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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 reply comments.

Sincerely,

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

**REPLY COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

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Dated: August 29, 2016

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 733

EXPEDITING RATE CASES

**REPLY COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

I. BACKGROUND

On August 1, 2016, Norfolk Southern Railway Company (“NS”) filed its opening comments (“Opening Comments”) in this proceeding 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”).

Based on its extensive research into judicial best practices and its experience in *E. I. DuPont de Nemours & Co. v. Norfolk Southern Railway Co.*, STB Docket No. NOR 42125, NS recommended various ways for the STB to expedite rate cases: (1) triage issues within stand-alone cost cases (“SAC Cases”, and the test therefor, “SAC Test”) to promote evidentiary alignment between the parties on the traffic group, traffic volumes, operating plan, and stand-alone railroad (“SARR”) configuration; (2) triage proceedings on the STB docket, to include expanding exemptions, to allow the STB to focus on inherently complex SAC Cases; (3) expand the use of intermediate technical conferences to narrow the issues in controversy; (4) adopt procedural schedules consistent with 49 C.F.R. § 1111.8 and § 1111.9, as applicable; (5) enforce

procedural schedules via sanctions and greater scrutiny of requests for extensions; (6) streamline discovery by requiring initial standardized requests from both parties and initial market dominance disclosures from complainants, experimenting with presumptive limits and proportionality standards, and codifying rules for motions to compel discovery; and (7) leverage motions to strike and motions to dismiss by ruling promptly thereon.

NS also responded directly to the various proposals raised by the STB in the Advance Notice of Proposed Rulemaking served on June 15, 2016 (“ANPRM”), supporting the following proposals: (1) promote a limited, voluntary, and non-precedential use of requests for admission; (2) define “to the present” in the discovery context as the filing date of the complaint; (3) clarify the legality of Security Sensitive Information disclosures during discovery; (4) require parties and STB staff to confer on discovery and procedural issues prior to filing a motion to compel, acknowledging that active STB control over these issues may yield more tangible benefits; (5) enforce more strictly the established limits for rebuttal evidence with motions to strike and monetary or terminating sanctions; (6) 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 (7) stagger the filings of public and highly confidential versions.

In its Opening Comments, NS strongly objected to two STB proposals in the ANPRM. First, the STB’s proposal to collect data on an ongoing basis from the railroads would create an unreasonable burden for both the STB and railroads with no countervailing benefit for future rate cases. Second, the STB’s proposal to standardize certain categories of evidence would advantage one party over the other, contravene the statutory directive for the STB to assess in this proceeding whether court procedures could expedite rate cases, and undermine the sound economic principles of the SAC Test.

II. INTRODUCTION

NS files these reply comments to respond to some of the comments and proposals raised by other interested stakeholders in this proceeding—in particular, the Rail Customer Coalition (“RCC”), the American Chemistry Council, Dow Chemical Company, and M&G Polymers USA, LLC (“Joint Carload Shippers”), and the Western Coal Traffic League, American Public Power Association, Edison Electric Institute, National Association of Regulatory Utility Commissioners, National Rural Electric Cooperative Association, and Freight Rail Customer Alliance (“Coal Shippers”). NS also joins in support of the reply comments filed in this proceeding by the Association of American Railroads.

In summary, NS emphasizes the following:

- The STB must maintain the sound economic principles of its rate regulatory regime and the SAC Test as it considers proposals related to alternative rate methodologies for carload shippers and evidentiary standardization. The STB should note that shipper-side groups across commodities and NS agree that evidentiary standardization is inconsistent with these sound economic principles.
- The STB must reject proposals that would not minimize the burden on rail carriers to develop and maintain accurate cost information, pursuant to its statutory mandate. Accordingly, the STB should not require railroads to create intact relational databases for information relevant to rate cases if the railroad does not already maintain such a database in the ordinary course of business; and, the STB should not require railroads to file data on a regular basis with the STB for use in rate cases.
- The STB should not prohibit the continued use of MultiRail for carload SARRs. This publicly available software is currently one of the best ways to design and test the classification, blocking, and train service plans for carload SARRs, and its use in SAC Cases does not unfairly disadvantage complainants. And consistent with STB practice and precedent, defendants who introduce MultiRail on reply should not be required to pay for a full license for complainants to use this software.
- The STB should not rely on requests for admission to resolve the ultimate legal question of whether a rail carrier is market dominant, based on judicial best practices and the STB’s statutory jurisdiction to assess the reasonableness of rates only where a carrier is market dominant.

- The STB should avoid setting impracticable deadlines for when defendants must file a motion to dismiss and when defendants must produce “Core SAC Data” given the significant time and effort required for these two actions. And, defendants should not be required to incur discovery costs before a rate case complaint is even filed.
- The STB should recognize that it is the complainants who typically have engaged in egregious gamesmanship in their opening evidence to produce artificially low SARR costs, thus forcing defendants to submit detailed replies correcting such evidence in accordance with established STB precedent.

III. STB MUST MAINTAIN THE SOUND ECONOMIC PRINCIPLES OF ITS RATE REGULATORY REGIME AND THE SAC TEST.

In its Opening Comments, NS stated that the relatively few rate cases filed should not be construed as evidencing a need for further reforms.¹

The Coal Shippers agree with NS on this point.

NS Statement	Coal Shippers Statement
<p><u>An optimally functioning regulatory environment should result in relatively few rate cases filed, as the Interstate Commerce Commission prophesized in 1986. 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. 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.</u>²</p>	<p><i>[C]oal shippers and carriers can and do make reasonably accurate assessments of their positions, and likely case outcomes, using the SAC rules and precedents in place today. That is the principal reason why the number of coal rate cases filed at the Board has decreased in recent years. Fewer cases fulfill one of the principle objectives the ICC emphasized when it initially adopted the Coal Rate Guidelines in 1985 – establishing a set of guidelines that would assist coal shippers and coal railroads in negotiating, rather than litigating, coal rate disputes.</i>³</p>

¹ Opening Comments, at 4.

² Opening Comments, at 4.

³ Comments of Coal Shippers, STB Ex Parte No. 733, at 57-58 (filed Aug. 1, 2016) (“Coal Shipper Comments”).

Thus, the relatively few rate cases filed actually should be construed as evidence that the STB's current rate regulatory regime is successful. Additional reforms would only risk disrupting this optimal regulatory environment.⁴ Accordingly, the STB must remain committed to the sound economic principles underlying its rate regulatory regime pursuant to its statutory mandate "to minimize the need for Federal regulatory control over the rail transportation system."⁵

A. Alternatives for Carload Shippers

The RCC and the Joint Carload Shippers urge the STB to "adopt a meaningful alternative to SAC for carload traffic and find ways to make SAC cases more accessible to carload shippers . . . by reducing the duration, cost, and complexity of SAC cases."⁶

As a preliminary matter, NS notes that the substantive reforms envisioned by the RCC and the Joint Carload Shippers are clearly beyond the procedural scope of this proceeding.⁷

However, given the nature of the RCC's and the Joint Carload Shippers' comments, NS takes this opportunity to briefly summarize the foundational economic principles of Constrained Market Pricing ("CMP"): (1) demand-based differential pricing; and (2) contestable markets.⁸

⁴ See Coal Shipper Comments, at 5, 56-58.

