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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 PETITION FOR
RECONSIDERATION**

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I. PREFACE AND SUMMARY OF ARGUMENT

Pursuant to 49 C.F.R. § 1115.3(b), Defendant Norfolk Southern Railway Company (“NS”) submits this Petition for Reconsideration of certain aspects of the Surface Transportation Board’s (“Board’s”) June 20, 2014 Decision in this case. *See SunBelt Chlor Alkali P’ship v. Norfolk So. Ry. Co.*, STB Docket No. NOR 42130 (served June 20, 2014) (“*Decision*”).¹ While the Board correctly resolved many of the disputed issues in this case, NS believes that some of the Board’s rulings were material errors that the Board should reconsider under § 1115.3(b).

While NS prevailed in the *Decision*, the errors challenged in this Petition could have a material effect on the ultimate outcome of this case, particularly in light of two other petitions that are being filed with the Board. First, the parties are today filing a joint technical corrections petition identifying adjustments to the Board’s SAC calculations and workpapers that, if accepted by the Board, would affect the Board’s final SAC analysis. Second, SunBelt has indicated that it intends to file its own petition for reconsideration that, if granted in whole or in part, also could affect the Board’s final SAC analysis. Under the Board’s rules and its July 30 decision setting today as the deadline for petitions for reconsideration, NS may not wait to see the Board’s ruling on the technical corrections petition or a SunBelt petition for reconsideration before filing NS’s own petition for reconsideration. Therefore, NS is filing this Petition today.

NS is not moving to reconsider every issue on which it disagrees with the Board’s rulings. The Board has made clear that petitions for reconsideration will only be granted where a party demonstrates a “material error” and that such petitions are not an opportunity to present new evidence or arguments that could have presented earlier.² In light of the restrictive standard

¹ *See also SunBelt Chlor Alkali P’ship v. Norfolk So. Ry. Co.*, STB Docket No. NOR 42130 (served July 2, 2014) (extending time to file petitions for reconsideration until July 30, 2014).

² *See Texas Mun. Power Agency v. BNSF Ry. Co.*, STB Docket No. 42056, at 3 (Sept. 24, 2004).

of 49 C.F.R. § 1115.3(b), NS focuses this Petition on issues where the *Decision* clearly commits a material error when evaluating the evidence in the record.³

The *Decision* contains several categories of material errors. First, in several instances the Board's analysis was predicated on a misunderstanding of the record. For example, the *Decision*'s rejection of NS's evidence of ballast transportation distance was based on an alleged "flaw" in NS's calculations that does not exist. Similarly, the *Decision*'s refusal to require the SBRR to pay for sufficient insurance to cover the risks of its TIH traffic was a material error that rests upon an apparent misunderstanding of the facts in the record. A similar misunderstanding caused the Board to allow SunBelt to ignore the full costs of constructing the Lake Pontchartrain bridge. The alleged "discovery violation" on which the Board based its decision on this issue is both fictional—for NS fully complied with SunBelt's discovery requests in a manner agreed to by SunBelt—and irrelevant, because rip-rap quantities on the Lake Pontchartrain bridge were plainly outside the scope of SunBelt's discovery requests.

Second, the Board materially erred in several instances by not accepting reasonable NS evidence of a legitimate cost that SunBelt ignored entirely—in violation of longstanding precedent.⁴ For example, NS's conservative evidence of equity flotation costs, which assumed

³ NS notes that because the Board's SAC analysis produced a relatively close SAC result, the threshold for what errors are "material" may be somewhat lower here than in some other cases. NS is only moving to reconsider issues that, individually or cumulatively with others, could materially affect the SAC results.

