, including, without limitation, revenues, costs of goods sold, administrative expenses, net income, historical and expected capital expenditures, and labor expenses.

**Interrogatory 18.** Do you contend that any of the Issue Rates will or may cause the closure of any DuPont Facility? If so, for each such DuPont Facility, provide financial information sufficient to show the financial condition of that DuPont Facility, including, without limitation, revenues, costs of goods sold, administrative expenses, net income, historical and expected capital expenditures, and labor expenses.

**Interrogatory 19.** For each Issue Movement, identify and describe with specificity all contracts for the purchase or sale of such Issue Commodity that are currently in force or scheduled to take effect in the next two years. For each such contract identify:

- a) the parties to the contract;
- b) date the contract was executed;
- c) effective date of the contract;
- d) term of the contract and expiration date;
- e) any minimum volume requirement;
- f) any maximum volume limitation;
- g) price terms;
- h) options for extension; and
- i) terms describing whether and under what circumstances DuPont or another party may terminate the contract.

**Interrogatory 20.** For each Issue Movement, identify and describe with specificity all data regarding monthly deliveries of supplies and/or Issue Commodity to the Issue Origin and Issue Destination, including, without limitation, supply requirements, supply stockpile quantities, production requirements, and product stockpile quantities within the last two years.

**Interrogatory 21.** Identify and describe with specificity each chemical production unit, plant or facility (referred to herein as "unit") included in or comprising any Issue Facility. For each such unit:

- a) Identify the name and location (city and state) of the unit;
- b) Identify the owner or owners of the unit and, in the case of multiple ownership interests, the nature, type and size of each owner's ownership interest in the unit;
- c) Identify the operator or operators of the unit, if different than the owner(s) of the unit;
- d) Identify the date on which construction of the unit was commenced, the date on which construction of the unit was completed, and the date on which the unit was placed into service;

- e) Identify (i) the original expected service life of the unit, and, if different, (ii) the current expected service life of the unit, including the date on which operations at the unit currently are expected or anticipated to end;
- f) Identify any future planned, contemplated or anticipated construction or modification of facilities at the unit that might affect the service life of the unit, including the date on which operations at the unit are expected or anticipated to end;
- g) Identify the production capacity of the unit, including the date, amount and causes of any change in such capacity since the original construction of the unit;
- h) Identify any anticipated future change in the production capacity of the unit and the date, amount and causes of such change;
- i) Describe in detail how supplies are transported and delivered to the unit;
- j) Describe in detail all transportation, loading and unloading facilities (including rail, truck and/or handling facilities) for the delivery of supplies to the unit;
- k) Identify the total net production of the unit during each calendar month from January 1, 2008 to the present;
- l) Identify any future planned, contemplated or anticipated construction or modification of facilities at the unit that might affect the type and/or volume or amount of production in the unit, and how such construction or modification of facilities would affect the type and/or volume or amount of production in the unit; and
- m) The average delivered cost of each type of product produced by the unit during each calendar month from January 1, 2008 to the present.

**Interrogatory 22.** Identify and describe in detail DuPont's current policies and procedures for handling and shipment of Issue Commodities from or to any DuPont Facility.

**Interrogatory 23.** Identify and describe with specificity all data regarding truck traffic to and from any Issue Facility since January 1, 2006 including without limitation:

- a) number of trucks;
- b) loaded truck weights;
- c) origins and destinations of truck shipments;
- d) volumes shipped to each such origin and destination;
- e) commodities, products or freight delivered or shipped; and

- f) any applicable weight, traffic type or volume restrictions or limitations on roads, highways, or streets within a 75-mile radius of the DuPont Facility that might be used by trucks moving freight to or from that DuPont Facility.

**Interrogatory 24.** Identify all Forecasts prepared by or for DuPont or in DuPont's possession, custody or control during the period from January 1, 2008 to the present (including any breakdowns of any such forecasts, projections or estimates by commodity classification, geographic region, producer or supplier, railroad, year or other time period, DuPont Facility, or any other category) concerning or referring to the level, volume or rate of change in any of the following:

- a) The expected or anticipated production capacity of any unit, plant or facility (referred to herein as "unit") included in or comprising any Issue Facility by calendar month, year or other time period;
- b) The expected or anticipated total net production by any Issue Facility, unit or facility, by calendar month, year or other time period;
- c) The expected or anticipated production requirements or commitments of any Issue Facility by calendar month, year or other time period;
- d) The expected or anticipated volume of demand for product produced or sold by any Issue Facility, by calendar month, year or other time period;
- e) The expected or anticipated volume of sales (in dollars) of product produced or sold by any Issue Facility, by calendar month, year or other time period;
- f) The location, amount and duration of any production or transportation constraints affecting or potentially affecting the transportation of product(s) produced by any Issue Facility;
- g) The expected or anticipated number of tons or volume of production inputs or supplies to be purchased or acquired by any Issue Facility, by calendar month, year or other time period;
- h) The expected or anticipated level of railroad rates for the transportation of product(s) produced by any Issue Facility, by calendar month, year or other time period;
- i) The expected or anticipated level or rate of change in the Rail Cost Adjustment Factor (with or without an adjustment for railroad productivity) published by the Surface Transportation Board ("STB"), or any other measure of the level or rate of change in the costs of providing rail freight transportation services, by calendar month, year or other time period; and
- j) The expected or anticipated level or rate of change in the Consumer Price Index, the Producer Price Index, the Gross Domestic Product-Implicit Price