⁵ 49 U.S.C. § 10101(2).

⁶ Comments of RCC, STB Ex Parte No. 733, at 1-2 (filed Aug. 1, 2016) ("RCC Comments"); Comments of Joint Carload Shippers, STB Ex Parte No. 733, at 3-4 (filed Aug. 1, 2016) ("Joint Carload Shipper Comments").

⁷ See Section 11(c), Act.

⁸ *Coal Rate Guidelines, Nationwide*, STB Ex Parte No. 347 (Sub-No. 1), 1985 ICC LEXIS 254, at *13-14 (ICC served Aug. 8, 1985). CMP establishes four constraints on the pricing freedom of railroads: (1) revenue adequacy; (2) management efficiency; (3) stand-alone cost; and (4) phasing. *Id.* at *35-36.

Shipping by carload versus by unit train does not affect the necessity of complying with these economic principles.⁹

First, demand-based differential pricing. Differential pricing is required by the cost structure of the railroad industry.¹⁰ Because railroads exhibit significant economies of scope and density, their long-run marginal costs are less than their long-run average costs (with the difference between marginal costs and average costs, the “unattributable costs”).¹¹ “Any means of allocating these [unattributable] costs among shippers other than actual market demand is arbitrary and may not permit a carrier to cover all of its costs,” with devastating consequences for both railroads and shippers.¹² Thus, in order for railroads to provide and maintain high-quality rail service, unattributable costs must be allocated among shippers in inverse relation to their demand elasticity—meaning, a higher mark-up above costs in price is borne by the shippers who are relatively less price-sensitive.¹³ Indeed, Congress has recognized that all shippers—even shippers lacking competitive alternatives—benefit when railroads are permitted to engage in differential pricing:

⁹ See, e.g., *Ashley Creek Phosphate Co. v. Chevron Pipe Line Co., et al.*, 1991 MCC LEXIS 11, at *9 (ICC served Feb. 1, 1991) (“We continue to believe that the SAC test may be appropriate in pipeline cases since its underlying economic principles are as valid in establishing efficient prices for pipelines as for railroads . . .”).

¹⁰ *Guidelines*, at *14.

¹¹ *Id.* at *14-15.

¹² *Id.* at *15 (“This is because non-demand-based cost apportionment methods do not necessarily reflect the carrier’s ability (or inability) to impose the assigned allocations and cover its costs. Thus, they frequently ‘over-assign’ or ‘under-assign’ the carrier’s unattributable costs to particular services. If a carrier sought to apply the formula price to all of its traffic, it would lose that traffic for which the demand could not support the price assigned. In that event, the remaining shippers might be required to pay a larger portion of the carrier’s unattributable costs because they would lose the benefit of sharing these costs with the lost traffic.”).

¹³ *Id.* at *16-17.

In the absence of the regulatory flexibility which permits differential pricing, all shippers would be harmed. If traffic which moved at low rates were forced to pay higher rates, the traffic would disappear to other modes. When the traffic moved to another mode, the contribution to fixed cost made by that traffic would also disappear. The result is that the remaining commodities would have to make up for the fixed cost formerly paid by the traffic which moved to another mode, resulting in higher rates for the remaining traffic.¹⁴

The SAC Test “provides an appropriate analytical tool for determining whether a return on noncompetitive traffic ‘properly reflects the high demand for the service, but is not set at an unreasonably high or “monopoly” level.’”¹⁵

Second, contestable markets. A contestable market is defined as “one into which entry is absolutely free and exit absolutely costless. . . . [T]he entrant suffers no disadvantage in terms of production technique or perceived product quality relative to the incumbent.”¹⁶ The rail industry is not contestable.¹⁷ However, the SAC Test omits the costs associated with entry and exit barriers to and from the rail industry, thereby making “market dominant rail traffic contestable in theory.”¹⁸ Accordingly, the SAC Test “approximates the full economic costs, including a normal

¹⁴ H.R. Rep. No. 1035, 96th Cong., 2d Sess. at 39-40.

¹⁵ *Guidelines*, at *12. See also *Potomac Electric Power Co. v. ICC*, 744 F.2d 185, 193-94 (D.C. Cir. 1984) (“We conclude that the Commission’s use of stand-alone cost in determining the reasonableness of the rates of railroad with inadequate revenues for noncompetitive traffic is an appropriate implementation of differential pricing.”).

¹⁶ William J. Baumol, *Contestable Markets: An Uprising in the Theory of Industry Structure*, THE AMERICAN ECONOMIC REVIEW 4-5 (Mar. 1982).

¹⁷ *Guidelines*, at *22 (“[E]ntry entails a long and tedious process of buying up parcels of land, generally requiring powers of eminent domain (which, in turn, requires some government intervention). Engineering and building a railroad line also require considerable time and expense. . . . [E]xit from the industry would be difficult by the standards of many other industries: heavy sunk costs, often financed with debt, are incurred to serve a specific market, without the opportunity to transfer them to other markets easily. While bridges, ballast, rails, and ties can be moved only at great expense.”).

¹⁸ *Id.* at *23.

profit, that need to be met for an efficient producer to provide service to the shipper(s) identified.”¹⁹

Regardless of how the STB proceeds with respect to carload shippers, CMP with its core tenets of demand-based differential pricing and contestable markets must remain the foundation of the STB’s rate regulatory regime.²⁰

B. Evidentiary Standardization

In its Opening Comments, NS strongly objected to the STB’s standardization proposal as it would: (1) undermine the sound economic principles of the SAC Test; (2) tilt the playing field in favor of one party; (3) not yield appreciable time savings; and (4) contravene the procedural focus of this proceeding.²¹

The RCC, the Coal Shippers, and the Joint Carload Shippers concur.²² As the Joint Carload Shippers explain, standardization “has a potentially significant trade-off that could bake real-world inefficiencies into the operations of a theoretically more efficient SARR, thereby undermining a critical objective of the SAC analysis.”²³ And as the Coal Shippers note, standardization would “depriv[e] coal shippers of their due process rights to a fair hearing.”²⁴ The Coal Shippers urge the Board “not [to] use this proceeding as a subterfuge for making

¹⁹ *Id.* at *23.

²⁰ *See* 49 U.S.C. § 10101(1) (“[I]t is the policy of the United States Government to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail”).

²¹ Opening Comments, at 43-44.

²² The STB’s standardization proposal was not addressed in the comments filed by Samuel J. Nasca, for and on behalf of SMART/Transportation Division, New York State Legislative Board.

²³ Joint Carload Shipper Comments, at 17.

²⁴ Coal Shipper Comments, at 5, 54-55.

changes to substantive SAC rules under the guise of asserted expedition.”²⁵ The Coal Shippers also emphasize that “[a]ny change in the Board’s standards for developing SAC evidence will cause uncertainty” and “will not assist coal shippers in predicting case outcomes,” undermining one of the principle objectives of the *Guidelines*.²⁶

Thus, there is broad agreement that evidentiary standardization would contradict the sound economic principles underlying the SAC Test, significantly disadvantage a party to a SAC Case, and exceed the scope of this proceeding. The STB should abandon this idea.

