

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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SUNBELT CHLOR ALKALI PARTNERSHIP

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

Docket No. NOR 42130

**NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO SUNBELT CHLOR
ALKALI PARTNERSHIP'S PETITION FOR RECONSIDERATION**

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TABLE OF CONTENTS

- I. PREFACE AND SUMMARY OF ARGUMENT1**
- II. THE BOARD DID NOT COMMIT MATERIAL ERROR BY REJECTING SUNBELT’S OPERATING PLAN.3**
 - A. The Board’s Decision To Accept NS’s Operating Plan Was Fully Consistent With The Record And Board Precedent.3
 - B. The Board’s Decision To Adopt NS’s Operating Plan In Lieu of SunBelt’s Fatally Deficient Plan Did Not Constitute Error.....5
 - 1. Multiple Deficiencies in SunBelt’s Yards Evidence Required Rejection of Its Operating Plan.7
 - 2. SunBelt’s Failure to Provide All the Trains Required to Transport Its Selected Traffic Required Rejection of Its Rebuttal Operating Plan.8
 - 3. Multiple Failures In SunBelt’s RTC Model Required Rejection of Its Operating Plan.10
 - C. The Board Did Not Adopt NS’s Operating Evidence In Its Entirety.13
 - D. The Board Did Not Commit Error By Accepting NS’s Operating Plan Developed With The Assistance of MultiRail Software.15
- III. SUNBELT’S ADDITIONAL CLAIMS ARE MERITLESS.19**
 - A. The Board’s Rejection of SunBelt’s “Interest Only” Approach to Debt Payments Was Not a Material Error.....19
 - B. The Board’s Acceptance of NS’s Ad Valorem Tax Evidence Was Not a Material Error.20
 - C. The Board’s Rejection of SunBelt’s “Trestle Hollow” Argument For Reducing SBRR Excavation Costs Was Not a Material Error.....22
 - D. The Board’s Calculation of Ballast Quantities Was Not a Material Error.30
 - E. The Board’s Calculation of Road Locomotive Counts Includes a Small Error.....33
 - F. The Board Did Not Materially Err When Accounting For Earthwork Quantities at Intermodal and Automotive Facilities.33
 - G. The Board Did Not Materially Err By Accepting NS’s Fine Grading Evidence...34
 - H. The Board Did Not Make a Material Error In Its Calculations of Railcar Acquisition Costs.35

I.	The Board Did Not Materially Err By Not Making Downstream Adjustments to Earthwork Preparation Spreadsheets.	37
J.	The Board Did Not Materially Err By Not Making Downstream Adjustments to Undercutting, Over-Excavation, and Gabion Excavation Costs.....	38
K.	As NS Showed In Its Petition for Reconsideration, The Board Should Use The Well-Supported Distances in NS’s Ballast Transportation Evidence.....	38
L.	The Board Did Not Materially Err By Accepting The Parties’ Agreed Costs of Rail Lubricators.	39
M.	The Board Did Not Materially Err By Not Making the Additional Unit Cost Index Changes SunBelt Advocates.....	39
N.	SunBelt’s PTC Labor Cost Adjustment Should Be Rejected.	40
O.	The Board Did Not Materially Err By Not Crediting the SBRR With Bonus Depreciation for 2012 and 2013.	42
P.	SunBelt’s Demands for Expansive Revisions of Forecasts Used By the Parties Should Be Rejected.....	43
IV.	CONCLUSION.....	47

I. PREFACE AND SUMMARY OF ARGUMENT

SunBelt Chlor Alkali Partnership's ("SunBelt's") Petition for Reconsideration catalogs 17 alleged errors in the Board's June 20, 2014 Decision ("*Decision*") that SunBelt says merit reconsideration. Most prominently, SunBelt alleges that the Board made procedural and legal errors by adopting Norfolk Southern Railway Company's ("NS's") operating plan rather than SunBelt's. *See* SunBelt Pet. for Reconsideration at 4-6 ("SunBelt Pet."). But SunBelt's Petition does not argue—much less demonstrate—that its operating plan satisfied the fundamental SAC requirements of meeting the service needs of its selected traffic¹ in a manner consistent with the realities of real-world railroading.² That omission is not surprising, because SunBelt's operating plan was riddled with errors, any one of which would have been independently sufficient to justify the Board's rejection of that plan.

SunBelt's Petition suggests that its failure to configure the SBRR yard at Birmingham, AL as a hump (rather than flat switching) yard was the only deficiency in SunBelt's operating plan and the only reason why the Board rejected it. According to SunBelt, the Board erred by failing to substitute a hump yard for SunBelt's flat switching yard at Birmingham and otherwise adopting SunBelt's operating plan. However, as the *Decision* makes abundantly clear, SunBelt's choice of a flat switching yard at Birmingham was just one of many serious flaws that made its operating plan infeasible. SunBelt failed to demonstrate that the SBRR could serve its selected traffic group with the truncated yard facilities, equipment, and staffing posited by SunBelt. *See*

¹ *See, e.g., Decision* at 12; *E.I. du Pont de Nemours & Co. v. Norfolk So. Ry. Co.*, STB Docket No. 42125, at 36 (Mar. 21, 2014) ("*DuPont*"); *Carolina Power & Light v. Norfolk S. Ry. Co.*, 7 S.T.B. 235, 259 (2003) ("*CP&L*") ("[complainant] carries the burden of demonstrating that its operating plan would meet the needs of the traffic group it selected"); *Duke Energy Corp. v. Norfolk So. Ry. Co.*, 7 S.T.B. 89, 99 (2003) ("*Duke/NS*") (operating plan must be "capable of providing the service required by the SARR's customers").

² *See, e.g., Decision* at 12; *DuPont* at 36; *Western Fuels Ass'n & Basin Elec. Power Coop. v. BNSF Ry. Co.*, STB Docket No. NOR 42088, at 15 (Sept. 10, 2007).

Decision at 16. In an effort to reduce the SBRR's costs, SunBelt chose an antiquated locomotive type (the SW1500) that is utterly incapable of performing the necessary classification switching at SBRR yards. While SunBelt claimed that its SARR operated "the same trains as NS operates in the real world" (SunBelt Reb. III-C-3), it failed to include all of the trains necessary to provide complete train service for the SBRR's customers—including SunBelt itself—even though NS provided a list of the missing trains to SunBelt in its Reply. *See* NS Reply III-C-13-19. More than 40% of the trains carrying TIH commodities in SunBelt's Rebuttal RTC simulation operated at 60 MPH, a blatant violation of federal law. SunBelt's Rebuttal RTC analysis also incorporated ludicrously unrealistic assumptions about the time required to switch cars at customer facilities. SunBelt's attempt to portray the major deficiencies in its operating plan as "isolated mistakes" and "inadvertent omission[s]" is disingenuous at best. SunBelt Pet. at 1, 5.

Importantly, SunBelt continued to rely upon those unrealistic operating assumptions in its Rebuttal Evidence, even after NS had identified (and corrected) them in its Reply Evidence. Having been placed on notice that its operating plan contained multiple errors that rendered it infeasible, SunBelt made a conscious tactical decision to adhere to its nonsensical positions on Rebuttal. The Board's finding that SunBelt's operating plan was not feasible and the Board's decision to reject that plan in favor of NS's superior operating plan did not constitute material error. Indeed, it would have been manifest error for the Board to have accepted SunBelt's operating plan as the basis for decision in this case.

SunBelt's other alleged "material errors" in the *Decision* are of a piece with its operating plan claims. For example, it revives its argument that the SBRR should be allowed the tax benefits of constant, never-decreasing interest payments on its debt, despite the Board's clear holding that such an approach is inconsistent with the purposes of SAC. It repeats one of its

technical criticisms of NS’s ad valorem tax methodology—utterly ignoring the Board’s holding that the “fundamental” and “incurable” flaws in SunBelt’s own methodology far outweighed its technical criticisms of NS’s calculations. *Decision* at 67 n. 307. And SunBelt takes yet another shot at the discredited “Trestle Hollow” argument—this time making the ludicrous claim that SunBelt’s use of purported costs from the atypical “Trestle Hollow” project was a conservative overestimate of earthwork costs. SunBelt’s claimed costs are completely inconsistent with both real-world earthwork costs experienced by NS and the well-accepted Means costs, and SunBelt has given the Board no basis to conclude that Trestle Hollow earthwork costs are a reasonable approximation of the SBRR’s costs. These are just a few examples of the multiple flawed arguments in SunBelt’s Petition, which should be rejected for the reasons explained below.

II. THE BOARD DID NOT COMMIT MATERIAL ERROR BY REJECTING SUNBELT’S OPERATING PLAN.

SunBelt’s Petition alleges that “[t]he Board committed three distinct material errors when it adopted the NS operating plan.” SunBelt Pet. at 4. First, SunBelt asserts that the Board erred by “permit[ing] NS to substitute an entirely new operating plan, rather than mak[ing] corrections to SunBelt’s opening evidence.” *Id.* Second, SunBelt claims that the Board erroneously “adopt[ed] the entire NS operating plan solely because the NS plan included a hump yard at Birmingham and SunBelt’s plan did not.” *Id.* (emphasis in original). Third, SunBelt argues that it was error for the Board to accept NS’s operating plan because NS utilized the MultiRail software in preparing it and did not provide a full “read/write” version of that software to SunBelt and the Board. SunBelt’s criticisms of the Board’s decision are meritless.

A. The Board’s Decision To Accept NS’s Operating Plan Was Fully Consistent With The Record And Board Precedent.

SunBelt first claims that the Board committed material error by even entertaining NS’s Reply operating plan. Citing the Board’s general observation that “in most circumstances, the

Board would indeed require the defendant in a SAC case to make any necessary corrections to the complainant's opening evidence rather than submitting something entirely new on reply," SunBelt argues that the Board erred by declining to follow that course in this case. *Decision* at 13. Indeed, SunBelt suggests that the Board "depart[ed] from its precedent[s]" in doing so. SunBelt Pet. at 4. SunBelt's assertions are incorrect as a matter of both law and fact.

As SunBelt acknowledges, the skeletal, 17-page operating plan that it submitted on Opening contained no evidence whatsoever addressing the blocking and classification of the SBRR's 450,000 cars of general freight traffic.³ *See* SunBelt Pet. at 5. Given that glaring evidentiary deficiency with respect to an "essential part of the operating plan for a predominantly carload system," the Board correctly concluded that "on this issue, there was nothing for NS to correct on reply" and that "NS needed to supply its own analysis." *Decision* at 13. Thus, the Board articulated a clear and correct rationale for accepting the NS operating plan. The Board's decision to accept NS's operating plan and to adopt it in lieu of SunBelt's infeasible plan was fully supported—indeed, it was compelled—by the record evidence.⁴

SunBelt is equally wrong to claim that correcting a complainant's infeasible operating plan is the "required course" and that the Board improperly departed from "precedent" in accepting NS's operating plan. When the Board determines that a complainant's operating plan

³ SunBelt's insistence that this fundamental omission was "inadvertent" is simply not credible. *Id.* SunBelt touted its operating witness, Mr. McDonald, as "one of the nation's leading rail operations and management experts." SunBelt Opening III-C-1. Certainly an expert with 42 years of experience in the operating departments of several railroads understood the need to classify and block general freight traffic as it moves along the rail network. *Id.* at IV-12.

⁴ SunBelt claims that "[it] was able to correct its inadvertent omission of an opening blocking and classification plan on rebuttal." SunBelt Pet. at 5. SunBelt is wrong. As NS demonstrated, the car classification analysis belatedly proffered by SunBelt on Rebuttal substantially understated the number of cars that the SBRR would be required to classify, by incorrectly and unrealistically assuming that every car received by the SBRR in interchange from another carrier would arrive pre-blocked for further movement. *See* NS Brief at 7-9.

has fundamental flaws that make it infeasible, the Board rejects that plan and bases its decision instead on the defendant's reasonable operating plan. Indeed, the Board has done precisely that in every decided Eastern SAC case, and in several Western SAC cases, in the past 25 years.⁵

Finally, SunBelt's claim that, upon discovering the massive flaws in SunBelt's operating plan, "NS was required to 'file a separate motion bringing that problem to the Board's attention'" is specious. SunBelt Pet. at 5. *Duke/NS* does not require a defendant railroad to file such a motion in order to be allowed to present an alternative to a fatally deficient operating plan. Rather, it states that a defendant is not supposed to "present[] criticism without appropriate evidence that can be used in the Board's SAC analysis" and that the railroad should file a motion only where "the shipper's evidence is so flawed as to preclude the development of appropriate reply evidence." *Duke/NS*, 7 S.T.B. at 101 & n.20. In other words, a motion is required only when the flaws in the complainant's evidence are so severe that the railroad cannot formulate a response to that evidence. This was not the case here, where despite the flaws in SunBelt's Opening Evidence NS was able to "develop[] . . . appropriate reply evidence." *Id.* at 101.

SunBelt's claim that the Board's decision to "permit" NS to proffer its Reply operating plan constituted material error is devoid of merit.

B. The Board's Decision To Adopt NS's Operating Plan In Lieu of SunBelt's Fatally Deficient Plan Did Not Constitute Error.

SunBelt's second basis for seeking reconsideration of the Board's decision is its claim that the Board committed error "when it selected the NS plan over Sunbelt's plan solely because SunBelt's plan lacked a hump yard at Birmingham, AL." SunBelt Pet. at 6 (emphasis added).

⁵ See, e.g., *Duke/NS*, 7 S.T.B. at 117-21; *CP&L*, 7 S.T.B. at 254-59; *Duke Energy Corp. v. CSX Transp., Inc.*, 7 S.T.B. 402, 426-31 (2004) ("*Duke/CSXT*"); *DuPont* at 36-41; see also *Public Serv. Co. of Colorado d/b/a Xcel Energy v. BNSF Ry. Co.*, 7 S.T.B. 589, 610-14 (2004) ("*Xcel*"); *Texas Mun. Power Agency v. BNSF Ry. Co.*, 6 S.T.B. 573, 606 (2003); *McCarty Farms, Inc. v. Burlington N., Inc.*, 2 S.T.B. 460, 476-78 (1997).