⁴ The Board's settled rule is that where only one party presents evidence on a particular issue, that evidence will be accepted as the best evidence of record. See *Duke Energy Corp. v. Norfolk S. Ry. Co.*, 7 S.T.B. 89, 161 (2004) ("*Duke/NS*") ("As NS's evidence on travel expenses is the only evidence of record, NS's proposed travel allowance costs are accepted"); *McCarty Farms, Inc. v. Burlington N., Inc.*, 2 S.T.B. 460, 496 (1997) ("*McCarty Farms*") ("Because BN's data . . . is the only documented evidence, we use it as the best evidence of record"); *Bituminous Coal – Hiawatha, Utah, to Moapa, Nevada*, 6 I.C.C.2d 1, 55 (1989) ("*Nevada Power*") ("Since the railroads present the only evidence of record . . . we accept their estimates for the road property investment accounts"); *id.* at 62 (because UP did not include costs for trackage rights, Board

that the SBRR's costs would be at the extreme low end of the typical range of those costs, should have been accepted, particularly in light of the Board's correct recognition that the SBRR would incur such costs. The *Decision* similarly erred by not accepting NS's rail transportation cost evidence, which was the only evidence in the record that accounted for the SBRR's costs to transport rail over residual NS lines from Harrisburg, PA to the SBRR railheads, and by refusing to accept NS's reasonable estimate of the cost of lighting for construction (another cost for which SunBelt submitted no evidence). And the Board likewise erred by rejecting NS's evidence that Means separately accounts for swelled volumes when calculating earthwork quantities and refusing to make NS's reasonable adjustment to account for swelled quantities.

Third, in several instances the *Decision* resolved issues or assigned costs in a way that was inconsistent with the logic of the Board's other holdings. For example, the *Decision*'s correct conclusion that the SBRR would have to pay ad valorem taxes in proportion to its relative profitability was not carried through in the Board's workpapers, which do not link in a way that assigns to the SARR a level of ad valorem taxes consistent with its profitability. And the Board's workpaper use of SunBelt's evidence on the cost of fixed approach spans to movable bridges (as opposed to the movable spans of those bridges) is inconsistent with its holdings for all nonmovable bridges, for which the Board accepted NS's evidence about bridge heights, length, and infrastructure. Finally, the Board's modification of the terminal value calculation creates an overstatement of projected SBRR interest expenses in years 11-20 that is logically irreconcilable with the Board's recognition elsewhere that the interest portion of the SBRR's debt would decrease over time.

accepted "NPC's cost as the only evidence of record"). *See also Duke/NS*, 7 S.T.B. at 100-01 (where a shipper's evidence on an issue is "infeasible and/or unsupported" and the railroad "offers feasible, realistic alternative evidence that avoids the infirmities in the shipper's evidence and that is itself supported, the Board will use the reply evidence for its SAC analysis.").

Fourth, in two instances the *Decision* accepted inferior cost evidence solely because of inconsequential and nonprejudicial typographical errors in NS's evidence. The *Decision* accepted a deficient estimate of derailment repair costs that the Board rejected in *DuPont* simply because of a minor workpaper discontinuity, and it accepted a SunBelt estimate of the transportation costs for plates, spikes, and anchors that the Board repeatedly rejected in *DuPont* and elsewhere in the *Decision* solely because NS's narrative misplaced a decimal point.

Fifth, the *Decision* materially erred by adopting a new approach on PTC implementation *sua sponte* that is not supported by either party's evidence or by the Board's workpapers.

Sixth, the *Decision* materially erred by accepting SunBelt assumptions that are inconsistent with "the realities of real-world railroading."⁵ The *Decision*'s acceptance of SunBelt's position on bonus depreciation creates a reverse barrier to entry that allows the SARR to claim tax benefits not available to the real-world NS. Another instance of the *Decision* accepting an unreasonable assumption was in the detector evidence, where the Board accepted SunBelt's counts of equipment detectors without any evidence that its equipment detector spacing was sufficient to satisfy current industry standards. And the *Decision*'s failure to include any Operations Support Staff is based on the impossible assumption that the SBRR could function with a single desk responsible for coordinating 100% of car and train reporting, demurrage billing, equipment orders and releases, and setouts, while simultaneously managing 100% of customer service communications.

NS is submitting workpapers with this Petition that explain how the Board can correct the material errors described below.