IV. STB MUST REJECT PROPOSALS THAT WOULD NOT MINIMIZE THE BURDEN ON RAIL CARRIERS TO DEVELOP AND MAINTAIN ACCURATE COST INFORMATION, PURSUANT TO ITS STATUTORY MANDATE.

The STB has a statutory mandate to “ensure the availability of accurate cost information in regulatory proceedings, *while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information.*”²⁷ This statutory mandate must guide the STB as it assesses the Joint Carload Shippers’ request for the STB to weigh the burdens on the defendants from a SAC Case against those on the complainants.²⁸

A. Intact Relational Databases

The Joint Carload Shippers urge the STB to require railroads to provide traffic and revenue data “in an intact relational format” “with functioning links, and accompanied by complete decoders,” claiming that it is “nonsensical” for complainants to rebuild this relational

²⁵ *Id.* at 5, 53-54.

²⁶ *Id.* at 5, 56-58.

²⁷ 49 U.S.C. § 10101(13) (emphasis added).

²⁸ *See* Joint Carload Shipper Comments, at 9.

database from the flat files produced by railroads when railroads already maintain such a database in the ordinary course of business.²⁹

However, NS does not maintain any such relational database in the ordinary course of business. NS maintains its data to run its railroad—not for a potential rate case.

It would be an inordinate distraction from the core business of running a railroad to require NS to invest to create and maintain such a relational database for future rate cases, especially given that a complainant bears the burden of proof in any rate case. Consider this staggering statistic: on average, NS has approximately 2.5 million car movements per day. Even the seemingly simple task of linking particular car movements to the associated waybill can be complicated by corporate name changes and reorganizations; and, identifying and linking other relevant data for a SAC Case would be even more difficult. Accordingly, creating and maintaining a relational database for all traffic movements on NS would be a massive undertaking requiring significant time, effort, and coordination from various internal business departments.

Furthermore, any benefit from such a relational database would not outweigh its significant burdens. NS does not need a relational database to conduct its day-to-day operations. This database would exist solely for use in a potential future rate case. And as noted in NS's Opening Comments, NS did not have to litigate a SAC Case to completion for ten years from 2004 to 2014.³⁰

²⁹ Joint Carload Shipper Comments, at 3-4.

³⁰ Opening Comments, at 38.

B. Filing Data Regularly

In its Opening Comments, NS strongly objected to the STB's proposal to collect and maintain data from the railroads on an ongoing basis, because it would impose an enormous burden on the STB and railroads and would serve no useful purpose for rate cases.³¹

The Joint Carload Shippers attempt to minimize the burden on the STB and railroads by claiming that “[m]ost of the data collected in the waybill sample is also data sought and used in SAC cases.”³² The Joint Carload Shippers also allege that any additional information necessary for a SAC Case “is contained in the same databases in which the waybill data resides, and would merely require the railroads to capture and produce these linked tables along with their current waybill reporting.”³³

As an initial matter, the data submitted for the Waybill Sample constitutes an extremely small subset of the data relevant to a SAC Case. Even the Joint Carload Shippers indirectly admit this fact. Messrs. Crowley and Mulholland identify about 10 categories of data collected in the Waybill Sample that are also sought and used in SAC Cases.³⁴ However in Complainant's First Set of Discovery Requests to Defendant in *DuPont*, as attached as Exhibit No. 3 to the Joint Carload Shipper Comments, DuPont identified about *45 categories of data* in Request for Production No. 20. Admittedly, there is some overlap. But the fact remains that the data relevant to a SAC Case far exceed the data required for the Waybill Sample.

Moreover, any additional data relevant to a SAC Case are not contained in the same database as the data for the Waybill Sample. The Joint Carload Shippers again rest their

³¹ See Opening Comments, at 37-38.

³² Joint Verified Statement of Thomas D. Crowley and Robert D. Mulholland, Exhibit No. 1, Joint Carload Shipper Comments, at 7 (“Crowley/Mulholland VS”).

³³ Joint Carload Shipper Comments, at 8-9.

³⁴ Crowley/Mulholland VS, at 7 n5.

arguments on the unfounded assumption that NS maintains a universal relational database. As explained above, this simply is not true.

And unlike the Waybill Sample, the benefits of data collection for rate cases do not outweigh its burdens. First, the Waybill Sample has a variety of uses for a broad spectrum of users, including the STB itself, federal agencies, state governments, railroads, and transportation consultants.³⁵ In contrast, the data proposed to be collected by the STB from railroads for rate cases have only one potential use (and only if a rate case complaint is ever filed). Second, the proposed data collection would impose enormous burdens on the STB and railroads: as discussed in NS's Opening Comments, the STB would need to collect data on the railroads' entire networks and determine how to standardize this data.³⁶ Even after any initial data collection, additional burdens would be triggered upon the filing of a SAC Case complaint because the data would need to be tailored to the actual SARR at issue.³⁷

³⁵ Economic Data: Waybill, Industry Data, SURFACE TRANSPORTATION BOARD, https://www.stb.dot.gov/stb/industry/econ_waybill.html ("The STB uses the Waybill Sample data for projects, analyses, and studies. Federal agencies use the Waybill Sample as part of their information base. The States use it as a major source of information for developing state transportation plans. Railroads are entitled to obtain Waybill data for movements they participated in. Waybill data are used by transportation practitioners, consultants and law firms with formal proceedings before the STB or State Boards. There is also a group designated as 'other users'.").

³⁶ See Opening Comments, at 37-38 (describing the burdens from collecting data on the defendant's entire rail network and determining how to standardize this data).

³⁷ See Opening Comments, at 37-38.

V. STB SHOULD NOT PROHIBIT CONTINUED USE OF MULTIRAIL FOR CARLOAD SARRS.

In its Opening Comments, NS identified no issues demanding STB resolution related to non-public software, given that Rail Traffic Controller (“RTC”), MultiRail, and most other software that would be used in a SAC Case are available to the general public, albeit for a fee.³⁸

The Joint Carload Shippers argue that use of MultiRail is prejudicial to complainants largely because of its proprietary nature. The Joint Carload Shippers allege that a complainant is “required simultaneously to learn new software during the same time in which it is expected to develop rebuttal evidence.”³⁹ At minimum, the Joint Carload Shippers request that the party introducing the software provide the other party with a license “for the same version and functionality of the software that the party has used to develop its evidence.”⁴⁰

As an initial matter, NS notes that MultiRail currently is one of the best ways to design and test classification and blocking plans for carload networks; and, classification and blocking plans are critical components of the overall operating plan for a carload network. The key to a viable operating plan in a carload rate case is that each car gets from its origin to its connections to its destination. MultiRail is a modeling tool that accounts for each carload to ensure that it has the necessary classification and blocking plans for this movement; and, MultiRail can develop the necessary classification and blocking plans for a large number of carloads.⁴¹

³⁸ Opening Comments, at 38.

³⁹ Joint Carload Shipper Comments, at 10.

⁴⁰ See Joint Carload Shipper Comments, at 25.