Deflator, or any other measure of inflation or rate of change in the level of prices, by calendar month, year or other time period.

**Interrogatory 25.** For each Forecast identified in response to Interrogatory 24, identify and describe in detail the methodology used to develop or prepare the Forecast including all assumptions utilized in preparing or developing such Forecast; all data and information used or relied upon to develop or prepare such Forecast, and the sources of all such data or information.

**Interrogatory 26.** State whether DuPont has conducted, caused to be conducted, or has access to any studies, reports or other documents describing or analyzing the costs of utilizing privately owned or leased rail cars for any Issue Movement or the costs of maintaining privately owned or leased rail cars for movement of any product encompassed in the Issue Movements. If the answer to this Interrogatory is affirmative, identify and describe in detail the scope of each such study, report or other document, the methodology utilized therein, and the specific results and conclusions of each such study, report, analysis, or document.

**Interrogatory 27.** For each DuPont Facility, identify competing producers or shippers of each Issue Commodity and any goods that are a close substitute for an Issue Commodity (collectively, "Competing Products"), including (1) name and address of the competing producer or shipper; (2) name and location of each facility producing an Issue Commodity or Competing Product; (3) name and description of Competing Product; and (4) the modes of transportation and carrier(s) the competing producer or shipper uses to transport the Issue Commodities and/or Competing Products from its facilities to its customers or other destinations.

**Interrogatory 28.** For each rail car owned or leased by DuPont, and for each of the calendar years 2008 to the present, identify the following:

- a) The owner or lessee of the car;
- b) The location(s) from which the hoppers or gondolas are assigned;
- c) Car initial and number;
- d) Source of car;
- e) Car model or type;
- f) Tare weight;
- g) Date of purchase or lease;
- h) Original cost plus additions and betterments;
- i) Description of financing vehicle (e.g., equipment trust);
- j) Debt rate as a percent;
- k) Finance terms (in years);
- l) Annual depreciation;
- m) Accrued depreciation;
- n) If leased, whether capital or operating lease;
- o) If capital lease, the capitalized value of the lease by car or car group. If group of cars, identify the number (by initial and number) and aggregate dollars;
- p) If an operating lease, the quarterly, semi-annual, annual, etc. lease payment by car or car group covering the term of the lease. If a group of cars, identify the number (by initial and number) and aggregate dollars;
- q) The movement history of each car, including location, miles traveled between stations (loaded and empty), and the time and date of arrival at each station; and
- r) The history (on a year-to-year basis) of mileage allowance payments or other compensation received by DuPont (or other owner or lessor) for the use of each car.

**Interrogatory 29.** For each of the cars identified in response to Interrogatory 28, identify maintenance and/or repair expenses by individual car initial and number (owned and leased), incurred by DuPont for each of the calendar years 2008 to the present.

**Interrogatory 30.** For each of the cars identified in response to Interrogatory 28, identify the total car unit-miles corresponding to the maintenance and repair expenses identified in Interrogatory 29 (*i.e.*, by individual car initial and number, or car type or car series) for each of the calendar years 2008 to the present.

**Interrogatory 31.** For any Issue Destination you contend is served solely by NS, identify any contracts, agreements, arrangements, or commitments that you (DuPont) have for obtaining or sourcing production inputs or supplies from suppliers, origins, or sources that are not served by the NS rail system, and describe with particularity how (using what mode(s), routing, etc.) such production input is or would be transported and delivered to an Issue Facility, including how any such fuel that would be delivered by NS would be transferred to, or enter, the NS rail system.

**Interrogatory 32.** For any Issue Origin you contend is served solely by NS, identify any contracts, agreements, arrangements, or commitments that you (DuPont) have for selling products from an Issue Facility to potential customers (including internal customers such as other DuPont Facilities) that are not served by the NS rail system, and describe with particularity how (using what mode(s), routing, etc.) such product is or would be transported and delivered to the potential customer, including how any such product that would be delivered by NS would be transferred from, or exit, the NS rail system.