⁵ See, e.g., *Western Fuels Ass'n & Basin Elec. Power Coop. v. BNSF Ry. Co.*, STB Docket No. 42088, at 15 (served Sept. 10, 2007) ("*WFA I*"); *Arizona Electric Power Coop., Inc. v. BNSF Ry. Co. & Union Pac. R.R. Co.*, STB Docket No. 42113, at 16 (served Nov. 16, 2011) ("*AEPCO 2011*").

II. THE BOARD SHOULD RECONSIDER THE FOLLOWING MATERIAL ERRORS IN THE *DECISION*.

A. The *Decision* Materially Erred Because It Resolved Several Issues Based on a Misunderstanding of the Record.

1. The *Decision* Materially Erred By Rejecting NS’s Ballast Transportation Evidence Because of a Plain Misreading of That Evidence.

The Board based its decision to accept SunBelt’s 100-mile estimate of the offline transportation distance for SBRR ballast on a perceived “flaw” in NS’s calculations that does not exist. The *Decision*’s reasoning on this point is thus based on a clear mistake of fact, and this material error should be reconsidered and corrected.

NS countered SunBelt’s unsupported assumption that the offline transportation distance for ballast would average 100 miles with evidence demonstrating that the quarries from which the SBRR could acquire ballast were all located far more than 100 miles from the SBRR’s railheads.⁶ As NS showed in NS Reply workpaper “Ballast Transportation Mileage to SBRR from Quarries.xls,” the average quarry-to-railhead distance for the SBRR’s four railheads is 349.9 miles.

AVERAGE DISTANCE TO SBRR RAILHEADS⁷

Railhead	Miles
Average Quarry to Birmingham Railhead ⁸	288.8
Quarry to McIntosh Railhead	314.8
Quarry to New Orleans Railhead	422.6
Quarry to Hattiesburg Railhead	373.6
Average Distance to SBRR Railheads	349.9

⁶ See NS Reply at III-F-127-129.

⁷ Source: NS Reply WP “Ballast Transportation Mileage to SBRR from Quarries.xls.”

⁸ As NS Reply workpaper “Ballast Transportation Mileage to SBRR from Quarries.xls” shows, the distance to the Birmingham railhead is the average distance from the three quarries that would serve the Birmingham railhead.

The *Decision* therefore plainly erred when it claimed that NS’s evidence was “flawed” because “NS employs an average quarry-to-railhead transportation distance of 349.9 miles. . . [which] represents an average of actual distances from various ballast sources to the railhead at Birmingham only, rather than the railhead closest to each quarry.” *Decision* at 131. On the contrary, the 349.9 mile distance used by NS was the average to serve all the SBRR’s railheads—not just the average to serve the railhead at Birmingham. The *Decision*’s only stated reason for rejecting NS’s evidence is therefore predicated on an obvious misreading of the evidence.

Not only does NS’s evidence not contain the “flaw” the *Decision* mistakenly perceived, it is also clearly the best evidence of record. SunBelt’s 100-mile assumption was an unsupported supposition that was not based on any estimates of actual transportation distances. Indeed, simply looking at a map of the location of the SBRR’s quarries and of the SBRR’s railheads shows that SunBelt’s 100-mile assumption is not realistic.⁹ NS’s evidence of ballast transportation distance is the best evidence of record, and the Board should accept it.¹⁰

2. The *Decision* Materially Erred By Not Accounting for the Costs of Catastrophic Insurance Coverage.

The *Decision* materially erred by not requiring the SBRR to purchase insurance sufficient to cover the significant liability risks created by the extraordinarily high levels of TIH carried by

⁹ NS provided just such a map at NS Reply WP “SBRR Ballast Distribution Map.pdf.” The above-described NS Reply WP “Ballast Transportation Mileage to SBRR from Quarries.xls” calculates mileages. *See also* NS Reply at III-F-129 n.256 (describing NS’s ballast transportation workpapers).