⁴¹ *E. I. DuPont de Nemours & Co. v. Norfolk Southern Railway Co.*, STB Docket No. NOR 42125, at *65-66 (served Mar. 24, 2014) (“MultiRail computer software is a modeling tool that generates car classification and blocking service plans for a selected traffic group, based upon the characteristics of the traffic, the railroad’s network configuration, and customer service requirements. Operating experts are capable of developing the costs for such blocking train service plans without the assistance of software, but the use of software like MultiRail can be

Furthermore, NS respectfully submits that the Joint Carload Shippers mischaracterize the situation. A complainant has total control over whether the defendant will introduce “new software” in its reply, as the STB confirmed in *SunBelt Chlor Alkali Partnership v. Norfolk Southern Ry. Co.*:

Sunbelt is correct that no party is required to use MultiRail or similar software to develop a SAC presentation involving carload traffic, and that adopting the classification and blocking plan of the incumbent railroad, with the necessary traffic and facilities sufficiently adjusted for volume differences (among other things), is one way to show that the proper blocking and classification is occurring at yards on a SARR. Thus, Sunbelt is also correct that MultiRail is not “necessary,” in the sense that it is not the only approach a party can use to account for blocking and classification. Even though MultiRail is not required, however, the Board has found that it is an acceptable way to address blocking and classification for a predominantly carload SARR. And at the time NS filed its reply, the record contained no proposed method from Sunbelt of accounting for blocking and classification, because Sunbelt did not include one on opening. NS, having to produce the first analysis of this issue in this proceeding, was free to choose among appropriate approaches, including MultiRail. We note, however, that if Sunbelt had developed a blocking plan without using MultiRail, NS would have needed to respond to that blocking plan instead of creating its own.⁴²

If a complainant truly wants to avoid simultaneously learning new software while developing rebuttal evidence, it simply needs to submit its own carload blocking and classification plan, consistent with STB precedent, in its opening evidence. And, although

used to facilitate this process. MultiRail is used to help develop a comprehensive blocking and train service plan, which then establishes the requirements for the network of yards and other facilities necessary to serve the selected traffic.”).

⁴² STB Docket No. NOR 42130, 2016 STB LEXIS 189, at *16-17 (STB served June 30, 2016). *Id.* at *22 n10 (“What is critical is that the complainant shows in some manner that it includes the costs of all necessary facilities and services, and provides evidentiary support for these costs. This inclusion of costs, with evidentiary support, could satisfy the SARR’s need for blocking in a carload system without adopting the blocking and classification of the incumbent railroad and without using a program such as MultiRail to model the blocking and movement of each car. Here, Sunbelt did not include the costs associated with the necessary facilities and services.”).

MultiRail is a permissible way to develop this plan, the complainant is not required to use MultiRail—or any software at all, for that matter.⁴³ Again, the only requirement is that the complainant’s operating plan must account for the complete movement of each and every carload from origin to destination. How this accounting occurs is up to the complainant.

Even if the complainant wishes to use MultiRail, it is fully capable of doing so. Despite the Joint Carload Shippers’ claims, Oliver Wyman licenses MultiRail not just to railroads but to the public at large, albeit for a fee. Depending on the cost-benefit analysis, a shipper and/or its consultants could invest in a MultiRail license in order to better learn the software and prepare for future carload SARR rate cases.

Finally, there is no need for the party introducing the software to provide a full license to the other party. As noted in NS’s Opening Comments, the STB resolved this issue in *DuPont*, acknowledging that the STB could simply convene a technical conference, with Board staff and all parties present, to evaluate the party’s use of the software.⁴⁴

Moreover, the parties to a rate case pay for their own licenses to use Microsoft Access, Microsoft Excel, and RTC. Considered in this context, the Joint Carload Shippers’ request is patently absurd. The complainants’ reliance upon several publicly available software programs (like Access, Excel, and RTC) to develop their opening evidence creates no obligation for them to pay for full licenses for the defendants to use these software programs for their reply. MultiRail should be no different.

⁴³ See *supra* note 42.

⁴⁴ See Opening Comments, at 47-48.

As a legal matter, there is nothing unfair about the well-established American Rule that each party to litigation must bear its own expenses.⁴⁵ The STB and its predecessor have consistently applied the American Rule to agency proceedings,⁴⁶ including rate cases. For example in *Carolina Power & Light v. Norfolk Southern Ry. Co.*, the STB rejected complainant's request to be reimbursed by defendant for filing fees, finding that the STB lacked authority to order such a shifting of litigation expenses.⁴⁷ Thus, consistent with STB practice and precedent, defendants' use of the publicly available MultiRail should create no obligation for them to pay for full licenses for the complainants to use this software program.⁴⁸

VI. STB SHOULD NOT RELY ON REQUESTS FOR ADMISSION TO ANSWER THE ULTIMATE LEGAL QUESTION OF WHETHER A RAIL CARRIER IS MARKET DOMINANT.

In its Opening Comments, NS supported a limited, voluntary, and non-precedential use of requests for admission.⁴⁹

⁴⁵ See, e.g., *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 800-801 (D.C. Cir. 1997) (explaining that the American Rule requires each party to bear its own litigation costs, and absent clear, exceptional statutory authorization, parties to agency litigation may not recover their litigation expenses from opposing parties); *PCI/RCI v. United States*, 37 Fed. Cl. 785, 788 n2 ("For over 200 years, United States courts have generally required each party to bear its own litigation costs.").

⁴⁶ See, e.g., *KCS Ry. Co. – Abandonment Exemption – Line in Warren County, MS*, STB Docket No. AB-103 (Sub-No. 21X) (STB served May 20, 2008) (noting that the STB has "consistently rejected requests for [litigation] costs in the past"); *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).

⁴⁷ 7 S.T.B. 235, 268 (2003). See also *CF Industries v. Koch Pipeline Co., L.P.*, 4 S.T.B. 647, 647 n2 (2000) (stating that the STB has "no authority" to award litigation costs, in this case, attorneys' fees).

⁴⁸ However, NS believes that the party introducing the software could be encouraged to provide cost-free access to a read-only version of such software—as NS provided to the complainants and STB in *DuPont* and *Sunbelt*. See Opening Comments, at 48.

⁴⁹ See Opening Comments, at 39-40.

The Joint Carload Shippers argue that requests for admission can expedite market dominance analyses, claiming that “[m]arket dominance is not always contested. However, sometimes a defendant waits until its reply evidence to make this declaration.”⁵⁰ The Joint Carload Shippers believe that such conduct is per se unreasonable and should be sanctioned.⁵¹ The Joint Carload Shippers also allege that defendants’ common objections to market dominance requests for admission (requires a special study and/or calls for a legal conclusion) are “inappropriate” under the Federal Rules of Civil Procedure (“FRCP”).⁵²

Actually, the Joint Carload Shippers’ proposed use of market dominance requests for admission is inappropriate. Under Rule 36(a)(1) of the FRCP, a request for admission can be served with respect to “facts, the application of law to fact, or opinions about either; and the genuineness of any described documents.” In *Morgan v. Demille*, the Nevada Supreme Court defined the proper use of a request for admission:

*[T]he procedure for obtaining admissions of fact is to be used to obtain admission of facts as to which there is no real dispute and which the adverse party can admit cleanly, without qualifications. Typical of such facts are delivery, ownership of an automobile, master and servant relationship, and other facts of that nature which are not in dispute and of which an admission will greatly facilitate the proof at trial. It is not intended to be used to cover the entire case and every item of evidence.*⁵³

Similarly in *Lakehead Pipe Line Co. v. American Home Assurance Co.*, the District Court of Minnesota held that “a request for admission which involves a pure matter of law, that is,

⁵⁰ Joint Carload Shipper Comments, at 14.