According to SunBelt, the Board “permitt[ed] a single, isolated flaw in SunBelt’s operating plan (i.e., the lack of a hump yard) to doom its entire case.” *Id.* at 7 (emphasis added). SunBelt contends that the Board should have instead “substituted the NS hump yard, with its associated operating and investment costs, for SunBelt’s flat yard, and still accepted the remainder of Sunbelt’s operating plan.” *Id.* at 9. SunBelt’s claim is utterly inconsistent with the record evidence and provides no basis for reconsideration of the Board’s decision in this case.

As an initial matter, SunBelt’s failure to provide a hump yard at Birmingham was by no means inadvertent. To the contrary, on Rebuttal, SunBelt made a conscious tactical decision to retain its flat switching yard at Birmingham in the face of NS’s showing that real world operating practice is to provide hump facilities at high-volume yard locations. While acknowledging that it may be more efficient to operate a hump yard where car volumes exceed 900 cars per day (as they would at Birmingham), SunBelt took the position that “[a]lternatively, a railroad can elect to add yard crew assignments [at a flat yard] when classification car count exceeds this threshold rather than to expend the capital resources to construct a hump yard.” SunBelt Reb. III-C-102.⁶ The Board considered and rejected that argument, finding that “adding more locomotives and crews into a busy flat switching yard as volumes increase would create more congestion, not less.” *Decision* at 15. Based upon that finding, the Board correctly concluded that “[g]iven the SBRR’s high proportion of carload traffic, the lack of adequate facilities for blocking and classifying this traffic means that SunBelt’s operating plan is not feasible.” *Id.* at 17.

SunBelt’s assertion that its selection of a flat switching yard (rather than a hump yard) at Birmingham was the “single, isolated flaw” in SunBelt’s operating plan is nothing less than

⁶ SunBelt’s tactical choice contrasts sharply with the decision by the complainant in the recent *DuPont* proceeding—represented by the same counsel and consultants that represented SunBelt—to revise its Rebuttal operating plan to provide hump yards at eight high-volume locations, in response to virtually the same evidence by NS on Reply.

delusional. While SunBelt’s decision to adhere to its theory that hump yards are “optional” was more than sufficient to support a finding that SunBelt’s operating plan was not feasible, the Board’s decision (and the record evidence) identified numerous other deficiencies that compelled rejection of SunBelt’s operating plan in its entirety.

1. Multiple Deficiencies in SunBelt’s Yards Evidence Required Rejection of Its Operating Plan.

The Board’s determination that SunBelt’s operating plan lacked adequate facilities for blocking and classifying the SBRR’s merchandise traffic was based not only on the type of yard constructed by SunBelt at Birmingham, but also on the size of the yards posited by SunBelt at Birmingham and other locations. Specifically, the Board noted that the yard posited by SunBelt “would be smaller than the existing Birmingham yard” —a fact that the Board found significant in light of SunBelt’s claim that the SBRR would operate in essentially the same manner as NS, but would have to classify even more cars than NS does in the real world. *Decision* at 15-16 & n.63 (noting that SunBelt provided for only 26 classification tracks at Birmingham, compared to 52 tracks at NS’s real world yard). In doing so, the Board found that:

if a complainant adopts the incumbent railroad’s car classification and blocking plan [as SunBelt purported to do], and the complainant modifies or removes a facility, or reduces staffing from the incumbent’s classification and blocking plan, it would need to establish that the SARR could still adequately serve the traffic group. Sunbelt has not done this.

Decision at 16. Based on SunBelt’s failure to demonstrate that its downsized yard facilities were adequate, the Board likewise rejected the yards posited by SunBelt at other locations and adopted NS’s yard acreage and yard track miles.⁷

⁷ See, e.g., *Decision* at 98 (“we will accept NS’s acreage quantities and yards”); STB Decision WP “STB – SunBelt Decision Tables.xlsx,” Tab “Real Estate Acreage” (accepting NS’s 378 acres for yards in lieu of SunBelt’s proposed 338 acres); STB Decision WP “STB – SunBelt Decision Tables.xlsx,” Tab “Constructed Track Miles” (rejecting SunBelt’s 76.14 yard track miles and adopting NS’s proposed 117.75 yard track miles).

The Board also evaluated and rejected SunBelt’s choice of locomotives for yard service. On Reply, NS demonstrated that the locomotive model selected by SunBelt for yard operations—the SW1500—was antiquated, underpowered, and likely to experience a high failure rate. *See* NS Reply III-C-169-72. While SunBelt increased the number of SBRR yard locomotives on Rebuttal, it adhered to its selection of the SW1500 model and proffered no evidence to rebut NS’s showing that the use of SW1500s for yard service would be infeasible. *See* SunBelt Reb. III-C-106, Table III-C-3. Based on that record evidence, the Board concluded that “the SW1500 does not have the horsepower or tractive effort to move train-length cuts of cars, and the SBRR would need to double or triple the number of SW1500s used in larger yards.” *Decision* at 35. Accordingly, the Board rejected SunBelt’s proposed use of SW1500 units and adopted instead the SD40-2 locomotives posited by NS. *Id.*

Finally, the Board rejected SunBelt’s proposed yard crew requirements. In response to NS’s Reply Evidence, SunBelt increased its yard staffing somewhat, based on its allegedly “inadvertent” failure to present any car classification plan on Opening. However, SunBelt claimed that NS’s yard crew estimate was “flawed” because NS’s car classification counts were derived from its MultiRail analysis. The Board considered and rejected SunBelt’s criticism of NS’s yard staffing estimate and adopted the NS figures. *Decision* at 41.

In short, the Board’s rejection of SunBelt’s proposed yard sizing, configuration, and staffing evidence was based upon and supported by multiple errors that SunBelt committed, in addition to its specification of a flat switching yard at Birmingham, AL.

2. SunBelt’s Failure to Provide All the Trains Required to Transport Its Selected Traffic Required Rejection of Its Rebuttal Operating Plan.

A feasible operating plan for a railroad whose traffic consists primarily of carload shipments must “provide for full service from each specific origin, through the network, and to

each specific destination.” *DuPont*, STB Docket No. 42125, at 38. In order to do so, the operating plan must account for all of the trains necessary to handle the SARR’s selected traffic from its origin (or on-SARR junction) across the SARR’s lines to its destination (or off-SARR junction).⁸ SunBelt proclaimed throughout this proceeding that the SBRR “operate[s] the same trains as NS operates in its real-world operations in the same basic fashion.” *See* SunBelt Reb. III-C-3 (emphasis in original). NS’s Reply Evidence demonstrated—and the Board found—that “this statement is not true.” *Decision* at 16.

SunBelt’s Opening operating plan failed to account for 1,622 trains that were used to transport the SBRR’s selected traffic. *See* NS Reply III-C-13–19. NS identified each of those missing trains for SunBelt and the Board, and even provided a workpaper showing that the missing trains could have been found in SunBelt’s own Car/Train Database.⁹ However, even though NS provided a clear roadmap for correcting that fatal deficiency in SunBelt’s train list, SunBelt made a conscious litigation decision to adopt only 1,031 of the trains in its Rebuttal operating plan, leaving its plan without 592 trains that the SBRR would need to provide complete service for its selected traffic. *See Decision* at 41; *see* NS Brief at 4-7.¹⁰

The “train selection” methodology employed by SunBelt is hopelessly flawed, because the SARR’s different traffic mix, assumed volume growth, and different infrastructure invariably require the SARR’s train service plan to differ from the defendant’s historical operations. *See*

⁸ *See id.* at 37-39 (rejecting complainant’s operating plan for failing to account for all trains required to provide complete carload service).

⁹ NS Reply WP “SunBelt_Car/Train_Database_Missing_Trains” provided a list of the 1,622 trains that were intentionally omitted by SunBelt from the SBRR’s train list. *See also* NS Reply WP “SUNBELT 2010.dbo.ttWaybill_Leadt_Unit_full_NS_event.txt;” “SUNBELT 2011.dbo.ttWaybill_Leadt_Unit_full_NS_event.txt.”

¹⁰ As NS explained, the 592 trains that remain unaccounted for can be identified by comparing Reply WP “Dropped_Trains_Traffic.xlsx” (which identified the 1,622 trains missing from SunBelt’s Opening train list) with Reb. WP “SRR Train Selection Reconciliation V06.xlsx,” Tab “Rebuttal Additions” (which lists the 1,031 trains added by SunBelt on Rebuttal).

DuPont at 42. But even if it were possible to develop a feasible carload operating plan by simply culling a list of trains from the incumbent's historical data, that process necessarily would require the complainant to adopt all of the incumbent's actual trains in which the selected traffic moved. SunBelt's failure to include all the trains necessary to serve its selected traffic group made it impossible for the Board to adopt its operating plan. In essence, SunBelt's Rebuttal Evidence proposed that the SBRR be credited with the revenue for serving all of its selected traffic without providing the train service required to serve its customers. This is of course not a mere technical oversight. SunBelt's decision to not include all the trains necessary to serve its traffic allowed SunBelt to estimate a lower number of SBRR locomotives, to posit fewer SBRR train and engine crews, and generally to depress SBRR operating expenses. SunBelt had no excuse for failing to include all of the required trains in its Rebuttal operating plan, particularly after NS identified those specific missing trains in its Reply Evidence.¹¹

3. Multiple Failures In SunBelt's RTC Model Required Rejection of Its Operating Plan.

SunBelt contends that the Board should have adopted SunBelt's operating expense estimates (rather than NS's) because "[t]he vast majority of the SBRR's operating expenses . . . [were] dictated by the RTC Model, which does not model yards and thus is not dependent upon whether Birmingham is a flat yard or a hump yard." SunBelt Pet. at 9 n.6.¹² The first problem with this assertion is that an RTC model run is only as good as the operating plan that is input into the model. The flaws in SunBelt's Rebuttal operating plan make any RTC model predicated on that plan automatically invalid. For example, because SunBelt's Rebuttal operating plan

¹¹ Even if one could attribute the missing trains in SunBelt's Opening Evidence to mistake or data confusion, those excuses cannot justify SunBelt's decision on Rebuttal to not include the missing trains that NS specifically identified on Reply.

¹² SunBelt's acknowledgement that the RTC Model "does not model yards" stands in stark contrast to its Rebuttal Evidence, where SunBelt argued that its RTC simulation proved that the SBRR's proposed yards were sufficient. *See* SunBelt Reb. III-C-10.

failed to account for 592 trains necessary to transport its selected traffic, its RTC model failed to model those trains and thus could not produce usable results.

The second problem with SunBelt's assertion is that SunBelt's RTC evidence was riddled with fatal errors that rendered its outputs invalid. For example, NS's Reply pointed out that SunBelt's Opening RTC model failed to limit TIH trains to 50 MPH as required by FRA regulations. *See* NS Reply III-C-81-83. SunBelt acknowledged this error and purported to correct it in its Rebuttal RTC simulation. SunBelt Reb. III-C-36. However, SunBelt's Rebuttal RTC workpapers showed that more than 40% of the 111 trains carrying TIH commodities still operated at 60 MPH in SunBelt's Rebuttal RTC simulation.¹³ Likewise, SunBelt's Rebuttal RTC Model (like its Rebuttal operating plan) failed to account for all of the peak period trains that the SBRR would need to operate in order to meet the needs of its selected customers, even though NS had identified those "missing" trains for SunBelt. *See* NS Reply III-C-90-93.

SunBelt also failed to model accurately intermediate train stops and local switching activities that SBRR trains would be required to perform. In some instances, SunBelt's RTC Model failed to account for such activities at all. *See* NS Reply III-C-93-99. Even where SunBelt's RTC Model incorporated events such as local switching, SunBelt applied a "generic" 30-minute dwell time assumption that vastly understated the time required to provide local service to shippers (and ignored the impact of local trains blocking the main line on the movement of other trains). *Id.* at III-C-99-103.

In order for an RTC simulation to produce meaningful results, the inputs to the RTC Model must account for all of the elements of a "feasible" operating plan. An RTC Model that does not include all required trains, permits other trains to operate at speeds that violate federal

¹³ *Compare* Reply WP "Key Trains in NS Reply RTC Simulation.xls" (identifying the 111 trains with TIH cars) *with* Reb. RTC WP "SunBelt REBUT.TRAIN" (identifying speed limit by train).

law, and understates (or ignores altogether) the impact of local switching activity on main line operations provides no evidentiary support for a complainant’s operating plan or operating expenses. Accordingly, the Board correctly declined to adopt operating expense estimates derived from SunBelt’s RTC simulation.

* * * * *

As the foregoing discussion demonstrates, SunBelt’s claims that the absence of a hump yard at Birmingham was the “single, isolated flaw” in its operating plan, and that the Board committed error by failing to adopt that plan (with a hump yard at Birmingham) is flatly contradicted by the record. In reality, virtually every element of SunBelt’s operating plan—including its train service plan (as reflected in its train list), the capacity of every SBRR yard, the size and makeup of its proposed locomotive fleet, its train crew and yard staffing, and its RTC Model—was fatally defective. Based upon the evidence before it, the Board correctly concluded that SunBelt’s operating plan was not feasible and declined to adopt that operating plan.

SunBelt’s assertion that the Board “abdicated its duty as a guardian of the public interest” by not trying harder to salvage SunBelt’s fatally deficient operating plan is nonsense. SunBelt Pet. at 6-7. Being a “guardian of the public interest” does not mean putting a thumb on the scale in favor of one party or the other. Rather, it requires the Board to protect the integrity of the SAC analysis within the framework of an adversary process. In particular, the Board’s statutory responsibilities do not compel it to rescue a complainant from the consequences of its litigation decisions.¹⁴ In this instance, the damage to SunBelt’s case was self-inflicted—NS’s Reply

¹⁴ *Public Service Co. of Colorado v. BNSF*, STB Docket No. 42057 (served January 19, 2005) (“*Xcel*”), cited by SunBelt to support its contention that the Board should not have “allowed a single error to be fatal to the shipper’s case” is inapposite. SunBelt Pet. at 8. *Xcel* involved an attempt by the defendant railroad to dismiss a complaint based upon deficiencies in the complainant’s Opening Evidence. The Board declined to dismiss the complaint, giving the

Evidence clearly identified the major deficiencies in SunBelt's Opening operating plan, but Sunbelt stubbornly refused to adopt the changes necessary to remedy those flaws on Rebuttal.