¹⁰ SunBelt’s only Rebuttal support for its 100-mile estimate was “the theory of unconstrained resources.” SunBelt Reb. at III-F-79. But if the Board were to credit SunBelt’s argument that it can use the theory of unconstrained resources to assume that suitable quarries would be only 100 miles away, then what is to stop a complainant from assuming that quarries would be 50 miles away, or 20 miles away, or even that they would pop up right next to the railheads? The theory of unconstrained resources does not mean that SunBelt can lower transportation costs simply by wishing that quarries would be located near to its railheads.

the SBRR. The *Decision*'s two justifications for allowing the SBRR to forgo the expense of catastrophic insurance coverage rest on a plain factual error about the evidence in the record and a logical fallacy, and the Board should correct this material error.

NS's evidence showed—and SunBelt did not seriously dispute—that (1) SunBelt's insurance ratio was predicated on that of a railroad that did not have liability insurance for damages in excess of \$200 million¹¹; (2) NS pays substantial annual premiums to insure against incidents causing over {{ }} in damages¹²; and (3) this tier of insurance was almost entirely attributable to NS's common carrier obligation to transport TIH commodities.¹³ NS conservatively estimated the costs of catastrophic insurance coverage for the SBRR by taking its own insurance costs for coverage in tiers over {{ }} and scaling them down in proportion to the percentage of NS's TIH ton-miles that would be handled by the SBRR.¹⁴

SunBelt offered no alternative evidence of the cost of catastrophic insurance—instead, it assumed that the SBRR would “roll the dice” that it would never have such an accident. SunBelt's assumption that the SBRR would not have to purchase any insurance to protect itself against a catastrophic TIH release is not reasonable,¹⁵ and it results in a SAC analysis in which SunBelt fails to account for all the real-world costs that NS incurs in order to fulfill its common carrier obligation to carry SunBelt's extraordinarily dangerous traffic.

¹¹ See NS Reply at III-D-207-208 (noting that P&W SEC filings reported that a passenger accident might exceed insurance coverage limits and that 49 U.S.C. § 28103(a)(2) limits liability for passenger accidents to \$200 million).

¹² See *id.* at III-D-208-209; NS Reply WP “Response to Interrogatory No. 23.pdf.”

¹³ See *id.*

¹⁴ See NS Reply at III-D-209-10.

¹⁵ Among other things, the notion that SBRR could attract investors while refusing to insure itself against catastrophic TIH releases is impossible to credit.

Unwilling to offer its own evidence of catastrophic insurance costs, SunBelt instead devoted its energies to nitpicking NS's methodology for estimating such costs. The Board's acceptance of two of SunBelt's criticisms constituted material error.

First, the *Decision* ignored evidence in the record when it concluded that "[t]here is nothing to indicate that NS's coverage over the Tier Amount is solely attributable to the release of TIH, as opposed to other catastrophic events such as accidents involving petroleum products or passenger trains." *Decision* at 21. On the contrary, NS produced detailed information in discovery about {{

}}.¹⁶

The *Decision*'s claim that "nothing" indicates that NS's insurance tiers over {{ }} are attributable to TIH traffic is thus a plain material error. Moreover, the *Decision*'s conjecture that NS's insurance coverage {{ }} might have been due to potential liability from accidents involving passenger trains or crude oil is plainly erroneous. Federal law caps potential damages from passenger train accidents at \$200 million per incident, so by definition NS's coverage tiers above {{ }} could not have been for passenger traffic. *See* 49 U.S.C. § 28103(a)(2). And the *Decision*'s suggestion that some coverage might be due to crude oil movements overlooks the fact that the insurance evidence that NS produced in discovery and submitted with its evidence showed NS's annual liability programs beginning in 2008-09, long before the boom in crude oil rail movements and at a time when NS handled minimal volumes of crude oil.¹⁷ In short, there is no basis in the record for the Board to reach any conclusion other

¹⁶ *See* NS Reply WP "Response to Interrogatory No. 23.pdf."