⁵¹ *Id.* at 16.

⁵² *Id.* at 15-16.

⁵³ 799 P.2d 561, 675 (Nev. 1990) (emphases added) (upholding the defendant’s refusal to respond to a request which asked the defendant “to admit that her negligence was the sole cause of the collision and that respondent was liable for any damages proximately caused to appellants as a result of the collision”).

requests for admissions of law which are related to the facts of the case, are considered to be inappropriate.”⁵⁴

Accordingly, while the FRCP would permit the following request for admission: challenged rates exceed 180% of the variable costs of providing the transportation to which the challenged rates apply, the FRCP would *not* permit the following request for admission: defendant is market dominant. A party cannot use a request for admission to whittle the STB’s entire market dominance analysis into a binary response to a blanket statement designed to cover every item of evidence relevant to the market dominance analysis. As the STB only has statutory jurisdiction to assess the reasonableness of rates where a railroad has market dominance,⁵⁵ this portion of a SAC Case deserves a careful, accurate, and nuanced analysis.⁵⁶

And, contrary to the Joint Carload Shippers’ assertions, it is entirely proper under the FRCP for the answering party to object on the grounds that the request calls for a legal conclusion,⁵⁷ requires a special study,⁵⁸ or relates to a matter in dispute.⁵⁹

Furthermore, the Joint Carload Shippers are wrong to impute that a defendant per se acts unreasonably, warranting sanctions, if it waits until its reply to concede market dominance. Although a defendant has some familiarity with the shipper and its competitive alternatives from conducting marketing and commercial negotiations and transactions in the ordinary course of

⁵⁴ 1997 U.S. Dist. LEXIS 22052, at *10 (D. Minn. Dec. 5, 1997).

⁵⁵ 49 U.S.C. § 10701(d)(1).

⁵⁶ The STB already has taken significant steps to streamline the market dominance analysis by excluding evidence regarding product and geographic competition. *See generally Market Dominance Determinations – Product & Geographic Competition*, 3 S.T.B. 937 (1998).

⁵⁷ *See Lakehead Pipe Line*, *supra* note 54.

⁵⁸ *See* FED. R. CIV. P. 36(a)(4) (permitting a party to refuse to admit or deny based on lack of knowledge or information under certain circumstances).

⁵⁹ *See* FED. R. CIV. P. 36(a)(5) (permitting a party to object, at least in part, “on the ground that the request presents a genuine issue for trial”).

business,⁶⁰ a defendant needs to engage in discovery and consult with experts in order to accurately assess market dominance.

VII. STB SHOULD AVOID SETTING IMPRACTICABLE DEADLINES.

A. Motions To Dismiss

In its Opening Comments, NS encouraged the STB to leverage motions to dismiss in response to fundamentally flawed evidence, such as an operating plan which cannot be corrected on reply, or other evidence inconsistent with STB precedent on a major issue, such as the costs borne by the SARR.⁶¹

The Joint Carload Shippers agree that the STB “should require a defendant, who genuinely believes that it cannot ‘correct’ the complainant’s operating plan, to file a motion to dismiss the case.”⁶² The Joint Carload Shippers propose that the STB require defendants to file their motions to dismiss within 30 days after the complainant files its opening evidence.⁶³ The Joint Carload Shippers also propose that the STB either could stay or not stay the procedural schedule during its consideration of a motion to dismiss, although noting that the former option could promote “opportunistic” motions to dismiss to buy more time.⁶⁴

NS respectfully submits that a 30-day deadline for motions to dismiss is impracticable. Complainants’ opening evidence is necessarily detailed; and, it takes defendants more than 30 days to analyze each aspect of this evidence to determine whether it reflects a permissible SARR or contains fundamental flaws. The situation is only complicated when complainants engage in egregious gamesmanship with their evidence, as in *DuPont*. In *DuPont*, NS only determined that

⁶⁰ See Opening Comments, at 26.

⁶¹ See Opening Comments, at 33-35.

⁶² Joint Carload Shipper Comments, at 21.

⁶³ See Joint Carload Shipper Comments, at 21-23.

⁶⁴ See Joint Carload Shipper Comments, at 22-23.

DuPont's Operating Plan was fundamentally flawed after analyzing the proposed SARR's traffic group, traffic volumes, carload service characteristics, yard configurations, yard locomotive fleet, yard staffing, intermodal and automotive facilities, industry track, topographical data, maintenance schedules, and various other factors relevant to running a railroad.⁶⁵ This analysis took NS more than 30 days.

NS's analysis in *DuPont* was significantly complicated by the fact that much of DuPont's evidence was submitted late as Errata. DuPont filed its Opening Evidence with the STB on April 30, 2012. Over two weeks later on May 17, 2012, DuPont proceeded to file Errata of 170 pages (not including voluminous new workpapers). This extensive Errata radically altered numerous elements of DuPont's case-in-chief from its Opening Evidence. Most significantly, the Errata included an entirely new RTC simulation analysis, modeling, and evidence. This placed an immense burden on NS:

NS's team is presently engaged in the time-intensive process of comparing DuPont's Opening Evidence with its "Errata" and workpapers to determine for each section and subsection of the evidence how and to what extent the "Errata" changed DuPont's case-in-chief. NS anticipates it will take significant additional time to fully understand the changes made by DuPont's extensive May 17 submission, and their effects on this case. When they have completed that analysis, NS's consultants and experts must re-start their analyses using DuPont's new evidence (DuPont's Opening Evidence as substantially revised by the "Errata"). The analysis and work done by the NS team over the 17 days following DuPont's filing of its Opening Evidence (particularly those aspects of the case that depend on RTC modeling and evidence) was for naught, because DuPont's "Errata" substituted new RTC runs and evidence. Not only was this a waste of effort and resources, but it also deprived NS of approximately a month (17 days between the filing of the Opening Evidence and the "Errata," plus at least two more weeks to determine how that extensive "Errata" changed

⁶⁵ See, e.g., Reply Evidence of Norfolk Southern Railway Co., Executive Summary, *E. I. DuPont de Nemours & Co. v. Norfolk Southern Railway Co.*, STB Docket No. NOR 42125 (filed Nov. 30, 2012) ("*DuPont* Reply Summary").

DuPont's case-in-chief) of its already-short time to analyze DuPont's evidence and to develop NS's Reply Evidence. NS also lost additional time because it had to re-distribute DuPont's revised evidence and workpapers to NS's numerous and geographically dispersed consultants and experts. All-in-all, NS conservatively estimates that the amount of time it will lose as a result of DuPont's extensive "Errata" will be at least 30 days.⁶⁶

Thus, to the extent that complainants exploit the procedural schedule for a particular SAC Case by filing substantive "Errata" after filing their Opening Evidence, the defendants will definitely require more than 30 days to determine whether a motion to dismiss is warranted.