Nor are the massive deficiencies in SunBelt's operating plan attributable to a lack of familiarity with railroad construction and operations. SunBelt's SAC presentation was developed by counsel and consultants who possess decades of experience in litigating rate cases before the Board. SunBelt's experts (L.E. Peabody) have presented evidence on behalf of the complainants in virtually every SAC case that has come before the Board over the past several decades. *See* SunBelt Opening IV-19-49. SunBelt's operating expert, Mr. McDonald, possesses 42 years of railroad operating experience. *Id.* IV-12-13. Indeed, SunBelt's Rebuttal Evidence included a section titled "SunBelt's Operating Plan Was Prepared By Experts With Many Years Of Railroad Operating Experience." SunBelt Reb. at III-C-13-14. SunBelt's primary counsel has been recognized by *Chambers USA* as one of the leading lawyers nationwide representing shippers in transportation matters. Any suggestion that SunBelt was prejudiced by a lack of familiarity with SAC procedures and evidentiary requirements is simply not true. To the contrary, many of the deficiencies in SunBelt's operating plan were the direct result of litigation choices made by SunBelt and its advisors in an intentional (but ill-conceived) effort to artificially depress the SBRR's operating expenses.

C. The Board Did Not Adopt NS's Operating Evidence In Its Entirety.

While the Board adopted NS's operating plan over SunBelt's deficient plan, it did not (as SunBelt claims) "arbitrarily impos[e] 'millions of dollars in *unrelated* costs'" on SunBelt, nor did it blindly accept "every other element of the NS operating plan." SunBelt Pet. at 6 (emphasis in original). Rather, the Board carefully evaluated the evidence submitted by both parties on a

complainant an opportunity to correct those deficiencies on Rebuttal. By contrast, in the instant case, SunBelt was fully apprised of the errors in its Opening operating plan, but made an intentional tactical decision not to correct many of those flaws in its Rebuttal submission.

variety of operating issues and made an independent determination of the SBRR's operating costs based on the best evidence of record.

For example, the Board rejected SunBelt's proposal to employ SW1500 locomotives for yard service and instead adopted the SD40-2 units posited by NS. However, the Board rejected NS's proposed lease cost for SD40-2 locomotives, agreeing with SunBelt that "NS's evidence on lease rates does not account for recent market changes." *Decision* at 37. The Board also adopted SunBelt's proposed lease rate for ES44AC and GP 38 locomotives, finding NS's argument in favor of a higher rate for ES44AC units "unpersuasive" and rejecting NS's indexing of an older rate for GP38s. *Id.* at 36-37. Likewise, the Board adopted SunBelt's estimate for rail car maintenance expenses, even though it agreed with NS that SunBelt's yards were inadequate because they were not equipped with facilities to perform running repairs. *Id.* at 40.

In determining the SBRR's train crew expenses, the Board adopted NS's evidence regarding the number of trains that the SBRR would be required to operate, the number of crews required to address directional imbalances, and the number of crews required to support switching operations at SBRR yards. *Decision* at 41. However, the Board analyzed separately the parties' positions regarding re-crew rates, and determined that NS's proposed re-crew rate of 3%, which was derived from NS's actual experience across its entire Alabama Subdivision (rather than on the more limited lines replicated by the SBRR), was "inappropriate and unsupported." *Id.* at 42. The Board adopted instead SunBelt's proposed re-crew rate of 1.1% as "the best evidence of record." *Id.*

The Board also adopted SunBelt's evidence with respect to a number of other operating personnel issues. For example, the Board found NS's proposal to staff the Chief Dispatcher position around-the-clock (with a total of five Chief Dispatchers) "excessive" and adopted

SunBelt’s proposed staffing of only one Chief Dispatcher. *Decision* at 45-46. The Board also rejected NS’s proposal to add a fifth Manager of Field Operations to the four positions posited by SunBelt, on the grounds that “NS does not provide adequate justification” for the additional position. *Id.* at 45. And the Board rejected NS’s proposal to add two Managers of Car Inspection to oversee the SBRR’s car inspectors. *Id.* at 47.

Finally, the Board rejected NS’s position that the SBRR’s operating expenses should include an “excess risk” cost to reflect the risk associated with the significant volume of TIH traffic that the SBRR would carry. In doing so, the Board “agree[d with SunBelt] that the SBRR’s ratio of TIH traffic to total traffic does not necessarily indicate that the SBRR has a higher risk of a catastrophic TIH release than other railroads.” *Id.* at 22-23. The Board also found that “no business is able to fully insure itself against all possible catastrophic events.” *Id.*

In short, the Board did not simply adopt NS’s evidence *in toto*, nor did it arbitrarily impose unsupported operating expenses on the SBRR. Rather, the Board weighed the evidence with respect to each operating expense category, and reached its own conclusions regarding the appropriate level of expenses. For most categories, the Board’s final estimates did not match the estimates posited by NS on Reply. *See Decision* at 34, Table A-1.

D. The Board Did Not Commit Error By Accepting NS’s Operating Plan Developed With The Assistance of MultiRail Software.

SunBelt’s final grounds for seeking reconsideration is that the Board erred by failing to reject NS’s operating evidence, because NS did not include the MultiRail software as part of its Reply Evidence and allegedly “refused” to provide SunBelt a copy of MultiRail. SunBelt Pet. at 2, 11-13.¹⁵ SunBelt claims that “without the fully functional version of MultiRail that NS used

¹⁵ Commercial software programs cannot simply be “included” in a party’s evidence without violating software license agreements—all a party can do is offer to purchase a license for the agency and the opposing party. That is what NS did in this case. *See NS Reply* at III-C-122

to create its plan, Sunbelt could not fully test the software's methods or divine flaws in NS's analysis" and that "without access to a fully functional version of MultiRail, there is no basis for the Board to conclude that NS's operating plan is acceptable." *Id.* at 12, 13.

As an initial matter, SunBelt's complaint regarding access to MultiRail should be rejected because SunBelt waived it. As the Board is aware, in conjunction with its Reply Evidence, NS provided SunBelt a limited MultiRail license (at NS's expense) that enabled SunBelt to review and verify the analyses that NS performed with the MultiRail software. Upon receipt of that license, SunBelt demanded that NS pay for a broader license that would give SunBelt's counsel and consultants "full access to MultiRail that permits them to adjust and electronically save MultiRail inputs and outputs and import them to downstream SAC analyses."¹⁶ In response to SunBelt's demand, NS filed a Petition for Clarification requesting the Board to advise whether NS was obligated to pay for such a MultiRail license for SunBelt.¹⁷ In responding to NS's Petition, SunBelt abruptly switched course and dropped its demand for a full read-write copy of MultiRail.¹⁸ As a result, the Board issued a decision finding that "[c]omplainant's position . . . therefore must mean that they are not requesting any MultiRail package from NSR at this point beyond the read-only version they have already been given. Accordingly, the question presented in NSR's petition requires no clarification, and the petition will be denied as moot." *SunBelt*,

n.192 ("NS has arranged with Oliver Wyman for both SunBelt and the Board to be permitted limited access to MultiRail for purposes of this case.").

¹⁶ NS Petition for Clarification, STB Docket No. 42130 (Jan. 25, 2013) at 4 (quoting letter dated January 20, 2013 from J. Moreno to P. Moates at 2).

¹⁷ *Id.* SunBelt also demanded that NS reimburse it for any costs incurred in setting up the MultiRail software and training its consultants to use it.

¹⁸ Complainants' Surreply to NS Petition for Clarification (filed Feb. 27, 2013) at 5 ("NS misapprehends Complainants to be seeking a specific level of MultiRail functionality. (NS Surreply 14 (claiming that a read-write version is not necessary for evaluating its operating plan).) But Complainants do not seek specific functionality; they only seek the same functionality as NS provides the Board.").

STB Docket No. 42130 (served Mar. 25, 2013). Having abandoned its demand that NS provide a full “read/write” MultiRail license, SunBelt cannot credibly claim now that it was prejudiced by not having such a license, or that the Board should have rejected NS’s operating plan because NS did not voluntarily underwrite the cost of such a license for SunBelt’s benefit.

SunBelt’s assertion that NS “refused to submit [MultiRail] into evidence” is patently false. As SunBelt knows, NS proffered a read-write copy to the Board for its use in connection with this proceeding, but the Board declined to accept it.¹⁹ By purchasing a read-only MultiRail license for SunBelt, and making arrangements for the Board to have access to the software as well, NS went above and beyond what it was legally required to do.²⁰ MultiRail is commercially available software, and SunBelt could have approached its developer, Oliver Wyman, to obtain its own license. NS’s efforts clearly illustrate that NS did anything but “refuse” to make MultiRail available to SunBelt and the Board. For SunBelt to suggest otherwise is disingenuous.

SunBelt’s claim that it was unable to “fully test the software’s methods or divine flaws in NS’s analysis” is contradicted by SunBelt’s own Rebuttal Evidence. Indeed, SunBelt devoted thirty-four pages of its Rebuttal filing —twice as many pages as the entirety of SunBelt’s Opening operating evidence (17 pages)—to discussing NS’s “MultiRail-based operating plan.” See SunBelt Reb. III-C-52-86. SunBelt’s Rebuttal makes clear that it was able to understand the methodologies and algorithms used by the MultiRail program (*id.* III-C-58-62). SunBelt acknowledged that it was “able to observe where NS altered dwell times” (*id.* III-C-61); that it

¹⁹ See Decision, Docket No 42130 (served Mar. 25, 2013) at 2 (noting that the Board declined NSR’s offer to receive access to the full read-write version of MultiRail).

²⁰ See, e.g., *Application for Water Rights of Hines Highlands Ltd. P’Ship v. Hines Highlands Ltd. P’Ship.*, 929 F.2d 718, 727 (Colo. 1996) (en banc) (rejecting a request that a party hand over a computer program and noting that “as long as the appellants could readily identify the input and output data for each variable in the program or for each simulation, a print out of the model should suffice”).

was able to discern routing information in NS's MultiRail analysis (*id.* III-C-64-67), and that it could identify NS's MultiRail traffic flows (*id.* III-C-72). SunBelt purported to identify a variety of ways in which NS's MultiRail analysis was "riddled with faulty and unalterable inputs and assumptions" (*id.* III-C-79-86) and generated "inefficient" results (*id.* III-C-86). SunBelt spent another fifteen pages in its Final Brief lambasting MultiRail and identifying alleged flaws in NS's Reply analysis. Thus, SunBelt's own submissions belie the notion that SunBelt was denied an opportunity to evaluate the MultiRail-based elements of NS's operating plan.

In summary, SunBelt's claim that NS's operating plan should be rejected because NS utilized the MultiRail software in preparing it is meritless. The Board has accepted MultiRail-based blocking and train service plans in prior SAC cases and other STB proceedings.²¹ In each instance the Board has been able to evaluate the evidence without access to the MultiRail software. Indeed, as SunBelt itself acknowledges, MultiRail is "not some magical program"—rather, "MultiRail is simply a tool" that facilitates the development of blocking and train service plans. SunBelt Reb. III-C-85. As the Board correctly observed, a read-write version of the MultiRail software was not needed to evaluate the feasibility of NS's operating plan—"we are able to analyze its inputs and outputs just as we would if the blocking and train service plans were developed by operating experts without the use of software." *Decision* at 18. As the discussion above makes clear, the Board did, in fact, reject and/or modify numerous aspects of NS's operating plan and expense calculations. NS provided more than enough evidence to

²¹ See, e.g., *DuPont*, STB Docket No. 42125, at 41; Reply Evidence of CSX Transp., Inc., *Seminole Elec., Inc. v. CSX Transp., Inc.*, STB Docket No. 42110 (filed Jan. 19, 2010); *Canadian Nat'l R.R. Co., Grand Trunk Corp. and Grand Trunk W. R.R. Inc.—Control—Illinois Cent Corp., Illinois Cent. R.R. Co., Chicago, Cent. and Pac. R.R. Co. & Cedar River R.R. Co.*, STB. Fin. Docket No. 33556 (served May 25, 1999).

enable the Board to evaluate the merits of NS's operating plan (including the car blocking and train service plans developed with the assistance of MultiRail).

III. SUNBELT'S ADDITIONAL CLAIMS ARE MERITLESS.

To simplify the Board's analysis, NS addresses SunBelt's other attacks on the *Decision* in the order they were raised in the Petition.

A. The Board's Rejection of SunBelt's "Interest Only" Approach to Debt Payments Was Not a Material Error.

The Board rightly rejected SunBelt's attempt to break with longstanding agency precedent and allow the SBRR to make interest-only coupon payments on its debt rather than amortized principal-and-debt payments. *See Decision* at 190-91 (recognizing that SunBelt's proposal breaks with that "used in prior cases"). SunBelt's argument that the SBRR would never pay down the principal on its debt allowed it to artificially inflate the SBRR's net present value by assuming that it would benefit from never-decreasing interest write-offs in every year of the SAC analysis. The Board rejected this manipulation, holding that "it would erase the basic outlines of the SAC test" to assume that a SARR could continually roll over its debt without ever paying down the principal. *Id.* at 191.

SunBelt does not contest the Board's basic holding that the SAC test requires that the SBRR pay down its debt over time. Instead, SunBelt argues that it has found a material error in the Board's analysis "because repayment of any principal amounts borrowed is accounted for in the levelized stream of capital recovery payments." SunBelt Pet. at 14. SunBelt suggests that the Board must have not realized this fact and claims that it shows that the Board was "factually wrong" to say that an interest-only approach is inconsistent with the need for a SARR to repay its debt. *Id.* at 14-15.

