

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E.I. DUPONT DE NEMOURS & COMPANY)	
Complainant,)	
v.)	Docket No. NOR 42125
NORFOLK SOUTHERN RAILWAY COMPANY)	
Defendant.)	
SUNBELT CHLOR ALKALI PARTNERSHIP)	
Complainant,)	
v.)	Docket No. NOR 42130
NORFOLK SOUTHERN RAILWAY COMPANY)	
Defendant.)	

**NORFOLK SOUTHERN RAILWAY COMPANY’S
PETITION FOR CLARIFICATION**

EXPEDITED CONSIDERATION REQUESTED

Pursuant to 49 C.F.R. § 1117.1, Norfolk Southern Railway Company (“NS”) hereby petitions the Board to clarify and confirm that NS is not obligated to pay the cost of a license for commercially available software that Complainants in the above-captioned proceedings may desire to use in preparing their Rebuttal Evidence. In recent correspondence, counsel for Complainants E.I. du Pont de Nemours & Company (“DuPont”) and SunBelt Chlor Alkali Partnership (“SunBelt”) made the extraordinary demand that NS provide Complainants with additional licenses for the MultiRail computer software that NS utilized in developing its Reply Evidence, so that Complainants may “adjust the NS [MultiRail] evidence” in their Rebuttal

submission and potentially “develop and present their own Rebuttal evidence based on the MultiRail program.”¹ NS has already made arrangements to provide Complainants access to and use of MultiRail (at NS’s expense) sufficient to allow Complainants to review and verify the analyses that NS performed with that software. Notwithstanding that accommodation, Complainants have taken the position that “[t]o prevent unfair prejudice to Complainants,” NS is required to “provide the licenses necessary for the Complainants to receive full access to MultiRail.”² Moreover, Complainants further demand that NS “cover or agree to reimburse Complainants for the costs that Oliver Wyman will charge for MultiRail setup and training.”³ Complainants have indicated their intention to argue that NS’s operating evidence should be rejected unless NS agrees to pay for a full MultiRail license and for Complainants’ consultants to receive training in the use of the MultiRail program.⁴

Complainants’ demands are utterly at odds with the well-established American Rule principle (which has been repeatedly endorsed by the Board) that parties are responsible for their own litigation costs. The Board should grant NS’s petition and confirm that NS is not obligated to bear the cost of providing additional MultiRail licenses or training for the benefit of Complainants. NS requests that the Board accord this petition *expedited consideration* and determination, so that the parties’ respective obligations can be resolved without further delaying the procedural schedules in these cases.

¹ See Exhibit 1, Letter dated January 10, 2013 from J. Moreno to P. Moates at 1.

² See Exhibit 1, Letter dated January 10, 2013 from J. Moreno to P. Moates at 2.

³ *Id.*

⁴ See Exhibit 3, Letter dated January 22, 2013 from J. Moreno to P. Moates at 1.

I. BACKGROUND

In their Opening Evidence, Complainants DuPont and SunBelt both presented SARRs that would carry large volumes of general freight “carload” traffic.⁵ Unlike the unit-train and trainload shipments that have constituted the vast majority of SARR traffic in prior SAC cases, the carload traffic posited by DuPont and SunBelt must be classified and blocked at intermediate terminals and transported in multiple trains between origin and destination. A feasible operating plan for such traffic must include both a detailed plan to classify and block individual cars and a train service plan that accounts for all of the transportation required to move the cars across the network in a manner that meets the service needs of the SARR’s customers.

To develop carload blocking and train service plans for the SARRs, NS’s operating experts utilized a software application called MultiRail. The MultiRail program is a modeling tool that generates optimized blocking and train service plans for a selected traffic group, based on the characteristics of the traffic, the railroad’s network configuration, and customer service requirements.⁶ Competent operating experts are capable of developing such blocking and train service plans without the assistance of such software (as railroads did for many years before the advent of computerized modeling tools), but NS’s use of MultiRail facilitated the process, maximized the efficiency of the resulting blocking and train service plans, and reduced the likelihood of human error.