As a broader point, it is fundamentally unnecessary to impose a specific deadline on when defendants are required to file a motion to dismiss. For example under the Federal Rules of Civil Procedure, a motion to dismiss based on a failure to state a claim on which relief can be granted may be filed *at any time* during litigation.⁶⁷ Defendants already have a keen interest in expediting SAC Cases, given that a SAC Case distracts significant time from the core business of running a railroad. And, defendants also have strong incentives to file a motion to dismiss as soon as possible after the complainant's filing of its opening evidence, in order to secure a ruling on such motion sufficiently before the defendant's deadline for filing its reply evidence, in order to avoid expending time and money on such reply.⁶⁸ As NS noted in its Opening Comments, the

⁶⁶ Norfolk Southern Railway Co.'s Motion for Modification of Procedural Schedule, *E. I. DuPont de Nemours & Co. v. Norfolk Southern Railway Co.*, STB Docket No. NOR 42125, at 3-4 (filed May 24, 2012).

⁶⁷ See FED. R. CIV. P. 12. A defendant only waives its defenses related to lack of personal jurisdiction, improper venue, insufficient process, and insufficient service of process by failing to raise these defenses in a responsive pleading or a pre-answer motion to dismiss. *Id.*

⁶⁸ Under the current schedule for SAC Cases, a defendant must file its reply evidence within 60 days of the complainant's filing of its opening evidence. 49 C.F.R. § 1111.8. See also Opening Comments, at 22 n73 (describing when an extension might be necessary to give the defendant more time to prepare its reply evidence).

critical element in leveraging motions to dismiss is ensuring that the STB rules promptly on such motions.⁶⁹

In considering whether a motion to dismiss should stay the procedural schedule of a SAC Case, it is useful to consider how courts handle this issue. The FRCP are noticeably silent on whether a case (and particularly discovery) should proceed while a motion to dismiss is pending.⁷⁰ As such, many courts simply employ a balancing test.⁷¹ In SAC Cases, discovery is already completed by the time the complainant files its opening evidence. Thus, the burden from not staying a SAC Case is largely borne by the defendant, in the event the motion to dismiss is not granted, because the defendant is on the clock to prepare and submit its reply evidence. NS reiterates that the STB must rule *promptly* on motions to dismiss; otherwise, failure to stay a SAC Case always would unduly prejudice the defendant and, by extension, the STB's decisionmaking process.

NS also maintains that the Joint Carload Shippers' concerns that staying a SAC Case could encourage "opportunistic" motions to dismiss are unfounded. As noted above, defendants have a strong interest in expediting SAC Cases, given that a SAC Case distracts significant time from the core business of running a railroad. For example in *DuPont*, NS only requested extensions to the procedural schedule when forced to do so by DuPont's untimely and

⁶⁹ See Opening Comments, at 33-34.

⁷⁰ Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay Discovery When a Motion to Dismiss is Pending*, 47 WAKE FOREST L. REV. 71, 73 (Mar. 2012). The primary goal of the FRCP to "secure the just, speedy, and inexpensive determination" creates a clear tension in this context: to secure a speedy determination, the case should not be stayed; but, to secure an inexpensive determination, the case (and particularly discovery) should be stayed if the motion to dismiss significantly narrows or wholly eliminates the case. *Id.*

⁷¹ *Id.* at 85 (considering "(1) the interest of the plaintiff in proceeding expeditiously with the civil action as balanced against the prejudice to plaintiffs if a delay; (2) the burden on defendants; (3) the convenience of the court; (4) the interests of persons not parties to the civil litigation; and (5) the public interest").

fundamentally flawed evidence and the STB's slow motions practice.⁷² And even assuming opportunistic motions to dismiss were a legitimate concern, the STB cannot impose the sanctions proposed by the Joint Carload Shippers.⁷³ (1) the STB is not authorized by statute to shift attorneys' fees and depart from the American Rule;⁷⁴ and (2) extending the period for rate prescriptions undermines the sound economic principles of the SAC Test.⁷⁵

B. Core SAC Data

The Coal Shippers argue that, in conjunction with any pre-filing notice requirement, defendants should be required to produce "the requested case-specific Core SAC Data" no later than 60 days after the pre-filing notice is submitted to the STB, akin to the requirement for merger applicants to make their traffic tapes available to interested parties under 49 C.F.R. 1180.4(b)(4)(iii).⁷⁶ If no pre-filing requirement is adopted, the Coal Shippers alternatively argue that defendants should produce the Core SAC Data within 60 days of the filing of the complaint, alleging that defendants generally "delay" production of such data until the end of discovery.⁷⁷

As a preliminary matter, a defendant should not be required to expend the considerable time and money on discovery, with the corresponding distraction from the core business of

⁷² See Opening Comments, at 22 n 73.

⁷³ See Joint Carload Shipper Comments, at 22.

⁷⁴ See Opening Comments, at 40.

⁷⁵ See Opening Comments, at 45-46.

⁷⁶ See Coal Shipper Comments, at 38-39.

⁷⁷ *Id.* at 3-4.

running a railroad, before a rate case complaint is even filed.⁷⁸ This conclusion is consistent with the majority of STB precedent rejecting pre-complaint discovery.⁷⁹

And, the Coal Shippers' reliance on 49 C.F.R. 1180.4(b)(4)(iii) is misplaced for two reasons. First, rate cases are not merger cases. In a merger case, the applicant railroads trigger the requirement to produce traffic tapes; and, they can choose to avoid this requirement by not merging. In contrast, no railroad voluntarily submits itself to a rate case. Accordingly, the railroad's production requirements in discovery should not be triggered prior to the complainant's actual filing of the complaint. Second, in *Major Rail Consolidation Procedures*, the STB drew a sharp distinction between early access to traffic tapes and broad pre-application discovery, clarifying that it was not proposing the latter because it could "impede the prospective applicants in the preparation of their application."⁸⁰ The responsive Core SAC Data is more akin to broad pre-complaint discovery. Unlike discrete traffic tapes, responsive Core SAC Data requires significant time, effort, and inter-departmental coordination to compile and produce.

In fact, this is why defendants generally need the full discovery period to produce the Core SAC Data—due to the significant time, effort, and inter-departmental coordination required to produce this complex and massive data. Without providing an exhaustive list, at minimum, the following departments would need to be involved in NS's production of Core SAC Data:

⁷⁸ See also Opening Comments, at 27-28.

⁷⁹ See, e.g., *Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings*, STB Ex Parte No. 527, 1 S.T.B. 754, 772 (STB served Oct. 1, 1996) (rejecting a proposal for petitioners to obtain discovery from the railroad before a petition to revoke is filed, partly because the "proposed rules would encourage parties to use discovery for fishing expeditions"); *Revision of Feeder Railroad Development Rules*, STB Ex Parte No. 395 (Sub-No. 2), 1991 ICC LEXIS 177, at *10-11 (ICC served July 24, 1991) (rejecting a proposal to provide any basis for pre-application discovery).