SunBelt's argument is meritless. It verges on the insulting to suggest that the Board was unaware of how capital carrying charges function in the "Investment SAC" portion of the DCF

model or that it was equally unaware that the debt amortization calculations in the DCF model are only used “to develop the expected interest payments for use in estimating state and Federal taxes.” SunBelt Pet. at 15. The issue is whether the debt amortization calculations used in the DCF analysis should reflect a SARR that is paying down its debt or a SARR that is only making payments on the interest. The Board’s DCF model assumes explicitly that the initial SARR investment—both the portion assumed to be acquired with equity and the portion assumed to be acquired with debt—will be amortized over the projected life of each SARR asset and that a new investment will be incurred at the end of each asset’s life. As such, the Board did not err by holding that interest related expenditures on the unamortized investment acquired with debt should decline, consistent with the DCF assumption that the principal on that debt be paid down.

If anything, the fact that the SARR’s quarterly capital carrying charges are assumed to account for principal repayment is confirmation that the interest calculations should reflect gradual principal repayment. Failing to do so would create a significant mismatch between the Investment SAC level of the DCF and the Interest Payments schedule. The Board plainly did not materially err by rejecting SunBelt’s “interest-only” coupon approach.

B. The Board’s Acceptance of NS’s Ad Valorem Tax Evidence Was Not a Material Error.

SunBelt’s attack on the Board’s decision to accept NS’s methodology for estimating ad valorem taxes is meritless. The alleged “error” SunBelt identifies is a rehash of a technical criticism of NS’s methodology that SunBelt offered on Rebuttal—namely that NS’s methodology did not properly account for the impact of income taxes. The Board considered and rejected that argument in the *Decision*, finding that even if SunBelt were right, NS’s unit-value methodology was still superior to SunBelt’s route-mile approach. *See Decision* at 67 n.307 (“Although SunBelt has presented criticisms of NS’s methodology, neither criticism, if true,

renders NS's proposal infeasible. By contrast, NS details fundamental flaws in SunBelt's position that are incurable." SunBelt's Petition is thus an exercise in quibbling over an alleged calculation error that the Board already has found to be far outweighed by the "incurable" and "fundamental" errors in SunBelt's ad valorem tax evidence. *Id.*

SunBelt's Petition does not provide any evidence that questions the basic holding of the *Decision* that NS's unit value methodology for estimating the SBRR's ad valorem taxes is fundamentally superior to SunBelt's route-mile based methodology. *Decision* at 67. The Board found that "NS has made a strong case" for using a unit-value-based methodology, reasoning that "NS . . . provided . . . detailed narrative and evidence indicating that all three states in which the SBRR operates use a unit valuation approach." *Id.* In contrast, the Board found that "SunBelt has provided no evidentiary support for its methodology" and "has not shown that NS's unit value approach as a general matter is inappropriate." *Id.*

SunBelt's Petition does not challenge any of those findings. SunBelt does not contest that each of the three SBRR states assesses ad valorem taxes based on "unit value," and it does not contest that the primary factor that states look to when assessing "unit value" is a railroad's income valuation. Instead, SunBelt simply repeats its claim that NS's methodology did not adequately account for the effect of income taxes. The Board fully addressed this technical criticism of NS's methodology in the *Decision*, holding that it paled in comparison to the "fundamental flaws" in SunBelt's own methodology. *Id.* at 67 n.307.

The Board's holding that SunBelt's technical criticisms were far outweighed by the flaws in its own methodology was eminently correct. In the first place, the Board's calculations show that SBRR would pay no income taxes in the Base Year. *See* STB WP "D42130 Exhibit III-H-I STB No3.xls" at "Federal Taxes" and "State Taxes" Tabs. Indeed, the SBRR pays no income

taxes until the second half of Year 7! *See id.* While SunBelt hypothesizes that the SBRR might incur some current or deferred taxes in those years, it failed to explain why that would be the case, and it provided no evidence of the amount of that alleged tax liability or the effect that it might have on the unit value calculations. Without such evidence, SunBelt cannot legitimately contest the Board's judgment that the impact of SunBelt's income tax criticism on the accuracy of NS's ad valorem tax calculations was minor in comparison to the significant flaws in SunBelt's own approach.

Indeed, NS's ad valorem tax methodology is overly conservative, because it does not account for the increasing profitability of the SBRR in the later years of the SAC analysis. As the SBRR becomes more profitable over the course of the SAC analysis period, its ad valorem tax obligations would increase faster than other operating expenses. The SBRR net return on investment upon which the ad valorem taxes are calculated more than doubles over the 2012 to 2020 time frame. *See* NS Recon. Reply Exhibit 1. But NS escalated ad valorem tax expenses at the same rate as other expenses. The understatement of taxes from this conservative escalation likely would significantly outstrip any overstatement resulting from any additional tax effects.

C. The Board's Rejection of SunBelt's "Trestle Hollow" Argument For Reducing SBRR Excavation Costs Was Not a Material Error.

SunBelt asks the Board to abandon its longstanding, consistent precedent of using R.S. Means construction cost data (drawn from hundreds of construction projects throughout the nation) to estimate SARR excavation costs and instead rely on one atypical 7000-foot line relocation project (the Trestle Hollow Project) that is not even on the SBRR route as the basis for estimating excavation costs for the 578-mile SBRR system. *See* SunBelt Pet. at 17. Earlier this year the Board already rejected this very same argument. *See DuPont*, STB Docket No. 42125 at 148-49. For several reasons, the Board again should deny this recycled argument.

First, SunBelt fails to present any argument or evidence to show that the challenged ruling was materially erroneous. Despite quoting the Board’s dispositive finding that SunBelt had failed to support “the proposition that a single, 1.3-mile rail relocation project in Tennessee could serve as suitable proxy for all 578 miles of [the SBRR] line,” SunBelt’s Petition makes no attempt to show that its evidence was sufficient to support that proposition. SunBelt Pet. at 17-20. As the Board further explained, the Trestle Hollow project and the construction of the SBRR

involve construction over significantly different topographies with different soil characteristics and different economies of scale. SunBelt itself recognizes these differences, but . . . argu[es] that both projects . . . are “complicated.” But those complexities only highlight the differences between constructing a line in a small rugged section of Tennessee, and constructing a system of lines through stretches of wetlands in Alabama, Mississippi, and Louisiana. Just because both types of construction would be complicated in a general sense does not mean that the costs from one would be similar to the other. . . . SunBelt relies on a single project, rather than supporting its position with multiple data points. Based on a combination of these factors, we find that the Trestle Hollow Project cannot serve as an adequate proxy.

Decision at 107 (emphasis added). SunBelt’s Petition effectively admits that the Trestle Hollow Project was not representative of the costs that would be incurred in constructing the SBRR, but claims that the Trestle Hollow Project represents the “high end” of the railroad construction “cost spectrum.” SunBelt Pet. at 18. This assertion is utterly unsupported. SunBelt presented no evidence of other projects having lower excavation costs than the Trestle Hollow Project. Rather, all of the other record evidence (including the Means-based costs that SunBelt itself calculated but declined to use) shows the opposite—the Trestle Hollow Project costs advocated by SunBelt were extraordinarily low outliers, far lower than the costs supported by multiple other sources. *See, e.g.*, NS Reply III-F-42–48.

NS presented substantial evidence demonstrating both that the Trestle Hollow Project enjoyed extraordinary economies and productivity advantages that would be unavailable to the

SBRR, and that typical real world rail project costs far exceed those purportedly incurred in the Trestle Hollow Project. *See, e.g.*, NS Reply at III-F-36–68. As NS demonstrated, the unit costs presented by SunBelt for the Trestle Hollow Project were a function of very high concentrations of excavation material in a small geographic area under near-ideal conditions. For example, the contractors for the Trestle Hollow Project, conducted in a small, concentrated area, benefited from excavation quantities that averaged nearly 600,000 cubic yards per mile and from the ability to distribute excavated spoil materials directly along the right-of-way. *See* NS Reply at III-F-37–39. In contrast, the long and narrow SBRR would average only 40,000 cubic yards of common excavation per mile, and would be required to haul spoil materials much longer distances from the point of excavation. *See id.* As a result, the excavating productivity of manpower and equipment on the Trestle Hollow Project was far greater than that which the SBRR could achieve.

NS also produced in discovery, and presented in its Reply, cost data from real world construction projects showing that excavation costs for actual projects on the NS system are significantly higher than the Means costs adopted by the Board, and much higher than the purported costs of the Trestle Hollow Project presented by SunBelt. *See* NS Reply at III-F-40–47. For example, NS produced evidence showing the construction costs of its 16-mile Keystone project completed in 2006 in Pennsylvania, which included 5.3 miles of new rail line construction. That evidence showed NS’s earthwork costs per cubic yard for the Keystone project were more than six times greater than the Trestle Hollow costs proffered by SunBelt. *See id.* at III-F-45.²²

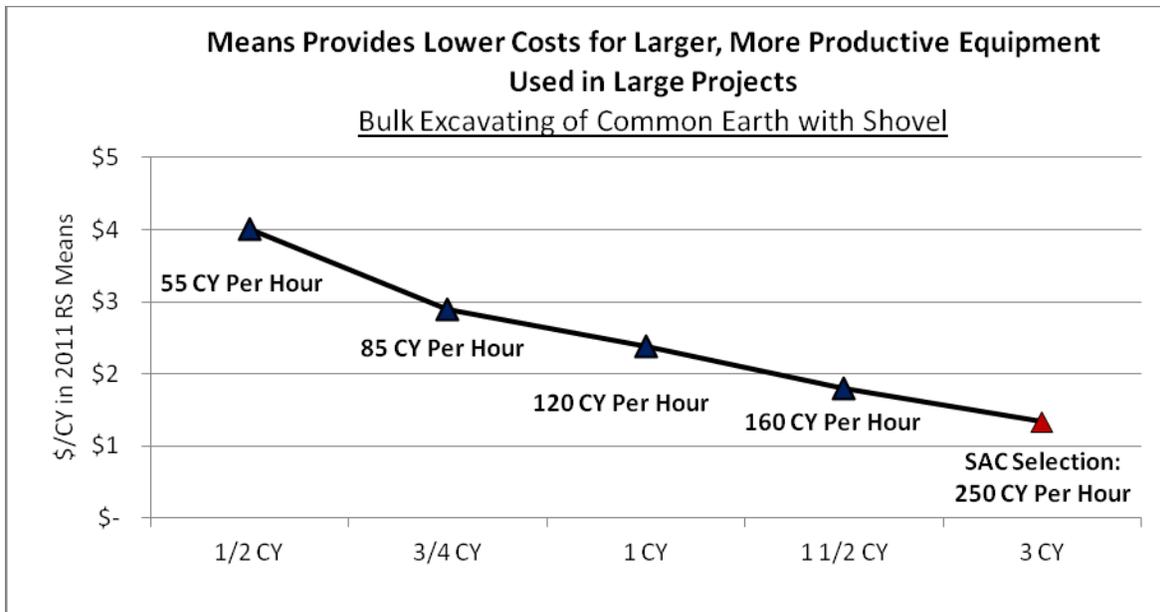
²² SunBelt conspicuously fails to mention the evidence of costs of numerous real-world projects, most of which were longer than the Trestle Hollow Project, that NS produced in this case. *See, e.g.*, NS Reply at III-F-41–45. Average earthwork costs were substantially higher for NS

Second, SunBelt’s claim that R.S. Means costs do not take into account economies of scale that would be available to the SBRR is demonstrably false. SunBelt is correct that Means collects nationwide data from construction contractors for a variety of different sizes of projects. What SunBelt fails to acknowledge, however, is that Means accounts for economies of scale by providing costs for a wide variety of different sizes and types of equipment, including large equipment packages with higher productivity and efficiency that are used in large projects. By selecting from Means the most productive equipment feasible for a given project and conditions, a construction company (such as the builder of the SBRR) may tailor its equipment and manpower to take advantage of all available economies of scale.

Means costs that SunBelt included in its evidence show how Means accounts for economies of scale. For example, Means provides costs for a variety of sizes of excavating “shovel” equipment, each having different productivity rates. *See* SunBelt Op. WP “Means Handbook pages.pdf” at 9. From the Means list of shovels available for excavating bulk bank material, SunBelt selected the largest and most efficient shovel available, a three cubic yard (“CY”) shovel.²³ As the following graph—illustrating cost and productivity data included in SBRR’s evidence—shows, the large 3 CY shovel allows the SBRR to take advantage of higher productivity and lower costs allowed by the size and scope of the project, *i.e.*, economies of scale.

construction projects other than the Keystone project. *See id.* In light of the evidence of real world construction project costs on the NS system—including the 5.3-mile greenfield construction on the Keystone project—SunBelt apparently has receded from the position that the Board should use evidence of actual construction projects conducted by the incumbent carrier. *See* SunBelt Opening at I-60.

²³ NS and other rail carriers have argued in previous cases that a 3 CY hauler is too large to be feasible for railroad excavation and earthwork. While NS is not asserting that argument here, it is clear that the large 3 CY hauler represents one of Means’ lowest excavation costs per cubic yard, which reflects very substantial economies of scale.



Source: SUNBELT OP. WP “MEANS HANDBOOK PAGES.PDF” AT 9.

Thus, SunBelt’s own evidence shows that Means data and costs—which the Board has long relied upon as its primary source for roadbed preparation unit costs in SAC cases²⁴—do account for economies of scale.

Finally, SunBelt’s comparison of overall road property investment costs per mile from prior cases is inapt and does not suggest that the Board’s rejection of costs from a small unrepresentative project as the basis for SBRR excavation costs was material error. *See* SunBelt Pet. Ex. 1. In the first instance, SunBelt’s comparison of total road property investment costs per mile from a number of Eastern and Western SAC decisions over the last fifteen years says nothing about the relative levels of excavation costs in those cases. Of course, excavation costs are only one component of road property investment. Indeed, the entire roadbed preparation category (which includes multiple subcomponents in addition to excavation) only accounted for approximately 15.5 % of the SBRR’s total road property investment costs. *See Decision* at 96,

²⁴ *See, e.g., Duke v. NS*, 7 S.T.B. 89, 171; *PPL Montana v. BNSF*, 6 S.T.B. 286, 305; *FMC*, 4 S.T.B. 699, 800; *see also* NS Reply at III-F-34 (citing cases where Board adopted Means costs).