⁵ See NS Reply at III-C-56, *DuPont v. NS* (filed Nov. 30, 2012) (“NS/DuPont Reply”) (three million cars of carload traffic); NS Reply at III-C-122, *SunBelt v. NS* (filed Jan. 7, 2013) (“NS/SunBelt Reply”) (471,597 carloads of general freight traffic).

⁶ A general description of MultiRail and its functions is included as a workpaper to NS’s Reply Evidence in both cases. See NS Reply, *DuPont v. NS*, STB Docket No. NOR 42125, NS Reply WP “MultiRail Freight Edition”; NS Reply WP “MultiRail Freight Edition”; NS Reply, *SunBelt v. NS*, STB Docket No. NOR 42130, NS Reply WP “MultiRail Freight Edition.”

MultiRail is commercially available software developed and owned by Oliver Wyman and Company (“Oliver Wyman”). All of the North American Class I railroads have used MultiRail for various network planning and service design purposes. Blocking plans and train schedules based on MultiRail have been presented in several prior STB proceedings.⁷

In order to use MultiRail in preparing its Reply Evidence, NS was required to purchase a license for that software from Oliver Wyman. To facilitate Complainants’ review of those aspects of the SARR operating plan that NS developed with the aid of MultiRail, NS also purchased limited MultiRail licenses for use by DuPont’s and SunBelt’s consultants. NS has also arranged with Oliver Wyman for the Board to have access to MultiRail, loaded on laptop computers by Oliver Wyman, for the Board’s use in evaluating NS’s Reply Evidence and any related Rebuttal Evidence that Complainants might file. While NS had no legal obligation to purchase such licenses for Complainants, it did so in order to ensure that DuPont and SunBelt would be able to review and evaluate the MultiRail evidence submitted by NS without delay. NS/DuPont Reply at III-C-158 n.245; NS/SunBelt Reply at III-C-122 n.192.

On January 10, 2013, counsel for DuPont and SunBelt sent a letter to counsel for NS “requesting that NS provide the [additional] licenses necessary for the Complainants to receive full access to MultiRail that permits them to adjust and electronically save MultiRail inputs and outputs and import them to downstream SAC analyses.”⁸ That letter further requested that NS reimburse Complainants for any costs they incur in setting up the MultiRail software and training

⁷ See, e.g., Reply Evidence of CSX Transportation, Inc. at III-C-56 through III-C-58, *Seminole Electric Cooperative, Inc. v. CSX Transp., Inc.*, STB Docket No. NOR 42110 (filed Jan. 19, 2010). See also NS Reply, *DuPont v. NS*, STB Docket No. NOR 42125, NS Reply WP “MultiRail Freight Edition” at 1 (stating that MultiRail was used to support operating plans submitted to the Board in connection with the *UP/SP*, *CN/IC*, and *Conrail* transactions); *SunBelt v. NS*, STB Docket No. NOR 42130, NS Reply WP “MultiRail Freight Edition” at 1 (same).

⁸ See Exhibit 1, Letter dated January 10, 2013 from J. Moreno to P. Moates at 2.

their consultants to use it. *Id.* Counsel for NS replied by letter on January 17, 2013, explaining that NS is under no obligation to bear the cost of providing Complainants with additional MultiRail licenses or training.⁹ On January 22, 2013, counsel for Complainants stated that Complainants would “proceed with the limited access that NS has provided to MultiRail” but were doing so “without prejudice to the Complainants’ right to pursue greater access if this limited access proves inadequate.”¹⁰ Counsel also indicated that Complainants “fully intend” to take the position that NS’s operating evidence is “not supported” because NS declined to provide the full MultiRail access and training requested by Complainants.¹¹