¹⁷ The Board's Quarterly Commodity Statistics reports aptly demonstrate that the sharp increase in crude oil transportation occurred after NS incurred the insurance costs at issue here. NS reported one carload of crude oil (STCC 13, spec. 131xxxx) in 2008; one carload at that STCC in 2009; three in 2010, 199 in 2011 and 19,313 in 2012.

than that NS's insurance tiers over {{ }} were almost entirely attributable to high-risk TIH traffic like SunBelt's.

Second, the *Decision* erred by adopting SunBelt's argument that it is inappropriate to scale insurance costs based on the percentage of TIH traffic SunBelt selected, because factors other than the total amount of TIH transported can affect the risk of a TIH release.¹⁸ SunBelt's citation of "other factors" ignores the fact that those other factors are not any different for the SBRR than they are for NS. SunBelt does not propose that its railroad would travel over a different "landscape" or through different "populations" than NS does today or that it would have a lower "volume of other traffic" on the lines it is replicating. The only significant variance is that one out of every 40 carloads on the SBRR will carry TIH, while just one of every 250 carloads on NS contains TIH. As a result, every derailed car on the SBRR has a 1-in-40 chance of being a TIH car, while every derailed car on NS has a 1-in-250 chance of being a TIH car. The fact that many factors can influence whether cars derail does not change the basic logic that having more TIH cars increases the risk of a TIH release.

In any event, SunBelt's arguments are ultimately quibbles about the best way to measure a cost that no one disputes is real and SunBelt fails to include altogether. SunBelt has not shown that NS's methodology for estimating this cost is "unsupported, infeasible, or unrealistic."¹⁹ NS's evidence is the best and only evidence in the record, and the Board should accept it.

¹⁸ See *Decision* at 21 (citing "the landscape over which the carrier operates, the population density on the route traveled, the volume of other traffic on the line, the complexity of overall operations, and the amount of traffic and congestion in yards, among others," as factors that could affect the risk of a TIH release).

¹⁹ *Duke/NS*, 7 S.T.B. at 100-01.

3. The *Decision* Materially Erred By Disallowing Lake Pontchartrain Rip-Rap Costs Because of a Nonexistent Discovery Violation.

The *Decision* also made a serious and material error when it refused to require SunBelt to account for the costs of constructing an essential protective berm of riprap for the Lake Pontchartrain bridge. The *Decision* did not deny that the rip-rap berm was necessary for the SBRR to replicate the bridge, but instead disallowed these costs as a discovery sanction on the theory that NS was obligated to produce data on these rip-rap quantities in discovery. *Decision* at 125. The *Decision*'s conclusion that SunBelt is entitled to ignore the costs of the rip-rap on the Lake Pontchartrain bridge is predicated on significant misstatements that SunBelt made on rebuttal about the discovery process. In reality, NS fully responded to SunBelt's requests in a manner consistent with the parties' discovery agreements, and NS did not withhold any requested information regarding Lake Pontchartrain rip-rap. The Board has no rational basis to disallow evidence that NS's experts developed in a special study on Reply as a sanction for a fictional discovery violation.

In the first place, SunBelt never requested that NS produce rip-rap quantities for Lake Pontchartrain or any other portion of NS's system. The *Decision* mirrors SunBelt's selective quotation of its Request for Production No. 113 when it claims that "SunBelt requested 'the number of cubic yards of rip rap placed for the protection of the roadway' on 'any portion of NS's system located in the SARR States.'" *Decision* at 125; *see* SunBelt Reb. at III-F-68 (making same truncations when quoting RFP). But RFP 113 was not a general request that NS provide data about cubic yards of rip rap on any portion of its system—rather, it was a request about NS construction projects and specifically a request to provide documents that might show the quantities of various materials used in specific NS construction projects in the SARR States. *See* SunBelt Reb. WP "NS Response to Rip Rap Discovery Request.pdf" (RFP 113 asks for

“documents sufficient to show the following [information] with respect to grading or construction activities” (emphasis added)).