105. A comparison of total road property investment costs per route mile thus provides no information about whether total excavation costs were higher or lower than in past cases.

Even as a matter of gross road property investment per mile, SunBelt's comparisons are distorted and misleading. In the first instance, SunBelt indexes construction costs from other years to 2011 levels using the GDP-Implicit Price Deflator ("GDP-IPD"). But in all prior SAC proceedings, the Board has consistently used the AAR Railroad Costs Recovery Index series to adjust SAC investment for changes in price levels.²⁵ Applying this indexing method to construction costs from prior SAC decisions produces a more relevant comparison that focuses on actual historical changes in railroad asset values, unlike the GDP-IPD which captures broader price level changes in the economy as a whole.

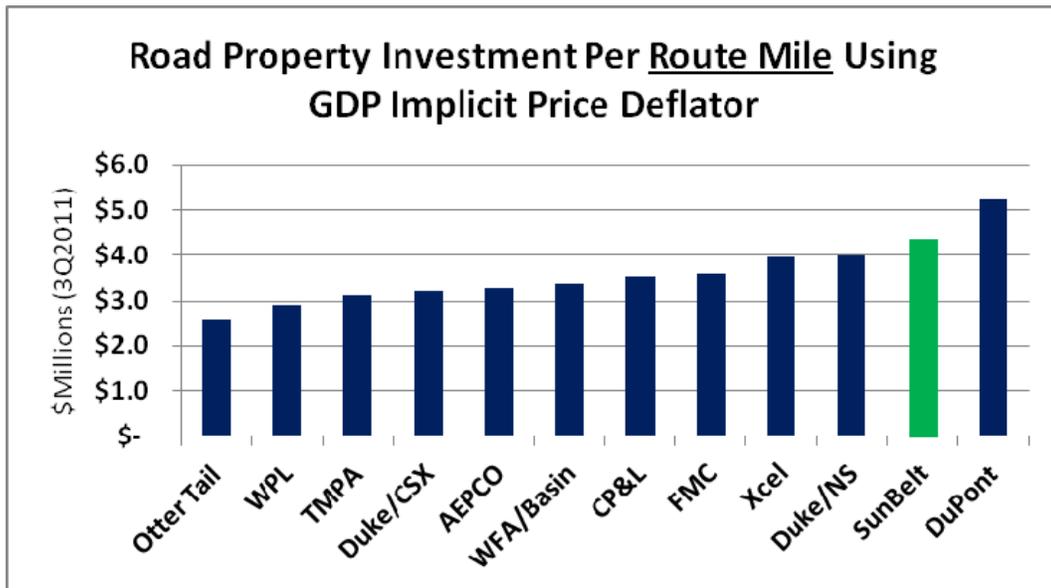
A second distortion inherent in the SunBelt comparisons is its use of route miles rather than track miles. The number of tracks per mile is a significant driver of the average cost per SARR route mile. The higher the ratio of track miles to route miles, the higher the average construction cost per route mile, all other things being equal. By focusing only on route miles, SunBelt fails to account for the variations in average investment driven by the number of tracks per mile, thereby distorting the relevant comparison. This route-mile versus track-mile distinction is particularly significant for cases involving larger volumes of merchandise and carload traffic—such as this case—where additional yard track miles are required to switch cars into blocks and siding tracks are needed along the route to access customer facilities, thus

²⁵ Specifically, this indexing method applies the AAR's Materials and Supplies Index to track construction materials and engineering investments, the AAR's Wage Rates and Supplements Index to track labor investment, and the AAR's Materials, Wages Rates, and Supplements, Excluding Fuel Index to all other road property investment accounts except land. Using public information from the Board's SAC decisions, NS developed composite index factors consistent with the DCF model's calculations of asset inflation to adjust the road property investment for each SARR to 3Q2011 price levels. *See* NS Recon. Reply Exhibit 2.

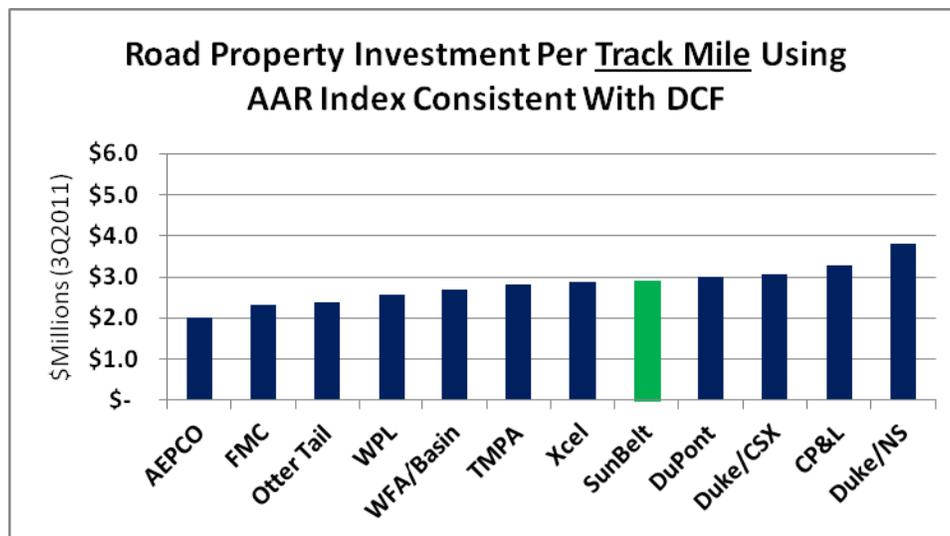
increasing the relative proportion of track miles to route miles and correspondingly increasing construction costs per route mile. Comparison of Eastern SAC cases decided over the last decade shows that the recent SunBelt and DuPont cases (involving more merchandise and carload traffic) had substantially greater track-miles-per-route-mile than other cases.

Decision	SARR Track Miles Per Route Mile
<i>Duke/NS</i>	1.24
<i>Duke/CSX</i>	1.26
<i>CP&L</i>	1.31
<i>DuPont</i>	1.76
<i>SunBelt</i>	1.50

The following two charts illustrate the difference in relative road property investment per mile resulting from application of a SARR-specific rail-asset index and comparing track miles rather than route miles. The first chart below graphically illustrates SunBelt’s comparison, using the GDP-IPD index and comparing road property investment per route-mile.



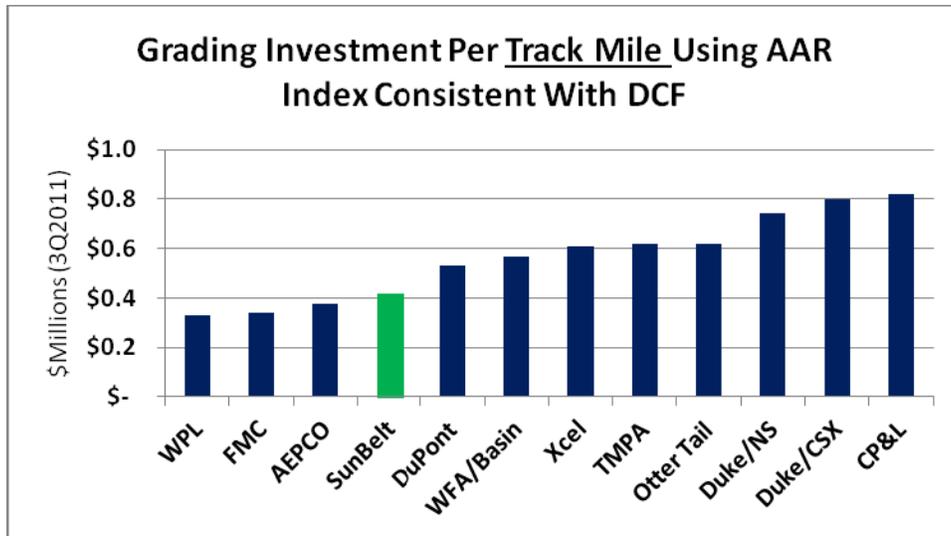
The second chart adjusts the comparison by using the same index the Board uses in its DCF calculation, and comparing track-miles instead of route-miles.



Note that the more apples-to-apples comparison of total road property investment shows that the road property investment per track mile in this case is actually at the low end of the costs for Eastern cases decided since 2000. As the Board knows, particularly with respect to road property investment in SAC cases, the East is not the West.²⁶

Finally, a more focused comparison of the primary category of costs for which SunBelt relied upon the Trestle Hollow Project—grading investment—shows that the Means-based costs adopted by the Board in this case are actually in the bottom third of the 12 cases SunBelt has chosen for comparison. As the following chart illustrates, grading investment per track mile in this case was not only lower than that in all Eastern cases, but also lower than the majority of Western cases.

²⁶ SunBelt’s comparison of SBRR investment costs per mile to those of the SARR in *AEPCO 2011* is also misleading for additional reasons. In the first place, excavation costs in *AEPCO* were based on costs of a large project conducted by the incumbent carrier on lines replicated by the SARR. But SunBelt rejected the use of incumbent NS’s costs of rail construction projects in this case. Moreover, contrary to SunBelt’s assertion, the terrain at issue in *AEPCO* was not more difficult to excavate than the SBRR route—the *AEPCO* SARR route primarily traversed plains, desert, and some rolling hills.



In sum, SunBelt’s arguments provide no basis for the Board to depart from its established precedent of using Means data to estimate excavation costs in SAC cases.²⁷ The Board properly rejected Trestle Hollow Project costs as unrepresentative of the excavation costs that would be incurred by a 580-mile rail system traversing three different states encompassing diverse terrain and topography. SunBelt has not shown that the Board materially erred in finding SunBelt failed to support the proposition that the small, atypical Trestle Hollow Project was a suitable proxy for excavation and grading costs that would be incurred by the SBRR. The Board should affirm its ruling and reject SunBelt’s insufficient reconsideration request.

D. The Board’s Calculation of Ballast Quantities Was Not a Material Error.

SunBelt complains on reconsideration that NS and the Board used the weight-to-volume conversion factor that SunBelt itself advocated in its case-in-chief. *Compare* SunBelt Pet. at 20-21 *with* SunBelt Opening at III-F-23. It is well-established that where the defendant carrier accepts evidence proffered by a complainant in its opening case-in-chief, the complainant may not seek on rebuttal to change the evidence accepted by the defendant. *See, e.g., Duke/NS, 7*

²⁷ *See, e.g., Duke v. NS, 7 S.T.B. 89, 171; PPL Montana v. BNSF, 6 S.T.B. 286, 305; FMC, 4 S.T.B. 699, 800; see also NS Reply at III-F-34 (citing cases where Board adopted Means costs).*

S.T.B. at 100-101 & n.18 (describing “proper role of rebuttal evidence” and explaining that where the defendant carrier does not contest the complainant’s evidence as to an issue, that issue is “not open to rebuttal”). On Reply, a carrier may either accept evidence that the complainant presented in its Opening or it may show that the complainant’s evidence is unsupported or infeasible and present an alternative that addresses the infirmity in the complainant’s opening case-in-chief. *See id.* If, as here, the defendant accepts the evidence presented by the complainant on opening, that is the end of the matter and the complainant may not seek to change that evidence on rebuttal.²⁸

Engaging in revisionist history, SunBelt now claims that it mistakenly posited a weight-to-volume conversion factor of 1.5 tons/cubic yard in its opening evidence for both ballast and sub-ballast quantities when it had intended to use a factor of 1.35. *See SunBelt Pet.* at 20-21. The text of SunBelt’s opening evidence, however, suggests it intended to use the “standard” conversion factor of 1.5, stating that SunBelt’s experts “used the standard conversion factor of 1.5 tons/CY in determining quantities, which is conservative versus the conversion factor of 1.325 tons/CY in the “Track Data Handbook.” SunBelt Opening at III-F-23 (emphasis added). The quotation shows both that SunBelt characterized the conversion factor of 1.5 as a standard, and that it posited the higher 1.5 as a conservative alternative to a conversion factor used by another source. Further support for the use of the standard 1.5 conversion factor is provided by its use by the Complainant and adoption by the Board in another recent SAC case. *See DuPont*, STB Docket No. 42125, at 187-89 (describing 1.5 tons/CY as “the standard conversion factor”).

²⁸ *See, e.g., DuPont*, STB Docket No. 42125, at 84 n.75 (“The complainant may not make changes on rebuttal when the defendant has accepted the opening submission and did not have an opportunity to reply to those changes.”); *Arizona Electric Power Coop., Inc. v. Burlington N. & Santa Fe Ry. Co. & Union Pac. R.R. Co.*, STB Docket No. 42113, at 112-13 (served Nov. 16, 2011) (“*AEPCO 2011*”) (same, and adopting parties’ narrative evidence agreement, despite inconsistent calculations in complainant’s workpapers).

SunBelt incorrectly accuses NS of engaging in “gamesmanship” when it accepted the conversion factor posited in SunBelt’s narrative opening evidence. NS noted on Reply that although SunBelt’s narrative evidence stated that it had conservatively used the standard 1.5 conversion factor, SunBelt’s workpapers had applied a different factor of 1.35. *See* NS Reply at III-F-123–124.²⁹ To conform SBRR ballast quantities to the approach SunBelt posited in its narrative evidence, NS supplied calculations applying the standard 1.5 conversion factor. *See id.* Then on rebuttal, SunBelt claimed that, contrary to its statements in its opening case-in-chief, it had intended to use a conversion factor of 1.35. *See* SunBelt Reb. at III-F-76 (claiming “SunBelt’s text was wrong and its workpapers were correct”). Because SunBelt made this new assertion for the first time on rebuttal, NS had no opportunity to submit responsive evidence.

Consistent with the Board’s rules and precedents and NS’s reliance on the express statements in SunBelt’s case-in-chief, the Board appropriately adopted the conversion factor that SunBelt had advocated on opening and NS had accepted on Reply. *Decision* at 129-30, 132 (adopting the position posited in SunBelt’s narrative evidence and accepted in NS’s Reply evidence); *see DuPont*, STB Docket No. 42125, at 84 n.75; *Duke/NS*, 7 S.T.B. at 100-01; *FMC Wyoming v. UP*, 4 S.T.B. 699, 790 (2000) (Board “cannot accept [complainant’s] change on rebuttal when the opposing party has acquiesced to the original evidence but is not afforded the opportunity to reply to the new evidence.”).