II. ARGUMENT

Complainants’ extraordinary demand that NS purchase MultiRail licenses and training for their benefit and their stated intention to challenge NS’s operating evidence on the grounds that NS refused to comply with that demand, necessitates that the Board clarify that NS is not obligated to bear the cost for Complainants to acquire access to MultiRail. Pursuant to 49 C.F.R. § 1117.1, the Board may grant a petition for relief not otherwise provided for in another rule. *See, e.g., Suffolk & Southern R.R. LLC – Lease and Operation Exemption – Sills Road Realty, LLC*, STB Finance Docket No. 35026 at 2 (served Aug. 27, 2008) (49 C.F.R. § 1117.1 “provides an avenue for relief not otherwise provided for in any other rule.”). Petitions must include a statement of the Board’s jurisdiction, a statement of the claims showing that the petitioner is entitled to relief, and a demand for the appropriate relief. 49 C.F.R. § 1117.1.

The Board’s jurisdiction over this dispute is clear. The dispute has arisen in two pending rate reasonableness cases under 49 U.S.C. § 10704(d), which grants the Board authority to

⁹ *See* Exhibit 2, Letter dated January 17, 2013 from P. Moates to J. Moreno.

¹⁰ *See* Exhibit 3, Letter dated January 22, 2013 from J. Moreno P. Moates at 1-2.

¹¹ *Id.* at 1.

“establish procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates.”¹² Inherent in that grant of jurisdiction is the power to resolve subsidiary disputes between the parties to a rate proceeding and to clarify the respective obligations of the parties to provide access to information or analytical tools.¹³

Moreover, prompt resolution of this dispute is necessary in the public interest. DuPont’s Rebuttal submission is due on March 28, 2013 and SunBelt’s Rebuttal Submission is due shortly thereafter on May 15, 2013. Unless the question presented in this Petition is promptly and definitively resolved by the Board, NS will be confronted with a choice between agreeing to pay significant fees to Oliver Wyman to acquire licenses and training that are readily available to Complainants or risking the possible rejection of NS’s well-supported operating evidence solely because NS declined to incur that expense. Conversely, Complainants will lack the certainty required to enable them to choose whether to license MultiRail for their purposes. Failure to clarify this issue promptly may also result in requests for further extensions of the procedural schedule, thereby potentially delaying the resolution of both cases.

There is no legitimate basis for Complainants to demand that NS pay for them to use commercially available software programs like MultiRail. Accordingly, the Board should grant

¹² As more SAC rate cases include SARRs designed as carload networks, this circumstance is likely to repeat itself. For example, this situation may repeat itself in *Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, STB Docket No. NOR 42121, because it is anticipated that the case (if it proceeds to the rate reasonableness phase) may involve a SARR with substantial carload traffic. It is likely that MultiRail will continue to be used, and this issue will reemerge, in future cases that have yet to be filed. The Board can expeditiously remove any uncertainty regarding the question of who bears the cost of MultiRail by deciding this petition now.

¹³ See, e.g., *M&G Polymers USA, LLC v. CSX Transp., Inc.*, STB Docket No. NOR 42123 (served Aug. 23, 2012) (Board decision on a motion to compel discovery); *Seminole Electric Cooperative, Inc. v. CSX Transp.*, STB Docket No. 42110 (served February 17, 2009) (same).

NS's Petition and confirm that NS is not required to bear the cost of obtaining MultiRail licenses or training for Complainants' benefit.

A Complainant Has No Legitimate Basis to Request That A Defendant Pay For It To Obtain Additional MultiRail Licenses or Training.