⁸⁰ STB Ex Parte No. 582 (Sub-No. 1), 2001 STB LEXIS 546, at *122 (STB served June 11, 2001).

transportation planning for train movement and car event data; engineering for track charts and Geographic Information System data; marketing for transportation contracts and business forecasts; locomotive control for locomotive and railcar leases; equipment planning for Authorizations for Expenditures; joint facilities for trackage rights agreements; accounting for trackage rights payments; real estate for valuation maps and land deeds; and information technology to ensure that all data are readable and functional. Each of these departments has its own database capabilities, recordkeeping requirements, and archival systems. And, each of these departments has its own day-to-day operational responsibilities with respect to the core business of running a railroad. Accordingly, defendants should not be subject to impracticable and arbitrary deadlines for the production of Core SAC Data.

VIII. STB SHOULD RECOGNIZE THAT COMPLAINANTS OFTEN ENGAGE IN GAMESMANSHIP IN THEIR OPENING EVIDENCE, THUS FORCING RAILROADS TO CORRECT SUCH EVIDENCE ON REPLY.

In its Opening Comments, NS supported stricter enforcement of the limits on rebuttal evidence set forth in *Duke Energy Corp. v. Norfolk Southern Ry. Co.*, 7 S.T.B. 89, 100 (2003), recommending that the STB should promptly rule on appropriate motions to strike and impose monetary or terminating sanctions.⁸¹

The Joint Carload Shippers blame the “tactical approaches recently employed by the railroads in which the railroads disclose new information and raise new arguments and theories in Reply to which the complainant must respond in Rebuttal,” claiming that complainants “must base their Opening evidence on precedent.”⁸² Similarly, the Coal Shippers state that defendants “raise hundreds, if not thousands, of issues in their SAC reply filings.”⁸³

⁸¹ See Opening Comments, at 46-47.

⁸² See Joint Carload Shipper Comments, at 21-26 (“The catch-22 for the complainants in Rebuttal is clear: they must either accept the new idea, which will undoubtedly result in

The Joint Carload Shippers and the Coal Shippers have it all wrong, based on NS's experience. The reply is the railroads' only opportunity to submit evidence and respond to the complainants' opening evidence. And, the number of issues raised by a railroad on reply directly depends on the quality of the complainant's case-in-chief, including how closely it adheres to established STB precedent. Long replies and longer rebuttals are merely a symptom of the underlying disease—opening evidence riddled with deficiencies and gamesmanship.

DuPont illustrates this point:

DuPont's failure to adhere to established precedent, gamesmanship with evidence, and distortions underlie its astonishing claim that SAC revenues exceed costs by more than \$20 billion. . . . The length and detail of NS's Reply Evidence and Argument are attributable to the necessity both of explaining DuPont's errors and failures and of correcting and rectifying them—category-by-category and issue-by-issue.⁸⁴

Thus, the defendant is placed in a Catch-22 from the complainant's opening evidence which contradicts established STB precedent: either the defendant must accept the complainant's unfounded opening evidence, which will undoubtedly result in artificially low costs for the SARR, or the defendant must correct such evidence on reply with arguments and theories which reflect established STB precedent and which the complainant inevitably will cast as "new evidence."

Below is a list of just some of the issues where DuPont failed to adhere to established precedent and which NS was required to correct to safeguard the integrity of the STB's decisionmaking process:

increased SAC, or develop comprehensive Rebuttal counterarguments regarding the necessity of the new SAC components and defend the Opening evidence and the precedent on which it is based.").

⁸³ Coal Shipper Comments, at 60.

⁸⁴ *DuPont* Reply Summary, at 1-2.

- “[T]he methodology that DuPont used to develop its train service plan failed to capture tens of thousands of NS trains in which DuPont’s selected traffic moved in the Base Year. *See FMC*, 4 S.T.B. at 736-37 (rejecting complainant’s operating plan in part for understating the number of trains).”⁸⁵ Accordingly in its Operating Plan on Reply, NS developed a train service plan “that provides for the complete movement of every carload in the DRR’s selected traffic group (and associated empty car movements) across the DRR network.”⁸⁶
- “[I]t is physically impossible for the DRR as constructed by DuPont to pick-up or set-off cars at customer facilities—meaning that the DRR by definition cannot provide service that is equal to or better than that provided by NS in the real world. *See CP&L*, 7 S.T.B. at 256 (rejecting complainants operating plan in part for failure to account for all elements of service to origins).”⁸⁷ Accordingly, in its Operating Plan on Reply, NS developed a “local train service plan that provides pick ups and set offs at all customer facilities and interchange locations.”⁸⁸
- “DuPont did not construct a single intermodal facility anywhere on the DRR’s 7,300 mile proprietary rail system. . . . It therefore could not handle the volumes of intermodal shipments for which it has claimed revenues. *See CP&L*, 7 S.T.B. at 256 (rejecting complainants operating plan in part for failure to account for all facilities such as staging and gathering yards needed to serve origins)”⁸⁹ On Reply, “NS’s Operating Plan for intermodal traffic accounts for all of the services, facilities, and time required to handle that traffic in accordance with customer requirements.”⁹⁰
- “DuPont’s operating plan is replete with assumptions that violate the terms of NS’s intercarrier agreements which were produced to DuPont in discovery. *See CP&L*, 7 S.T.B. at 255 (noting that operating plan cannot change service without evidence the “connecting carriers . . . would not object”) (*citing West Texas*, 1 S.T.B. at 667); *Xcel*, 7 S.T.B. at 610. For example DuPont assumes that the DRR would enjoy the benefits of those agreements (including such items as pre-blocking of cars prior to their interchange to the DRR, and fueling and inspection of locomotives prior to their receipt by the DRR from foreign roads) without acknowledging and making provisions for any obligations to provide ‘reciprocal’ services to connecting carriers.”⁹¹ On Reply, NS detailed the “many

⁸⁵ *DuPont* Reply Summary, at 6.

⁸⁶ Reply Evidence of Norfolk Southern Railway Co., Narrative Sections I Through III-B (Volume 1 of 5), *E. I. DuPont de Nemours & Co. v. Norfolk Southern Railway Co.*, STB Docket No. NOR 42125, at III-C-155 (filed Nov. 30, 2012) (“*DuPont* Reply Volume 1”).

⁸⁷ *DuPont* Reply Summary, at 8.

⁸⁸ *DuPont* Reply Volume 1, at III-C-155.

⁸⁹ *DuPont* Reply Summary, at 10.

⁹⁰ *DuPont* Reply Volume 1, at III-C-169.