The Board’s ruling was also an independently reasonable determination. Faced with a choice between two potential conversion factors in the same range, one of which the complainant had characterized as “standard” and intentionally conservative, the Board reasonably selected the

²⁹ Notably, the conversion factor applied in SunBelt’s workpapers is neither the 1.5 it characterized as standard, nor the 1.325 it cited from the Track Data Handbook, but rather a third figure (1.35) for which it cited no support.

standard, conservative factor. Moreover, the 1.5 conversion factor is consistent with the standard factor the Board adopted a few months earlier in another case. *See DuPont*, STB Docket No. 42125, at 187-89.

SunBelt presents no argument showing that the Board's acceptance of the conversion factor SunBelt proffered in its narrative case-in-chief was material error. Indeed, reversal of that ruling based on SunBelt's rebuttal change of position would violate the Board's rules and itself would be a material error. The Board should reject SunBelt's request that it revisit this ruling.

E. The Board's Calculation of Road Locomotive Counts Includes a Small Error.

SunBelt next argues that the Board erred by not correcting a slight overstatement in NS's count of road locomotives. SunBelt argued on Rebuttal that an error in an NS spreadsheet caused NS to calculate a need for 36 ES4400 locomotives rather than 34. SunBelt Reb. at III-C-108. SunBelt claims that this represents a ten percent overstatement of ES 4400 locomotives (*id.* & SunBelt Pet. at 21), but of course two locomotives is less than six percent of the total of 34 ES4400 locomotives. In any event, NS has reviewed the claimed error and does not dispute that it miscalculated ES4400 locomotive counts. NS does not object to SunBelt's requested correction, but notes that this minor error has a minimal impact on the DCF calculations.

F. The Board Did Not Materially Err When Accounting For Earthwork Quantities at Intermodal and Automotive Facilities.

SunBelt argues that the Board erred when it accepted NS's excavation quantities based on the full areas of intermodal and automotive yards. *See SunBelt Pet.* at 21-22. The Board rejected SunBelt's argument that including those quantities in roadbed preparation costs would result in a double-count of associated costs, finding "there is not a double count of excavation quantities for automobile and intermodal yards, because neither party included excavation quantities in building and facility costs." *See Decision* at 113. On reconsideration, SunBelt claims it would be "unorthodox" to include those yard excavation quantities in the roadbed

preparation cost account, because such excavation costs should be classified in the buildings and facilities account. *See SunBelt Pet. at 22.* Significantly, SunBelt provides no evidence or argument suggesting the yard excavation quantities would not be necessary, but only the *non-sequitur* that if those necessary excavation quantities are misclassified, they should be excluded from the analysis altogether. SunBelt’s proposed “correction” to this alleged error thus would result in the even greater error of ignoring these excavation quantities altogether.

Even if SunBelt’s misclassification argument were accepted, that would be grounds only for reclassification of those costs to the buildings and facilities account. Indeed, classification of those excavation costs in the roadbed account instead of in the buildings and facilities account actually favors SunBelt. Because roadbed account assets have longer life spans than buildings and facilities account assets in the DCF model, including intermodal and automotive facility excavation costs in the roadbed account results in a lower present value of SBRR construction costs. Thus, if the Board were to reclassify intermodal and yard excavation quantities in response to SunBelt’s complaint, the result would be to increase the present value of SBRR road property investment.

G. The Board Did Not Materially Err By Accepting NS’s Fine Grading Evidence.

SunBelt complains that the Board erred in accepting NS’s evidence on fine grading because it was derived from total valuation section miles. *See SunBelt Pet. at 22-23.* This complaint misses the point. The Board correctly accepted NS’s fine grading cost evidence because it was the best (and only) evidence of record regarding those costs. *See Decision at 115-116.* Moreover, if the Board were to adjust its fine grading calculations, it should also fix another error, which would result in a net increase in SBRR fine grading costs. Specifically, NS’s Reply evidence explained that fine grading costs should be applied to all cubic yards of

earthwork. *See* NS Reply at III-F-83. However, NS’s workpaper calculations inadvertently neglected to apply the fine grading unit cost to common excavation quantities, which resulted in an understatement of fine grading costs.³⁰ If the Board were to adopt SunBelt’s proposed adjustment, consistency would require the Board also to apply the adjusted unit cost to common excavation quantities. The net effect of both these changes would be to increase construction costs by \$2.4 million. In light of the further adjustment that would more than offset the change SunBelt advocates,³¹ NS’s Reply evidence is a conservative estimate that understated fine grading costs and remains the best evidence in the record.

H. The Board Did Not Make a Material Error In Its Calculations of Railcar Acquisition Costs.

SunBelt has two disagreements with the Board’s calculation of railcar acquisition costs, neither of which has merit. In both cases, SunBelt complains that the Board used a figure from SunBelt’s Opening Evidence that NS accepted on Reply and did not instead use a revised figure from SunBelt’s Rebuttal Evidence. The Board did not materially err by using agreed-upon numbers rather than SunBelt’s Rebuttal revisions.

First, SunBelt complains that the Board “uses the dwell time amount SunBelt submitted on Opening rather than [what it submitted on] Rebuttal,” claiming that this was inconsistent with the stated intention on page 40 of the *Decision* to use SunBelt’s dwell times. SunBelt Pet. at 23. This description confuses the Board’s holdings on two separate forms of dwell times: (1) the time railcars dwell at customer origins and destinations (“customer dwell”); and (2) the time railcars dwell at intermediate yards during the course of rail transportation (“in-transit dwell”).

SunBelt’s Opening evidence included an estimate of customer dwell time, which NS accepted on

³⁰ *See Decision* workpaper “No.2_STB - SBRR Open Grading NS Reply.xlsx,” Tab “Finish Grading” at cell G19 and tab “Unit Costs” at cell T16.

³¹ SunBelt estimates that the fine grading quantities adjustment it seeks would reduce SBRR investment by only \$352,000.

Reply and which the Board used in its *Decision*.³² But SunBelt omitted the in-transit dwell time, and thus NS's Reply calculated an in-transit dwell time. *See* NS Reply at III-D-24-25.

SunBelt's Rebuttal admitted that it omitted in-transit dwell time and submitted its own estimate, which the Board accepted in the *Decision* and used in its workpapers. *See* SunBelt Reb. at III-D-15; *Decision* at 40.

The Board therefore did use SunBelt's Rebuttal evidence of in-transit dwell time, just as it said in the *Decision*. SunBelt's complaint is that the Board also used the customer dwell time SunBelt proposed on Opening (which NS adopted on Reply), rather than using a new customer dwell time SunBelt presented for the first time on Rebuttal. But there is no error in using a reasonable calculation that the complainant proposed and the defendant accepted simply because the complainant improperly sought to substitute a different number on Rebuttal.

Second, SunBelt complains that "the Board incorrectly states that it accepts the 15.1 percent peaking factors to which the parties agree." SunBelt Pet. at 23 (citing *Decision* at 35). There is nothing "incorrect" about the Board's statement: SunBelt used a 15.1% peaking factor on Opening. *See* SunBelt Opening III-C-11. NS used the same peaking factor in its Reply Evidence. *See* NS Reply WPs "SBRR Operating Statistics NS Reply" at Cell D34 & "SBRR Reply Yard Assignments" at Tab "Totals" Cell E10. Once NS agreed to SunBelt's peaking factor in NS's Reply, SunBelt did not have the right to change that factor on Rebuttal.³³ Thus the fact that SunBelt submitted a slightly different 14.83 peaking factor on its Rebuttal evidence is beside the point. The Board certainly did not err by not allowing SunBelt to change on Rebuttal an element of its operating plan to which NS agreed on Reply.

³² *See* NS Reply WP "SBRR Car Costs NS Reply.xlsx;" STB WP "SBRR Car Costs stb.xlsx."

³³ *See, e.g., AEPSCO 2011*, STB Docket No. 42113, at 113 (complainant "may not make changes on rebuttal when defendants have accepted the opening submission and did not have an opportunity to reply to those changes"); *Duke/NS*, 7 S.T.B. at 100-01.

I. The Board Did Not Materially Err By Not Making Downstream Adjustments to Earthwork Preparation Spreadsheets.

SunBelt takes the unprecedented and unworkable position that, where the Board finds that neither party's evidence correctly addresses some SAC element or issue and adopts an alternative or hybrid approach, the Board should independently undertake to revise all SAC evidence and calculations that may be affected by that finding. *See* SunBelt Pet. at 24-25 (referring to such revisions to the parties' evidentiary spreadsheets and calculations as "residual downstream effects"). By SunBelt's calculations, the effect of this particular proposed adjustment on the costs and SAC results in this case would be relatively minor (\$1.3 million). Even though this particular adjustment would favor NS, NS opposes SunBelt's novel position as unworkable and having staggering adverse practical implications for the Board and its staff.

As SunBelt notes, its request that the Board rework the evidence submitted by the parties to take account of "residual downstream effects" of its rulings "underlies nearly every element of a SAC case." SunBelt Pet. at 24. As the Board is aware, the parties submit voluminous and complex evidence with thousands of inter-connected calculations, spreadsheets, and data inputs. It would be impractical in the extreme for the Board to attempt to adjust and revise all of these complex calculations to take account of all the compound "residual" effects of changes it may make to elements of that evidence. The Board has neither the time nor the resources that would be required to make such revisions accurately. Moreover, in many instances it is likely the appropriate additional revisions and adjustments may be debatable or uncertain, potentially giving rise to further disputes and litigation regarding those revisions.

The Board has not undertaken such a herculean effort in prior cases, and it would not be a wise or productive use of its limited resources to start now. The Board should reject SunBelt's unprecedented invitation to engage in potentially unlimited revisions and adjustments to the

parties' SAC presentation to account for compound "residual" effects of rulings and decisions regarding myriad issues.

J. The Board Did Not Materially Err By Not Making Downstream Adjustments to Undercutting, Over-Excavation, and Gabion Excavation Costs.

SunBelt claims that the Board erred by removing earthwork costs associated with undercutting, over-excavation, and gabion foundation excavation, but not removing associated earthwork quantities. *See* SunBelt Pet. at 25. Like the earthwork preparation spreadsheet issue addressed above, this is an argument for a "downstream" adjustment to the SAC analysis. SunBelt's suggestion that the Board exhaustively address the arguable residual effects of its decisions—no matter how limited those effects might be—would significantly complicate the SAC process. The Board does not need to and should not undertake to adjust its SAC calculations to account for all conceivable downstream effects of its rulings, particularly for issues like this one that have such a limited impact on the SAC result. (According to SunBelt, this issue's impact on the SARR's net present value amounts to only \$676,000.)

K. As NS Showed In Its Petition for Reconsideration, The Board Should Use The Well-Supported Distances in NS's Ballast Transportation Evidence.

SunBelt contends that the *Decision* should have applied SunBelt's hypothetical assumption that ballast suppliers are located within 100 miles of every SBRR railhead to calculate the transportation component of the cost per track foot of "different ballast types and track configurations." SunBelt Pet. at 25. However, as NS explained in its reconsideration petition, the Board's acceptance of SunBelt's erroneous and unsupported hypothetical assumption regarding available ballast suppliers was based on a plain misreading of NS's evidence. *See* NS Pet. at 5-6. The necessary and appropriate adjustment to ballast transportation distances that NS seeks in its Petition renders this SunBelt request moot.

L. The Board Did Not Materially Err By Accepting The Parties’ Agreed Costs of Rail Lubricators.

SunBelt’s argument that the Board erred by accepting the parties’ agreed unit cost for rail lubricators is meritless. SunBelt admits that the Board used the unit cost that SunBelt proposed on Opening and that NS accepted on Reply, but claims that the Board should have used a different cost because SunBelt made a minor error in calculating the cost on Opening. *See* SunBelt Pet. at 25. It is not an error for the Board to accept a cost on which the parties agree. That is particularly so here, because SunBelt did not even attempt to correct the alleged error in its calculations on Rebuttal and instead waited until after the Board issued its *Decision* to raise it. And it is particularly so when the alleged error is as insignificant as this one—just \$32,000 in a case where road property investment alone totals more than \$2.5 billion.

M. The Board Did Not Materially Err By Not Making the Additional Unit Cost Index Changes SunBelt Advocates.

SunBelt requests that the Board change the index it used in its workpapers to adjust to 3Q 2011 levels the costs of tie plates, spikes, and anchors, turnouts, rail lubricators, crossbucks, and milepost signs. *See* SunBelt Pet. at 26. SunBelt provides no adequate basis for changing the index method the Board applied for certain track materials. SunBelt’s argument is that, because for some track items the Board’s workpapers substituted the Means Historical Cost Index for the AAR Materials and Supplies Index proffered by NS, the Board should substitute that alternative Means index for other SBRR track materials. *See id.* But the text of the *Decision* gives no indication that the Board had any intention to substitute the Means index for the AAR Materials and Supplies Index for any track item. Instead, the *Decision* adopted the parties’ agreed unit costs for track materials and its implementing workpapers used the NS evidence—which used the AAR Index for adjusting the costs to 3Q 2011 levels—as the basis for computing track construction costs. *See* STB WP “No. 2_STB - SBRR Track Construction NS Reply.xls.”

Without explanation, the Board’s workpapers applied the Means Index instead of the AAR Index when adjusting the costs of some track items to 3Q 2011 levels. However, the *Decision* expresses no preference for the Means Index for any track component cost. *See Decision* at 136. There is thus no basis in the *Decision* for the additional index changes SunBelt requests on reconsideration. Nor does SunBelt’s Petition provide any reason or rationale to suggest that substitution of the Means Index would generate more accurate results. Because there is no basis in the *Decision* to conclude that the Board intended any change to the index that both parties used to calculate their agreed track materials costs, the Board should reject SunBelt’s unsupported request for such a change.