As explained above, NS has already arranged with Oliver Wyman for both DuPont and SunBelt to be provided the level of access to MultiRail needed to review, verify, and analyze the MultiRail-based components of NS's operating evidence. In addition, Oliver Wyman has provided Complainants' counsel and consultants information regarding the availability and cost of additional MultiRail functions and training.¹⁴ Complainants may be interested in obtaining such additional licenses and training services, but they do not want to pay for them. Although Complainants assert that "free" access to MultiRail is necessary "[t]o prevent unfair prejudice to the Complainants" (*see* Exhibit 1 at 2), they have not cited any principle or precedent in support of their extraordinary demand. There is nothing unfair about the basic, longstanding American Rule that each party to litigation must bear its own expenses. *See, e.g., Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 800-801 (D.C. Cir. 1997) (American Rule requires each party to bear its own litigation costs; absent clear, exceptional statutory authorization, parties to agency litigation may not recover their litigation expenses from opposing parties); *PCI/RCI v. United States*, 37 Fed. Cl. 785, 788, n.2 ("For over 200 years, United States courts have generally required each party to bear its own litigation costs.") (*citing Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796)).

The Board and its predecessor have consistently applied the American Rule and held that parties to litigation are responsible for their own costs. As the Board has explained, "[a]warding

¹⁴ *See* Exhibit 1, Letter dated January 10, 2013 from J. Moreno to P. Moates (attaching correspondence between Oliver Wyman and Complainants' representatives).

‘professional fees’ (and *associated* or miscellaneous *expenses*) would be contrary to agency practice. The ICC consistently rejected awarding attorney fees unless specifically authorized by the statute.” *Caddo Antoine et al. – Feeder Line Acquisition – Arkansas Midland R.R.*, 4 S.T.B. 610, 630-31 (2000) (emphasis added), *aff’d in part, rev’d in part on other grounds sub nom GS Roofing Products v. STB*, 262 F.3d 767 (8th Cir. 2001). *See also Burlington Northern, Inc. – Control and Merger – St. Louis-San Francisco Ry. Co.*, 1990 ICC LEXIS 20 at * 14 (Jan. 18, 1990) (“[U]nder the ‘American Rule’ ‘the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser.” (citing *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975))).

The Board has also rejected requests from SAC complainants that the defendant railroad be required to “reimburse” complainants for the Board-mandated filing fees, finding that the Board lacked authority to order such litigation expense shifting. *See Carolina Power & Light v. Norfolk Southern Ry. Co.*, 7 S.T.B. 235, 268 (2003) (“CP&L’s request that the Board order NS to reimburse CP&L for the filing fee is denied. The Board is not persuaded that it has the authority to direct such action.”); *see also CF Industries v. Koch Pipeline Co., L.P.*, 4 S.T.B. 647, 647 n.2 (2000) (Board has “no authority” to award litigation costs, in this case attorney fees). More recently, the Board reaffirmed that it had “consistently rejected requests for [litigation] costs in the past.” *KCS Ry. Co. – Abandonment Exemption – Line in Warren County, MS*, STB Docket No. AB-103 (Sub-No. 21X) (May 20, 2008).¹⁵

¹⁵ Even in the unusual instances in which a statute or rule authorizes partial reimbursement of attorney fees or certain limited costs, such fee-and-cost-shifting awards are available only to the prevailing party following a final decision. Thus, even if SAC cases were subject to a cost-shifting statute—which they are not—a request for reimbursement of any litigation expenses would not be ripe at this juncture. Moreover, the “costs” that are typically taxed on behalf of a prevailing party by the clerk of court in federal court litigation (*see* Fed. R. Civ. Pro. 54(d)) are generally limited to court costs (*e.g.*, court reporter costs at trial and other ancillary court costs,

Complainants' letters demanding that NS buy MultiRail licenses and training services for Complainants' use do not acknowledge the Board's longstanding precedent. Nor do Complainants offer any rationale as to why the precedent should not apply here. Instead, Complainants simply assert that "fairness" dictates that NS pick up the tab for all parties to these cases to have full use of MultiRail and all of its functions. However, there is nothing "unfair" about the longstanding requirement that litigants such as DuPont and SunBelt pay for available third-party goods and services if they wish to use them. Complainants have retained numerous lawyers, consultants, and experts, and they have purchased a variety of computer programs and applications (including Microsoft Excel, Microsoft Word and the Rail Traffic Controller ("RTC") modeling software) for use in pursuing their rate complaints against NS. Defendant NS has likewise been required to retain lawyers, consultants, and experts and to spend large sums on computer programs, applications, and services in order to respond to Complainants' extensive discovery requests, analyze Complainants' Opening Evidence, and develop its Reply Evidence. NS does not contend that anyone but NS itself is responsible for paying those litigation costs.