⁹¹ *DuPont* Reply Summary, at 11-12.

ways in which DuPont's Operating Plan violates the terms of NS's intercarrier agreements DuPont's failure to take into account the 'reciprocal' nature of interline rail operations results in a substantial understatement of the costs (in time and resources) required to serve the DRR's selected traffic group."⁹²

- "DuPont underestimated the costs of land acquisition by more than \$1 billion, a feat that it managed to accomplish in large part by embracing a June 1, 2009 date of valuation for the land necessary for the DRRs ROW and other facilities which is the very same day on which the DRR is to start operations. But the correct valuation date is mid-2007, as specified in DuPont's own construction schedule for the DRR. . . . Cf. *McCarty Farms*, 2 S.T.B. & n.132 (adjusting land valuation data back to start of construction period); *Arizona Pub. Serv. Co. v. ATSF*, 2 S.T.B. 367, 387 & n.55 (valuing land to provide for one-year construction period prior to start of service). DuPont also ignored Board precedent and valued easements at historic costs rather than at current market values. See *Xcel*, 7 S.T.B. at 669. NS's Reply Evidence uses July, 2007, as the correct valuation date, which reflects land prices at the time that the DRR would have to acquire it and not the severely depressed prices that resulted from the significant economic downturn of 2008-2010."⁹³
- "DuPont generated unrepresentative and unrealistically low roadbed preparation costs by rejecting the well-respected RS Means average unit costs accepted by the Board in numerous prior SAC cases in favor of costs derived from a small, isolated line relocation project for a short-line railroad in southern Tennessee. See, e.g., *AEP Texas, Xcel*."⁹⁴ "NS's Reply Evidence demonstrates that this "Trestle Hollow" project was small and atypical, and that its unit costs cannot be reliably extrapolated to a large project, let alone a 7,300 mile SARR. The size, scope, and geographic and topographic diversity of the DRR make it much more amenable to use of RS Means average costs than to extrapolation from any single project."⁹⁵
- "DuPont used a tunnel construction cost per foot derived from a 1980 Interstate Commerce Commission decision in *Coal Trading*. . . . But DuPont has ignored another Board precedent that recognizes that *Coal Trading* dealt with costs for timber-lined tunnels that are inapplicable to the steel and concrete-lined tunnels that would be required for most DRR tunnels, and that it is not reasonable proxy for tunnels costs. See *AEPCO 2011*, STB Docket No. 42113, at 110-11. NS's Reply Evidence contains five separate

⁹² See Reply Evidence of Norfolk Southern Railway Co., Narrative Sections III-C Through III-D (Volume 2 of 5), *E. I. DuPont de Nemours & Co. v. Norfolk Southern Railway Co.*, STB Docket No. NOR 42125, at III-C-68 – III-C-91 (filed Nov. 30, 2012) ("*DuPont* Reply Volume 2")

⁹³ *DuPont* Reply Summary, at 13.

⁹⁴ *DuPont* Reply Summary, at 13-14.

⁹⁵ *DuPont* Reply Volume 1, at I-64-65 (internal cross-references omitted).

tunnel classifications and related construction specifications with costs for each to account for the varied fixed and variable components of costs of different tunnels.”⁹⁶

- “DuPont manufactured growth estimates based on a single NS internal forecast that has been proven dramatically wrong while ignoring the fact that the coal market has substantially changed—indeed has endured a “sea-change” since 2010. *See Xcel*, 7 S.T.B. at 639 (rejecting manufactured growth rates). NS’s Reply Evidence corrects this error by using the Board’s preferred data source, namely the Energy Information Administration’s *Annual Energy Outlook 2012* for actual and projected coal volumes, which results in the drastic shift in coal volumes, as shown below. . . . *See Duke/NS*, 7 S.T.B. at 397-98 (served Feb. 3, 2004) (technical corrections decision) (adopting EIA data rather than demonstrably inaccurate internal forecasts); *TMPA II*, 7 S.T.B. at 821-22 (EIA more reliable forecast).”⁹⁷
- “DuPont improperly attributed to the DRR revenues earned by NS subsidiaries TCS and TDIS, which provide non-rail services to their customers. . . . Despite Board precedent to the contrary, DuPont claimed for the DRR revenues that NS itself does not collect. *See, e.g., AEPCO 2002*, 6 S.T.B. at 326. DuPont did not account either for the capital costs or for the operating expenses required for TCS and TDIS to provide those services, so the DRR could neither perform those services nor collect non-rail revenues from TCS and TDIS customers. *See, e.g., Coal Rate Guidelines*, 1 I.C.C. 2d 520, 542-43; *AEPCO 2011*, STB Docket No. 42113, at 4-5 (SAC analysis must develop and present ‘investment requirements and operating expense requirements (including such expenses as . . . personnel, material and supplies, and administrative and overhead costs)’ in order to generate the revenue requirements of the SARR).”⁹⁸ On Reply, NS revised DuPont’s calculation to account only for the “rail line-haul revenue NS collects for the rail segment of those intermodal movements” it provides for TCS and TDIS.⁹⁹
- “DuPont claims these absurd staffing levels without providing credible support for them and with no benchmarking to justify their reasonableness. *See, e.g., AEPCO 2011*, STB Docket No. 42113, at 58 (criticizing parties for not providing benchmark analyses or any other sufficient explanation for staffing levels chosen). NS’s Reply Evidence

⁹⁶ *DuPont Reply Summary*, at 16.

⁹⁷ *DuPont Reply Summary*, at 19-20.

⁹⁸ *DuPont Reply Summary*, at 20-21.

⁹⁹ *DuPont Reply Volume 1*, at III-A-61. *See also id.* at I-30 (“Moreover, DuPont’s attempt to claim non-rail TCS and TDIS revenues is an impermissible cross-subsidy, for attribution of any net revenue generated by TDIS or TCS trucking services to the DRR would constitute a subsidy of the issue traffic by the trucking and supply chain management services provided by TCS and TDIS. *See infra* at III-A-64; *PPL Montana v. BNSF Ry.*, 6 S.T.B. 286, 293-95; *Otter Tail*, STB Docket No. 42071, at 23- 30.”).

appropriately sizes the DRR's staff to a best-in-class railroad by using careful analysis and benchmarking."¹⁰⁰

- "DuPont claims that the DRR will enjoy below-average G&A spending because it can expect other railroads to perform marketing and customer service functions for its overhead traffic. . . But in *AEPCO 2011*, the Board specifically and unequivocally rejected the exact same theory. *AEPCO 2011*, STB Docket No 42113, at 56-57."¹⁰¹ On Reply, NS asked the STB to "reject this argument out of hand" and presented evidence "firmly grounded on real-world experience and industry standards."¹⁰²

IX. CONCLUSION

As described in its Opening Comments, consistent with the statutory directive in the Act, NS has proposed various ways for the STB to expedite rate cases based on judicial best practices and the lessons learned from *DuPont*.

As the STB assesses the various proposals raised in this proceeding, NS urges the STB to keep in mind two guiding principles. First, pursuant to its statutory mandate, the STB must not increase the burdens on rail carriers with respect to developing and maintaining accurate cost information for rate cases. As such, the STB must reject any proposals for the railroads to create intact relational databases of, or to file with the STB on a regular basis, data relevant to rate cases. Second, pursuant to its statutory mandate, the STB must not compromise the sound economic principles underlying its rate regulatory regime. As such, the STB must reject any proposals to standardize certain categories of evidence in rate cases.

NS reiterates that the STB's current rate regulatory regime has created a predictable framework in which carriers and shippers can negotiate, resulting in fewer rate cases filed over recent decades. As various shipper-side groups and NS agree, fewer rate cases filed indicates an optimally functioning rate regulatory regime. The STB must not use the current proceeding to

¹⁰⁰ *DuPont* Reply Summary, at 24.

¹⁰¹ *DuPont* Reply Summary, at 24.

¹⁰² *DuPont* Reply Volume 2, at III-D-50, III-D-71.

disrupt this regime which is benefiting the overwhelming majority of carriers, shippers, and other interested stakeholders.

NS looks forward to continuing to work with the STB on this proceeding.

Respectfully submitted,

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

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