N. SunBelt’s PTC Labor Cost Adjustment Should Be Rejected.

The revisions to Positive Train Control (“PTC”) labor costs requested by SunBelt are premature, materially incomplete, and based on a misunderstanding of the Board’s PTC cost calculations. As NS explained in its reconsideration petition, the *Decision* adopted an approach to PTC implementation that neither party’s evidence contemplated, *i.e.*, the SBRR would implement “an initial PTC system” in 2011 and then upgrade that initial system to comply with RSIA requirements between 2011 and 2015. *See* NS Pet. at 31-32. Because SunBelt assumed a PTC system would be fully installed in 2011 and NS assumed an initial CTC signaling system with a PTC overlay in 2015, the Board has no evidence of what PTC costs might be incurred in which period(s) under the hybrid scenario posited by the *Decision*. *See id.* at 31-34.

SunBelt’s request that the Board reduce PTC labor costs for the second period (effectively allocating PTC labor costs between the two periods) is predicated on the erroneous assumptions that the Board’s workpaper calculations distributed PTC implementation costs between those periods and that most PTC labor costs would be incurred during initial installation in 2011. However, the Board’s workpapers did not include any costs—be they for labor,

equipment, research and development or any other facet of a PTC system—for implementing an initial PTC system in 2011. *Id.* at 32. Stated differently, because the Board’s calculations did not include any costs for installation of the initial PTC system, it did not distribute PTC labor costs between the two periods. Logically, any rational allocation of PTC labor costs must be part of an overall allocation of PTC costs in accordance with the Board’s assumption of installation of an initial PTC system followed by a subsequent upgrade of that system to meet RSIA 2015 standards (interoperability, *etc.*).³⁴

In addition, SunBelt’s request is materially incomplete because it provides for a reduction of “future” PTC labor costs without a corresponding increase in initial PTC labor costs in 2011. The road property investment costs as calculated in the Board’s workpapers include no PTC labor costs. But SunBelt’s argument for reduction of PTC labor costs in the second, “future” period is based on the (unsupported) assumption that the SBRR would incur most of those costs (75%) prior to commencing operations, in 2011.³⁵ *See* SunBelt Pet. at 26. It would be arbitrary and irrational to reduce future PTC labor costs on the theory that they would be incurred by the SARR prior to start-up without ever accounting for those initial costs. For this additional reason, the Board should reject SunBelt’s request for a reduction in future PTC labor costs as unbalanced, unreasonable, and unsupported by the evidence.

³⁴ NS’s reconsideration petition presented two alternative approaches to implement the Board’s PTC ruling, one that would use SAC evidence in the record and a second that would require re-opening of the record for the parties to submit supplemental evidence regarding what PTC costs would be incurred in each of the two periods (initial costs through SBRR start of operations in 2011 and costs to make system RSIA-compliant from 2011 through 2015). *See* NS Pet. at 31-34.

³⁵ Even putting to one side all other PTC system costs that must be accounted for in 2011 in order to implement the *Decision*’s ruling, if the Board were to assume that the SBRR would incur 25% of PTC labor costs between start-up and the end of 2015, it necessarily must assume the SBRR would incur 75% of its PTC labor costs prior to commencing operations in 2011. Therefore, even under the logic of SunBelt’s isolated request for adjustment of PTC labor costs, the initial 75% of PTC labor costs must be added as SBRR road property investment in 2011.

Because SunBelt's evidence assumed a fully RSIA-compliant PTC system would be installed in 2011 and did not address the hybrid approach adopted by the *Decision*, PTC labor costs cannot be assigned in accordance with SunBelt's evidence.³⁶ PTC labor costs, like all other SBRR PTC costs, can be determined only once the Board determines which PTC system costs the SBRR would incur in 2011 and which it would incur between 2011 and 2015. Thus, the Board should deny SunBelt's petition to reduce future PTC labor costs as both inconsistent with the Board's PTC ruling and lacking adequate evidentiary basis.

O. The Board Did Not Materially Err By Not Crediting the SBRR With Bonus Depreciation for 2012 and 2013.

SunBelt next claims that the Board should have credited the SBRR with small amounts of bonus depreciation for the years 2012 and 2013. *See* SunBelt Pet. at 27. In the first place, this alleged error has only a \$0.1 million impact on the total NPV in the DCF model, well below the level at which it could have any noticeable effect on the outcome of the case or the level of any rate prescription. Moreover, the Board's holding that the SBRR would be entitled to claim massive bonus depreciation benefits that were not available to NS would give the SBRR an unfair financial advantage over the real-world NS. For the reasons NS explained in its Petition, the Board should reconsider its decision to allow the SBRR to claim unlimited bonus depreciation benefits, and instead the Board should limit the bonus depreciation credited to the SBRR to the amount available to NS. *See* NS Pet. at 34-36.

³⁶ As NS demonstrated in its Reply evidence, the amount of SunBelt's reduction of PTC labor costs (75%) was completely arbitrary and unsupported by any evidence. SunBelt's new request that the Board reduce future PTC labor costs by 75% would compound that arbitrariness and cannot be reconciled with SunBelt's SAC evidence, which assumed that all PTC costs would be incurred before the SBRR commenced operations in 2011. This further illustrates the need for the Board to adjust the *Decision* and implementing workpapers to distribute PTC costs between the two periods (an approach that was not directly addressed by either party's evidence) as NS requested in its Reconsideration Petition.

P. SunBelt’s Demands for Expansive Revisions of Forecasts Used By the Parties Should Be Rejected.

SunBelt attempts to expand significantly post-close-of-record revisions to SAC evidence by importuning the Board to adopt a practice of routinely revising and “updating” the numerous forecasts presented in the parties’ evidence and used in SAC analyses in order to reflect the most recent forecast available at the time of the Board’s decision, or even later. *See* SunBelt Pet. at 27. If accepted, this new practice would significantly impair the Board’s efforts to issue final SAC decisions in a timely and efficient manner and undermine finality because parties would always be searching for and submitting subsequent forecasts more favorable to their interests.

Contrary to SunBelt’s assertion, the Board does not “routinely” update[]” forecasts using subsequent forecasts issued after the parties have submitted their evidence. SunBelt Pet. at 27. Rather, with the occasional exception of updating coal volume forecasts using the publicly available, policy-neutral EIA Annual Energy Outlook (“AEO”), the Board generally does not adopt new forecasts issued after the close of the evidentiary record. SunBelt appears to be confusing the Board’s substitution of actual data (*e.g.*, actual traffic volumes or actual inflation) for prior forecasts of that data, reflecting a sound preference for actual data over forecasts and projections. In those rare instances in which the Board has adopted revised forecasts after the parties have submitted their evidence, it is because there has been a very significant, unforeseen change in a forecast, and the substituted forecast is publicly available. Significantly, SunBelt was able to cite only one SAC case in which the Board adopted a revised forecast issued after the parties had submitted their evidence. *See* SunBelt Pet. at 27, n.37 (*citing Duke/NS*).

As the Board has repeatedly admonished, finality and efficient decisionmaking require that the evidence not be subject to continuing revision after the record has closed:

The record must close at some point. Absent a clearly defined cut-off point that is observed by all, one party or the other could always point to

some new piece of data to bolster its arguments. Both parties in a rate reasonableness proceeding have ample opportunity to support their case in their scheduled evidentiary submissions. If a party wishes to introduce further material at a later stage, it must file a petition to supplement the record. Such a petition should show that the information sought to be introduced is central to the petitioning party's case . . . and would materially influence the outcome of the proceeding.

Duke/NS, STB Docket No. 42069, at 2 (served Mar. 25, 2003). As the Board has further explained, “forecasts are continually shifting and implementing changes to forecasts, particularly volume forecasts, can be burdensome. . . . Accordingly, we will only revise a forecast if we see a significant change between the forecasts in the record and those publicly available from EIA.” *AEP Texas North v. BNSF*, STB Docket No. 41191, at 32, n.57 (Sept. 10, 2007). SunBelt does not claim that there has been a significant change in the forecasts it asks the Board to revise. Applying the standard articulated in *AEP Texas*, the Board should reject SunBelt's requests for multiple “updates” to the forecast evidence submitted when the evidentiary record was open.

With respect to SunBelt's specific requested forecast revisions, it has failed to demonstrate that such widespread adjustments are otherwise necessary or appropriate. It is clear from a review of the Board's workpapers that it did not intend to update all of the various indexes and forecasts used in the SAC analysis. Rather, the single update to the WTI fuel cost forecast implemented by the Board was the direct result of its decision to substitute the EIA forecast of WTI prices for the Global Insight fuel forecast in the RCAF.³⁷ To implement this substitution, the Board created a new tab to the parties' spreadsheet that calculates the Hybrid RCAF-U/A index used to forecast SARR operating expenses, named “Restated RCAF.”³⁸ As the name suggests, the tab is used by the Board to substitute the EIA WTI fuel price index for the Global Insight fuel price forecast and recalculate the RCAF. For its creation of a new RCAF

³⁷ *Decision* at 179.

³⁸ See STB Decision WP “Hybrid RCAF STB b.xlsx”.

index, the Board used the most recent 2014 EIA forecast.³⁹ Consistent with its decision to use the same index to forecast revenues and operating expenses, the Board also modified the spreadsheet used by the parties to forecast fuel prices to incorporate the 2014 EIA forecast.

Based on the Board's decision to update this single forecast, SunBelt argues that the Board should revise the entire RCAF forecast, without providing any evidence either that changes in non-fuel components of the RCAF are correlated with changes in diesel fuel costs or any other evidence or argument to suggest that the RCAF forecast used in the *Decision* is less accurate than a revised forecast. In addition, SunBelt fails to note that, unlike EIA forecasts of WTI fuel costs, forecasts of other RCAF components are not public and do not have the imprimatur of an independent government agency.

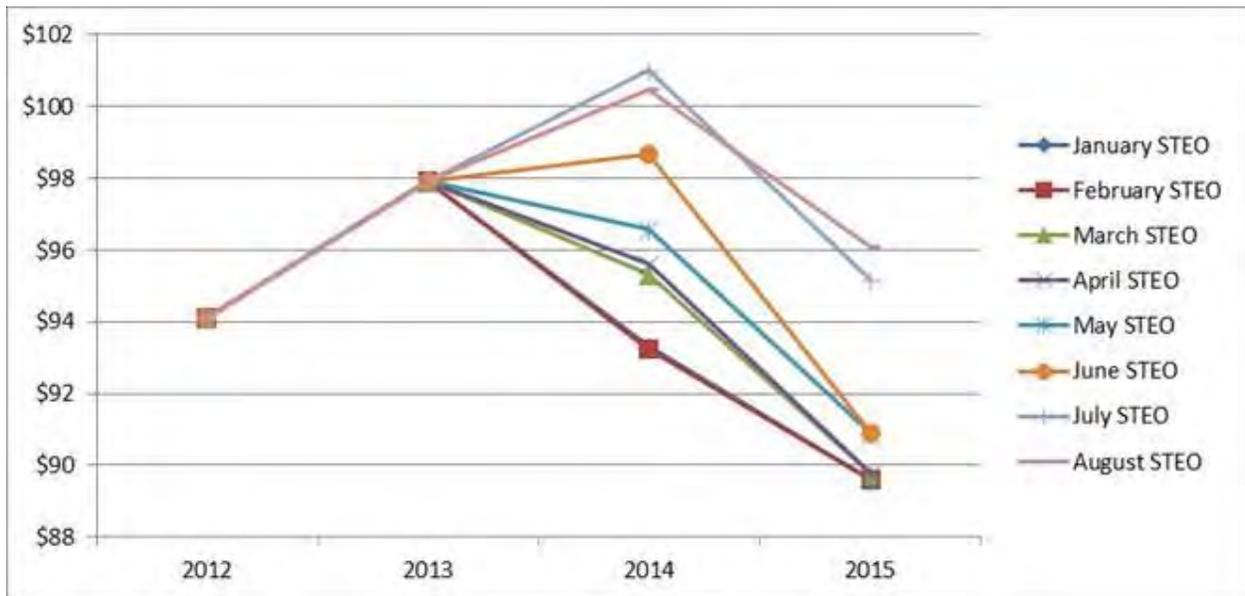
SunBelt goes even further. Illustrating the slippery slope of adopting revised forecasts, SunBelt blithely asserts that because of the narrow RCAF revision it requests, "all RCAF index forecasts in all models (e.g. the revenue forecasts and the URCS costs forecasts used in the MMM model) must also be updated to keep things aligned." SunBelt Pet. at 28-29 (emphasis added).⁴⁰ Then, in its Exhibit 3, SunBelt proposes a wholesale revision of indices that range from coal volumes to land inflation. Despite this broad-gauge request for changes to diverse and distinct index forecasts, SunBelt makes no attempt whatsoever to explain how an update to projected fuel costs would generate changes in future land values or other unrelated indices.

³⁹ See STB Decision WP "Hybrid RCAF STB b.xlsx", tab "Restated RCAF" and new Board WP "AEO 2014 Early Release aeotab_12.xlsx".

⁴⁰ SunBelt's reconsideration calculations also make another change to the Board's RCAF calculations: inserting forecasts from the EIA's STEO into the hybrid RCAF computation. See SunBelt Petition WP "Hybrid RCAF STB update all indices with tech corr.xlsx." SunBelt did not identify this change to the Board's RCAF calculations in the narrative of its Petition. Regardless of whether SunBelt believes that change is justified, it was obligated to advise the Board that it had made that change and not simply bury the change in its workpapers, undisclosed.

Similarly, SunBelt claims that the fact that the Board used that updated EIA Annual Energy Outlook forecast of the price of diesel fuel means it should make additional revisions to account for the agency’s separate Short Term Energy Outlook (“STEO”) forecasts for that cost. As the Board is aware, the forecasting processes for the AEO and the STEO are separate and distinct, and changes in the AEO do not necessarily track changes in the STEO. Thus, the fact that the Board deployed a more recent AEO fuel forecast does not mean it should also adopt any changes resulting from the unrelated STEO forecast process. Further, as the following chart illustrates, monthly STEO projections fluctuate significantly. Because of these significant fluctuations, the application of any particular month’s projection could unduly skew and distort fuel price projections, and the SAC analysis along with them.