The absurdity of Complainants' position that NS's decision to use MultiRail in developing its Reply Evidence requires NS to foot the bill for Complainants to use MultiRail on Rebuttal is readily apparent when considering the computer software that Complainants used to prepare their Opening Evidence. Complainants' reliance upon several publicly available software programs (such as the RTC Model, Microsoft Excel, and Microsoft Access) in developing their Opening Evidence did not create an obligation for them to acquire licenses for NS to use that software. Complainants' use of real estate appraisers to develop and support their

costs of obtaining and reproducing the trial court record for appeal, cost of an appellate appendix), and do not include a party's litigation expenses incurred to develop or present its own case or defense (*e.g.*, costs for experts, discovery, or computer modeling to build and support a party's case).

Opening Evidence likewise did not require them to retain real estate appraisers to assist NS in developing its Reply Evidence. Indeed, earlier in the DuPont proceeding, when NS raised a concern about the capacity of the RTC model to simulate a network the size of DuPont's SARR, DuPont's counsel suggested that NS buy a larger, more powerful computer.¹⁶ Tellingly, DuPont did not offer to reimburse NS for the cost of a larger computer to run the RTC Model submitted by DuPont in its Opening Evidence. NS was, in fact, required to purchase an advanced liquid-cooled computer to run the RTC Model on the scale required by DuPont's SARR (with the modifications to the Model required to reflect a feasible real world railroad operation). For present purposes, there is no relevant distinction between the hardware that NS was required to purchase in order to respond to the evidence presented by DuPont, and the MultiRail software that Complainants might desire to utilize in responding to NS's Reply operating evidence.

Indeed, had Complainants submitted a complete operating plan for a "carload" rail network in their Opening Evidence, they likely would have used MultiRail (or a similar product) in preparing that evidence. In that situation, Complainants would not have provided, nor would NS have expected, reimbursement for the cost of access to, and training for, such software. Rather, it would have been incumbent on NS to purchase any software it elected to use in formulating an operating plan for its Reply Evidence. Under the American Rule of litigation that long has been accepted by the Board, neither the Complainants nor NS are required to furnish software or training for the opposing party that such party is perfectly capable of purchasing itself.

The situation presented here is analytically different from a circumstance in which a software application used by one party is not available for the opposing party to purchase and use

¹⁶ See DuPont Reply to NS Motion for Modification of the Procedural Schedule at 4, n.4, *DuPont v. NS*, STB Docket No. NOR 42125 (filed May 29, 2012).

itself. For example, in developing the yard configurations posited by its operating plan, NS used a proprietary yard-sizing tool that was developed by NS personnel and is not available to the public. Recognizing that Complainants would not otherwise have access to that tool in preparing their Rebuttal Evidence, NS provided to Complainants' counsel and consultants both the outputs of NS's reply yard analysis and the underlying program files that would enable Complainants to use NS's proprietary yard sizing tool in developing their Rebuttal Evidence (if they choose to do so).¹⁷ Unlike the proprietary NS yard-sizing tool, the MultiRail software is available for purchase from Oliver Wyman—a fact well known to Complainants' counsel and consultants who have been in communication with Oliver Wyman through contact information provided by NS. NS should not be required to subsidize Complainants' purchase of a license to use MultiRail, any more than Complainants should be required to purchase for NS's benefit access to the RTC Model, Excel or other publicly available computer programs and hardware that Complainants used in preparing their Opening Evidence.