**Interrogatory 33.** Identify any and all studies, reports, or analysis done by or for you, or received by you, concerning or related to development, or potential development, of transportation infrastructure, including development that would allow use (or greater use) of any transportation facility (including, without limitation, any port, depot, station, or other type of facility) for delivery of product(s) or production inputs that could, or might, be transported to or from any DuPont Facility.

**Interrogatory 34.** Identify and quantify the costs of rail-truck transloading for any DuPont shipments of Issue Commodities that utilized rail-truck transloading from 2008 to present, with itemized detail of all component costs, including, without limitation, rail

transportation of Issue Commodities to and from a transloading facility; transloading facility costs; truck transportation of Issue Commodities to and from a transloading facility; truck washing costs, if applicable; transloading facility costs; and labor costs.

**Interrogatory 35.** To the extent that you claim that any customer requirements or preferences foreclose your ability to deliver an Issue Commodity to that customer by any particular mode of transportation, describe those customer requirements or preferences in detail.

**Interrogatory 36.** Do you, or have you ever, used Brokers for any movements of the Issue Commodities; if so, identify each Broker used and the movements of Issue Commodities handled by that Broker from 2008 to present.

#### **DOCUMENT REQUESTS**

**Request for Production 1.** Produce all documents that underlie, support, analyze, explain, relate to, or concern your allegation(s) that NS possesses “market dominance” (as defined in 49 U.S.C. § 10707) with respect to the transportation of the Issue Movements, including the allegations in Paragraphs 11-13 of the Complaint, regardless of whether those documents were prepared, generated, transmitted, or developed for purposes of this proceeding.

**Request for Production 2.** For the period from January 1, 2006 to the present, produce all documents concerning, referring to, or relating to, transportation options or alternatives for the Issue Movements, including all documents concerning, relating to, or referring to:

- a) The costs and feasibility of transporting the Issue Commodities, in whole or in part, using Alternative Transportation, including all comparisons of the costs and feasibility of those transportation alternatives with those of NS’s rail transportation service;
- b) Any correspondence with any potential carriers of Issue Commodities by truck, barge, vessel, ship, pipeline, or other mode of transportation (or combination of modes);
- c) All analyses performed by or for you (including analyses conducted by consultants) to identify, analyze, assess or compare Alternative

Transportation, including the costs and/or feasibility of any and all such Alternative Transportation.

**Request for Production 3.** For the period from January 1, 2008 to the present, produce all bills, invoices, bills of lading, waybills, or other billing documents issued to, or received by, DuPont for transportation of Issue Commodities to or from an Issue Facility.

**Request for Production 4.** For the period from January 1, 2008 to the present, produce databases or spreadsheets in computer readable format that include the information listed below for each movement of an Issue Commodity to or from an Issue Facility:

- a. Commodity (seven-digit Standard Transportation Commodity Code);
- b. Commodity Description (as listed in Exhibits A & B of the Complaint);
- c. Origin station and state;
- d. The date and time the movement originated;
- e. Destination station and state;
- f. The date and time the movement was received at the destination;
- g. The quantity of Issue Commodity shipped;
- h. The name of the customer, consignee, payee or supplier for each shipment record;
- i. The name of each movement carrier;
- j. The amount paid for the movement to each carrier;
- k. The distance each carrier transported the movement (in miles);
- l. Total movement miles.

**Request for Production 5.** Produce any and all rail transportation contracts, agreements, circulars, or other rail pricing arrangements between DuPont and rail carriers other than NS that (1) are or were in effect at any time from January 1, 2008 to the present; and (2) applied or could apply to all or any part of any interline or joint line movement that involved NS

and one or more other carriers, including all contracts or other rail rate authorities or pricing documents covering the non-NS portion of all Issue Movements identified in Exhibit B to the Complaint.

**Request for Production 6.** Produce any and all rail transportation contracts, agreements, circulars, or other rail pricing arrangements between DuPont and rail carriers other than NS for movements originating or terminating at transloading facilities located within 200 miles of one or more Issue Origin and/or Issue Destination.

**Request for Production 7.** Produce any and all truck, barge, pipeline, vessel, multimodal, or intermodal transportation contracts, agreements, circulars, or other pricing arrangements between DuPont and an Alternate Transportation provider that (1) are or were in effect at any time from January 1, 2008 to the present; and (2) applied or could apply to all or any part of a movement of an Issue Commodity.

**Request for Production 8.** Produce maps or diagrams showing any land ownership, access or easement rights or licenses, and other rights to real property, facilities or improvements held by (or usable by) DuPont in the area within a 10-mile radius of the Issue Origins, the Issue Destinations, and the DuPont Facilities.

**Request for Production 9.** Produce detailed maps or diagrams showing the facilities at the DuPont Facilities, including any storage and handling facility or equipment location(s) and capabilities.