MONTHLY STEO WTI PRICE/BARREL FORECASTS – JANUARY—AUGUST 2014



The annual AEO fuel consumption and forecast data more accurately account for longer-term fuel cost trends and reduce potential distortions caused by short-term variations or volatility reflected in the monthly STEO projections. By its nature, an annual data report and forecast

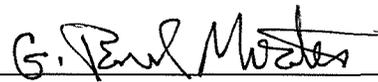
should smooth short-term fluctuations and better reflect the overall fuel costs and trends over the course of a year.

In sum, the Board should reject SunBelt's claim that the Board's application of a revised EIA annual fuel cost forecast warrants changes in every other index forecast. Such wholesale revisions after all of the evidence has been submitted are unnecessary and unfair, and they undermine important interests of finality and prompt and efficient resolution of rate disputes.

IV. CONCLUSION

For the reasons stated above, the Board should deny SunBelt's Petition for Reconsideration.

Respectfully submitted,



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Dated: September 9, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September 2014, I caused a copy of the foregoing Norfolk Southern Railway Company's Reply to SunBelt's Petition for Reconsideration to be served by email and hand delivery upon:

Jeffrey O. Moreno
Jason D. Tutrone
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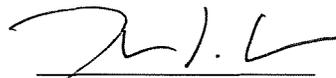

Matthew J. Warren

EXHIBIT 1

SBRR Net Return on Investment (NROI) in Future Years

<u>Year</u>	<u>Revenue - 1/</u> (1)	<u>Operating Expenses Less Depreciation - 2/</u> (2)	<u>Depreciation - 3/</u> (3)	<u>Federal Income Tax - 4/</u> (4)	<u>State Income Tax - 5/</u> (5)	<u>Net Return on Investment (Before Provision For Deferred Taxes) - 6/</u> (6)
2012	\$395,399,772	\$207,956,118	\$56,228,054	\$0	\$0	\$131,215,601
2013	\$432,518,636	\$213,033,154	\$56,228,054	\$0	\$0	\$163,257,428
2014	\$470,393,888	\$216,358,796	\$56,228,054	\$0	\$0	\$197,807,038
2015	\$512,437,993	\$226,577,142	\$56,228,054	\$0	\$0	\$229,632,797
2016	\$558,953,843	\$238,009,947	\$56,228,054	\$0	\$0	\$264,715,843
2017	\$608,949,422	\$252,345,253	\$56,228,054	\$0	\$0	\$300,376,116
2018	\$663,887,355	\$268,749,470	\$56,228,054	\$77,525,505	\$14,603,719	\$246,780,608
2019	\$725,963,494	\$286,585,486	\$56,228,054	\$101,876,762	\$19,190,841	\$262,082,351
2020	\$791,605,615	\$304,227,771	\$56,228,054	\$106,465,519	\$20,055,239	\$304,629,033

Increase in NROI from 2012 to 2020: 232.2%

Notes:

- 1/ - See STB WP "D42130 Exhibit III-H-1 STB No3.xls" , tab "Summary", at cells E13:E21
- 2/ - See STB WP "D42130 Exhibit III-H-1 STB No3.xls" , tab "Summary", at cells C13:C21
- 3/ - See STB WP "SBRR Ad Valorem Tax_Reply STB.xlsx" , tab "Modifier_Reply", cell C6
- 4/ - See STB WP "D42130 Exhibit III-H-1 STB No3.xls" , tab "Federal Taxes", at cells K10:K58
- 5/ - See STB WP "D42130 Exhibit III-H-1 STB No3.xls" , tab "State Taxes", at cells K10:K58
- 6/ - Column (1) - Columns (2) to (6)

EXHIBIT 2

STB ROAD PROPERTY INVESTMENT PER TRACK MILE
(ADJUSTED TO 3Q2011 BY AAR/DCF RAIL ASSET INDEX)

<u>Decision</u>	<u>Decision Date</u>	<u>SARR Start Date</u>	<u>Track Miles</u>	<u>STB Investment (Millions)</u>	<u>Rail Asset Index</u>	<u>3Q2011 (SBRR Start Date) Investment (Millions)</u>	
						<u>Factor - 1/</u>	<u>Aggregate - 2/</u>
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1. FMC	12/5/2000	7/1/1997	5,998.0	\$8,392.6	1.61	\$13,539.1	\$2.26
2. WPL	12/9/2001	1/1/2000	1,819.3	\$2,940.6	1.52	\$4,469.8	\$2.46
3. Xcel	6/8/2004	1/1/2001	679.1	\$1,259.8	1.55	\$1,947.0	\$2.87
4. TMPA	3/24/2003	4/1/2001	2,243.7	\$4,097.1	1.53	\$6,285.8	\$2.80
5. Otter Tail	1/25/2006	1/1/2002	1,562.9	\$2,517.4	1.48	\$3,736.6	\$2.39
6. Duke/NS	11/6/2003	1/1/2002	1,378.8	\$3,592.7	1.46	\$5,247.8	\$3.81
7. Duke/CSX	2/4/2004	1/1/2002	1,562.3	\$3,260.0	1.47	\$4,794.2	\$3.07
8. CP&L	12/22/2003	4/1/2002	1,072.6	\$2,372.2	1.48	\$3,520.6	\$3.28
9. WFA/Basin	2/18/2009	10/1/2004	442.6	\$881.2	1.36	\$1,197.7	\$2.71
10. AEPCO	1/22/2011	1/1/2009	3,598.5	\$6,979.4	1.04	\$7,259.9	\$2.02
11. DuPont	3/21/2014	6/1/2009	12,905.0	\$36,688.4	1.05	\$38,591.6	\$2.99
12. SunBelt - 4/	6/20/2014	7/30/2011	870.2	\$2,505.2	1.00	\$2,505.2	\$2.88

1/ - See line 26 of page 3 of this exhibit

2/ - Column (5) x Column (6)

3/ - Column (7) / Column (4)

4/ - Use investment amount based on joint technical corrections

STB GRADING INVESTMENT PER TRACK MILE
(ADJUSTED TO 3Q2011 BY AAR/DCF GRADING INDEX)

<u>Decision</u>	<u>Decision Date</u>	<u>SARR Start Date</u>	<u>Track Miles</u>	<u>STB Investment (Millions)</u>	<u>Grading Index</u>	<u>3Q2011 (SBRR Start Date) Investment (Millions)</u>	
						<u>Factor - 1/</u>	<u>Aggregate - 2/</u>
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1. FMC	12/5/2000	7/1/1997	5,998.0	\$1,335.9	1.63	\$2,177.3	\$0.36
2. WPL	12/9/2001	1/1/2000	1,819.3	\$389.3	1.54	\$599.9	\$0.33
3. Xcel	6/8/2004	1/1/2001	679.1	\$278.1	1.49	\$413.7	\$0.61
4. TMPA	3/24/2003	4/1/2001	2,243.7	\$932.5	1.48	\$1,383.3	\$0.62
5. Otter Tail	1/25/2006	1/1/2002	1,562.9	\$674.0	1.43	\$966.5	\$0.62
6. Duke/NS	11/6/2003	1/1/2002	1,378.8	\$714.1	1.43	\$1,024.0	\$0.74
7. Duke/CSX	2/4/2004	1/1/2002	1,562.3	\$871.0	1.43	\$1,249.0	\$0.80
8. CP&L	12/22/2003	4/1/2002	1,072.6	\$611.7	1.44	\$881.3	\$0.82
9. WFA/Basin	2/18/2009	10/1/2004	442.6	\$190.5	1.31	\$249.9	\$0.56
10. AEPCO	1/22/2011	1/1/2009	3,598.5	\$1,279.7	1.06	\$1,353.5	\$0.38
11. DuPont	3/21/2014	6/1/2009	12,905.0	\$6,464.1	1.06	\$6,863.4	\$0.53
12. SunBelt - 4/	6/20/2014	7/30/2011	870.2	\$363.9	1.00	\$363.9	\$0.42

1/ - See line 22 of page 3 of this exhibit

2/ - Column (5) x Column (6)

3/ - Column (7) / Column (4)

4/ - Use investment amount based on joint technical corrections

Decision:	FMC	WPL	Xcel	TMPA	Otter Tail	Duke/NS	Duke/CSX	CP&L	WFA/Basin	AEPCO	DuPont	SunBelt
SARR Start Quarter:	3Q1997	1Q2000	1Q2001	2Q2001	1Q2002	1Q2002	1Q2002	2Q2002	4Q2004	1Q2009	2Q2009	3Q2011

		AAR Rail Cost Recovery Index Used in DCF												
Line	Road Property Category:	Road Property Investment from STB Public Decisions:												
		(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)	(l)	
1.	Land	GDP-IPD - 1/	\$352	\$178	\$18	\$234	\$42	\$106	\$61	\$37	\$11	\$217	\$5,188	\$220
2.	Grading	MWS Ex. Fuel	\$1,336	\$389	\$278	\$932	\$674	\$714	\$871	\$612	\$190	\$1,280	\$6,464	\$393
3.	Track Construction - Materials	Material and Supplies - 2/	\$3,250	\$1,093	\$278	\$1,119	\$618	\$565	\$612	\$414	\$214	\$1,923	\$8,200	\$674
4.	Track Construction - Labor	Wages and Supplements - 2/	\$0	\$0	\$79	\$330	\$243	\$206	\$213	\$157	\$97	\$875	\$1,576	\$115
5.	Tunnels	MWS Ex. Fuel	\$26	\$0	\$24	\$45	\$0	\$415	\$346	\$273	\$29	\$74	\$1,081	\$0
6.	Bridges	MWS Ex. Fuel	\$807	\$307	\$83	\$422	\$161	\$703	\$294	\$261	\$46	\$736	\$4,461	\$376
7.	Signals & Communications	MWS Ex. Fuel	\$490	\$136	\$77	\$121	\$204	\$149	\$183	\$136	\$62	\$373	\$2,050	\$185
8.	Buildings & Facilities	MWS Ex. Fuel	\$319	\$87	\$41	\$53	\$54	\$39	\$57	\$38	\$37	\$191	\$1,412	\$104
9.	Public Improvements	MWS Ex. Fuel	\$185	\$221	\$23	\$111	\$39	\$40	\$13	\$14	\$25	\$60	\$165	\$12
10.	Engineering	Wages and Supplements	\$747	\$223	\$88	\$316	\$210	\$294	\$261	\$192	\$70	\$551	\$2,541	\$186
11.	Mobilization	Allocated Above	\$152	\$59	\$21	\$63	\$48	\$79	\$70	\$49	\$21	\$65	\$686	\$50
12.	Contingencies	Allocated Above	\$731	\$251	\$99	\$351	\$225	\$283	\$259	\$190	\$79	\$634	\$2,864	\$209
13.	Other	Allocated Above - 3/			\$150			\$19	\$0					
14.	Total		\$8,393	\$2,941	\$1,260	\$4,097	\$2,517	\$3,593	\$3,260	\$2,372	\$881	\$6,979	\$36,688	\$2,524

Asset Group:	Source:	Road Property Investment by Asset Group Used in DCF Indexing Method: - 4/												
15.	MWS Ex. Fuel	=Lines 2 + 5-9	\$6,412	\$2,232	\$526	\$1,685	\$1,131	\$2,060	\$1,764	\$1,333	\$389	\$2,713	\$15,633	\$1,070
16.	Material and Supplies	=Line 3	\$0	\$0	\$278	\$1,119	\$618	\$565	\$612	\$414	\$214	\$1,923	\$8,200	\$674
17.	Wages and Supplements	=Lines 4 + 10	\$747	\$223	\$167	\$646	\$453	\$500	\$475	\$349	\$167	\$1,426	\$4,117	\$301
18.	GDP-IPD - 1/	=Line 1	\$352	\$178	\$18	\$234	\$42	\$106	\$61	\$37	\$11	\$217	\$5,188	\$220

		AAR Rail Cost Recovery Index Values (United States):												
19.	MWS Ex. Fuel	Index Value from SARR Start Quarter	282.6	298.9	309.6	310.5	321.2	321.2	321.2	319.7	351.1	435.5	433.8	460.6
20.	Material and Supplies	Index Value from SARR Start Quarter	198.3	196.5	199.5	200.5	208.6	208.6	208.6	201.1	227.6	347.1	334.0	345.8
21.	Wages and Supplements	Index Value from SARR Start Quarter	300.9	321.4	333.8	334.7	345.9	345.9	345.9	345.7	378.2	453.0	453.7	483.3

		Index Factors to 3Q2011:												
22.	MWS Ex. Fuel	=Line 19/Line 19 Column (l)	1.63	1.54	1.49	1.48	1.43	1.43	1.43	1.44	1.31	1.06	1.06	1.00
23.	Material and Supplies	=Line 20/Line 20 Column (l)	1.74	1.76	1.73	1.72	1.66	1.66	1.66	1.72	1.52	1.00	1.04	1.00
24.	Wages and Supplements	=Line 21/Line 21 Column (l)	1.61	1.50	1.45	1.44	1.40	1.40	1.40	1.40	1.28	1.07	1.07	1.00
25.	GDP-IPD - 1/	=Col. (6) / Col. (5) of SunBelt Pet.'s Exhibit 1	1.33	1.28	1.25	1.24	1.23	1.23	1.23	1.22	1.15	1.04	1.04	1.00

26.	AAR/DCF Rail Asset Index	=(Lines 15-18 * Lines 22-25) / (Lines 15-18)	1.61	1.52	1.55	1.53	1.48	1.46	1.47	1.48	1.36	1.04	1.05	1.00
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NOTES:

1/ - Indexes for land investment vary among decisions. Use GDP-IPD index for land investment

2/ - Track labor investment amount is not included in Board's public decisions for FMC and WPL. Use MWS Ex. Fuel for all track construction costs for these two decisions.

3/ - Board's public decisions in Xcel and Duke/CSXT do not describe DCF indexing method for other investments. Assume they are allocated to above RPI categories similar to mobilization and contingency costs

4/ - See STB WP "D42130 Exhibit III-H-1 STB No3.xls" at tab "Asset Inflation" for details on DCF indexing method that is applied here.