The suggestion that NS's refusal to arrange cost-free access to MultiRail constitutes “unfair prejudice” or “substantially curtails the Complainants' right to verify and, if necessary, adjust the NS evidence generated by the MultiRail program” is nonsense. Both Complainants chose to pursue rate relief against NS under the Board's SAC rules and standards. Complainants have expended significant amounts in legal, consulting, and expert fees and related expenses during the course of these proceedings, and NS has likewise been required to expend significant amounts in responding to those complaints. While the cost of a MultiRail license and training is not trivial, it strains credulity for Complainants to contend that that they will be unfairly

¹⁷ See NS Reply, *DuPont v. NS*, STB Docket No. NOR 42125, NS Reply WP Folder “Yard Sizing Analyses”; *SunBelt v. NS*, STB Docket No. NOR 42130, NS Reply WP Folder “Yard Sizing Analyses.”

“prejudiced,” or that their right to pursue relief in these cases will be “substantially curtail[ed]” unless NS bears the cost of making such licenses and training available to Complainants.

Complainants May Not Submit Any New MultiRail-Based Evidence On Rebuttal to Attempt to Cure Fatal Flaws in Their Cases-in-Chief.

Finally, requiring NS to pay for MultiRail licenses for Complainants’ use is especially unwarranted given the evidentiary posture of these cases. As discussed above, the primary utility of the MultiRail software is to facilitate the development of car blocking and train service plans for large, heterogeneous traffic groups like those posited by Complainants in their Opening Evidence. However, as NS demonstrated in its Reply Evidence, the operating plans proffered by DuPont and SunBelt did not include any type of car classification or blocking plan. Moreover, the “train service plans” submitted by Complainants consisted of nothing more than an “automated” selection of historical NS trains as surrogates for SARR trains. The flawed methodology applied by Complainants resulted in the exclusion of thousands of trains that are necessary to provide complete, uninterrupted on-SARR train service for massive volumes of traffic, including the vast majority of the issue traffic in both cases. See NS/DuPont Reply at III-C-10 to III-C-36, III-C-52 to III-C-56; NS/SunBelt Reply at III-C-12 to II-C- 0, III-C-41 to III-C-46.

Complainants may not attempt to “cure” those fatal defects in their operating evidence by presenting for the first time on Rebuttal either a carload classification and blocking plan for merchandise traffic or a new train service plan that includes all of the trains necessary to move the SARR’s selected traffic. As the Board recently re-affirmed in *Intermountain Power Agency v. Union Pacific Railroad Co.*, STB Docket No. 42127 at 3 (served April 4, 2012) (“*Intermountain Power*”), a “complainant may not significantly modify the foundation of its case after it and the defendant carrier have put forward their initial evidence and arguments, an

expensive and time-consuming effort, merely because the complainant believes the modification to be in its best interest.”¹⁸ The Board further explained that “[t]he complainant cannot claim that a technical error, brought on by the complainant’s own mistake, is grounds for it to modify a core part of its evidence after the defendant carrier has already filed a reply to that evidence.” *Id.* (emphasis added).

While Complainants have made irreconcilable statements regarding their intent to use MultiRail to develop new Rebuttal Evidence,¹⁹ under the Board’s precedents they clearly may not do so. NS has already arranged for Complainants to have cost-free access to a version of MultiRail that will enable them to review and analyze the Reply Evidence that NS submitted, and to identify any operating parameters and assumptions with which they might disagree. Requiring NS to go further by underwriting the cost of a full MultiRail license for Complainants’ use is both unnecessary and unjustified in the circumstances of these cases, because Complainants are barred from presenting on Rebuttal either the car blocking plans that they failed to proffer on Opening or substitute train service plans based on a methodology other than their ill-conceived “automated” train selection process. Such new evidence would be plainly impermissible and the Board should not consider it.

* * *

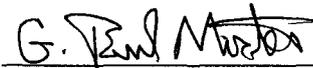
¹⁸ See also *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, 5 S.T.B. 441, 445-446 (2001) (“[T]he party with the burden of proof on a particular issue must present its entire case-in-chief in its opening evidence Rebuttal may not be used as an opportunity to introduce new evidence that could and should have been submitted on opening to support the opening submissions.”).