**Request for Production 10.** Produce all documents concerning, referring to, relating to, or regarding any review, assessment, or analysis of NS rail transportation rates that you (including your agents or consultants) conducted or performed, including without limitation any and all comparisons of rates charged or offered by NS with rates offered or charged by other

transportation providers; analysis of the cost of rail transportation as a proportion of DuPont's overall cost of products and supplies delivered by NS to or from DuPont Facilities; and all presentations you made to NS during the course of transportation contract negotiations between the parties between January 2008 and the present (including all data, information, calculations and analyses underlying or supporting such documents or presentations).

**Request for Production 11.** Produce each study or analysis, and all workpapers and other supporting documents and data, prepared by or on behalf of DuPont during the time period from January 1, 2008 to the present, referring to the reasonableness of the rates charged (or proposed to be charged) by NS or to the stand-alone costs of service for the transportation of Issue Movements. For each such study or analysis, produce all underlying workpapers and source documents, including (without limitation) all computer-readable data containing inputs to or the results of such study or analysis.

**Request for Production 12.** Produce all documents concerning, referring to, or comprising any contract or agreement with any DuPont customer and/or supplier identified in response to Interrogatory 14.

**Request for Production 13.** Produce all documents concerning, referring to, or comprising any Forecast identified in response to Interrogatory 24 including, but not limited to, all documents referring to the methodologies identified in response to Interrogatory 24.

**Request for Production 14.** Produce all documents referring to any of the following subjects:

- a) The reasonableness of the level of the rates charged by NS for the transportation of Issue Commodities;
- b) The impact of the level of the rates charged by NS for the transportation of Issue Commodities on the production levels at any DuPont unit, plant or facility; and
- c) market rates for rail transportation of Issue Commodities.

**Request for Production 15.** Produce each Forecast, study or analysis (including, but not limited to, strategic studies, long-range planning studies, analyses of options, management audit studies or reports and testimony), and all workpapers and other supporting documents and data (including machine-readable data), prepared by or on behalf of DuPont during the time period from January 1, 2008 to the present, referring to the impact or potential impact of DuPont's compliance with applicable state and federal environmental laws on any of the following:

- a) DuPont;
- b) Any DuPont Facility;
- c) The volume or amount of Issue Commodities generated, produced, or consumed at any DuPont Facility;
- d) The relative costs to generate, produce, or consume Issue Commodities between DuPont Facilities;
- e) The relative costs to generate or produce Issue Commodities at a DuPont Facility as compared with the generation or production costs of chemical manufacturers or sellers other than DuPont; and
- f) DuPont's ability or potential ability to compete for present or future sales of Issue Commodities with chemical manufacturers or sellers other than DuPont.

**Request for Production 16.** Produce all documents referring to any sale or acquisition of land (improved or unimproved) completed by DuPont in the "SARR States," as defined in DuPont's First Set of Requests for Admissions, Interrogatories, and Requests for Production of Documents (dated December 2, 2010), during the period from January 1, 2008 to the present including (but not limited to) documents showing the location of the parcel, size of the parcel, sale or acquisition price, a description of any improvements to the parcel, date of sale, and any characteristics of the parcel such as land use, utilities, access and topography.

**Request for Production 17.** Produce all appraisals prepared by or for DuPont, or in DuPont's possession, custody or control, at any time during the period from January 1, 2008 to the present, for any real estate parcels located in the "SARR States," as defined in DuPont's First

Set of Requests for Admissions, Interrogatories, and Requests for Production of Documents  
(dated December 2, 2010).

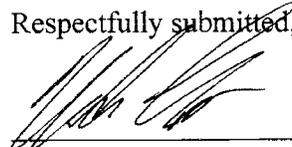
**Request for Production 18.** Produce all videos and other documents regarding policies, procedures, and practices for safe and/or secure handling of DuPont products, including the Issue Commodities.

**Request for Production 19.** Produce all videos and other documents showing or concerning loading and/or unloading operations for any transportation mode at any Issue Facility.

**Request for Production 20.** Produce all documents, including contracts, studies, analyses, and communications, referring or relating to DuPont's use of Alternative Transportation as claimed by DuPont in its complaint filed against NS on September 1, 2000 in the United States District Court for the Eastern District of Virginia in docket no. 00-cv-1489, including but not limited to documents concerning DuPont's claims in that case that it "secur[ed] substitute rail transportation"; "secur[ed] transportation by other modes, including truck and barge"; "modif[ied] its facilities to accommodate new modes of transportation"; and "intall[ed] additional loading and unloading equipment."

**Request for Production 21.** Produce all documents, data, or information identified or referenced in your responses to NS's Interrogatories, and all documents or other information you reviewed, consulted, considered, or relied upon in developing or preparing those responses.

Respectfully submitted,



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Dated: December 14, 2010