¹⁹ Compare Exhibit 1 at 2 (complaining that without a full access license “DuPont and SunBelt will not have capability to develop to develop and present their own Rebuttal evidence based on the MultiRail program.”) with Exhibit 3 at 1 (“Complainants do not have, and never had, any plans to submit ‘new’ rebuttal evidence based on MultiRail.”). The latter, more recent and more definitive “clarification” and representation by Complainant should be binding and estop them from submitting new evidence based on MultiRail in this proceeding.

In conclusion, there is no basis for Complainants' demand that NS purchase MultiRail access rights or training for Complainants' benefit. The Board adheres to the standard American Rule that each party is responsible for its own costs of pursuing the litigation. Complainants' extraordinary demands ignore this two-centuries old, near-universal American precedent. Nor have Complainants articulated any real rationale for departing from the American Rule here—to the contrary, the circumstances of these cases strongly support adherence to that rule. In short, there is no basis in law or logic for Complainants to expect NS to underwrite their litigation expenses, nor will Complainants be unfairly "prejudiced" in any way by NS's refusal to do so. Therefore, NS respectfully requests that the Board promptly clarify the applicability of the American Rule to the dispute between the parties, and confirm that Complainants, not NS, must bear the cost of obtaining any further MultiRail licenses, training, or services for any proper use of MultiRail that Complainants might elect to make in these proceedings. Because it is in the best interests of all the parties to have the dispute resolved promptly, NS urges the Board to consider and decide this petition as expeditiously as possible.

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Respectfully submitted,



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Counsel to Norfolk Southern Railway Company.

Dated: January 25, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2013, I caused a copy of the foregoing Norfolk Southern Railway Company's Petition for Clarification to be served by email and U.S.

Mail upon:

Jeffrey O. Moreno
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036



Marc A. Korman

EXHIBIT 1

January 10, 2013

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

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

Dear Paul:

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

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

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

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

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

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

THOMPSON
HINE

G. Paul Moates
January 10, 2013
Page 3

Very truly yours,



Jeffrey O. Moreno

Moreno, Jeffrey

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

Robert,

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

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

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

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

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

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

Best regards,

Kevin

Kevin M. Foy
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Surface Transportation Practice
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Exhibit 1

Fax: +1 609 419 9600
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<http://blog.railplanning.com/>

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

Robert,

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

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

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

Best regards,

Kevin

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

Robert,

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

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

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

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

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

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

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

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

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

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

Exhibit 1

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

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

Best regards,

Kevin

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

Robert,

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

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

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

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

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

Exhibit 1

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

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

Best regards,

Kevin

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

Kevin,

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

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

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

I look forward to hearing from you on this matter.

Best regards,

Rob

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

Exhibit 1

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EXHIBIT 2



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FOUNDED 1866

January 17, 2013

By Email and First Class Mail

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

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

Dear Jeff:

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

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

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

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

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

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

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

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



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

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

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

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

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

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



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

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

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

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

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



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

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

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

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

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

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



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

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

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

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

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

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



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 Page 7

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

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

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

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



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

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

* * *

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

Sincerely,

A handwritten signature in black ink, appearing to read "G. Paul Moates".

G. Paul Moates
 Paul A. Hemmersbaugh

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

EXHIBIT 3

January 22, 2013

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

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

Dear Paul:

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

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

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

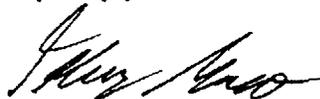
¹ Complainants presume that NS has provided the Board with the same level of access to MultiRail as the Complainants, which includes requiring the Board to pay the same set-up and training costs as the Complainants. If NS is providing any greater access to the Board, or covering any of the Board's set-up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

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

Very truly yours,



Jeffrey O. Moreno

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