NS responded to SunBelt’s request for information on construction projects in the way that has become standard procedure in SAC cases: NS provided SunBelt with detailed spreadsheets listing every NS Authorization for Expenditure (“AFE”)²⁰ within the agreed discovery time frame and offered to produce the AFEs in which SunBelt was interested. This AFE selection process was not a means to “restrict the scope” of NS’s discovery responses—it was a mutually agreed approach to focus discovery on the construction projects in which SunBelt was most interested. NS had approximately 900 AFEs within the agreed discovery time frame of 2007 through 2011, and the discovery files NS produced itemized over 105,000 cost entries for these AFEs. Many of those AFEs and their associated files run to hundreds of pages or more.²¹ Neither SunBelt nor NS would be served by NS dumping tens of thousands of pages of documents detailing every single NS construction project. Instead, NS and SunBelt agreed that NS would provide a list of all its AFEs and that SunBelt would select the construction projects in which it was most interested. Through this process NS produced supporting documents for well over 100 AFEs to SunBelt. *See* SunBelt Reb. at III-F-24.

Critically, SunBelt did not object to the AFE selection process. It did not object to NS’s proposal that it respond to RFP 113 by producing a list of AFEs from which SunBelt could select projects for production. It did not complain to NS verbally or in writing about the AFE process. It did not file a motion to compel. SunBelt’s claim that NS should be punished because of a

²⁰ AFEs are used in the railroad industry to develop and track capital projects. An AFE is developed for each proposed capital project, and if the project is approved the AFE is used to track the project and its associated costs.

²¹ *See* NS Reply at III-F-40-43 for a description of the AFE selection process and some of the NS AFEs produced in discovery. *See also* NS Reply WPs “AFE List.xlsx” and “AFE List Update.xlsx,” which are the AFE lists that NS produced in discovery for SunBelt to select from.

discovery compromise to which SunBelt agreed should be rejected. Indeed, accepting SunBelt's claims could inadvertently make discovery in future cases more burdensome, as parties may eschew reasonable compromises to try to avoid exposing themselves to such frivolous arguments

Moreover, the existence of the protective berm was disclosed to SunBelt in discovery. NS produced detailed GIS data for its entire system, which included (among other things) photographs of NS lines that showed the Lake Pontchartrain rip-rap berm. *See* NS Brief at 37 (citing GIS data provided at NS-SB-HC-EHD-024, folder "090319f2"). The *Decision's* suggestion in a footnote that NS was required to direct SunBelt toward these specific photographs in its written response to Request for Production No. 113 is misguided. *See Decision* at 125 n.610. As detailed above, Request for Production No. 113 did not call for disclosure of rip-rap quantities generally, but rather for disclosure of quantities related to construction projects on NS conducted within the discovery period. Moreover, the footnote's suggestion that a railroad is required to annotate and cross-reference every potentially responsive document that it may produce in written responses that are due just 30 days after service is completely impractical and inconsistent with standard discovery practice in state and federal courts. Railroads bear a heavy burden in responding to SAC discovery requests, which require them to assemble and produce vast quantities of data in a short time frame. It is not too much to expect complainants to review the data that they have requested, or at the very least to not claim a "discovery violation" for information that was actually produced to them.

Regardless, SunBelt's claims of a "discovery violation" are a red herring, because NS did not rely on any unproduced information to develop its evidence on Lake Pontchartrain rip-rap quantities. On the contrary, NS's evidence on this issue was a special study developed on Reply by NS's experts based on their study of the berm. *See* NS Reply at III-F-117. NS thus did not

use some preexisting document that was arguably responsive to some SunBelt discovery request. On the contrary, the analysis in NS's Reply is an analysis that NS developed for this case after learning that SunBelt proposed to replicate the Lake Pontchartrain bridge without constructing the 11.3-mile protective berm that is clearly shown from the GIS data NS produced and that would have been plainly apparent on the Birmingham-to-New-Orleans Amtrak ride that SunBelt's bridge expert said he took to inspect the lines.²² SunBelt has no justification for not including the full costs of the Lake Pontchartrain bridge, and the Board should reconsider its decision to not require SunBelt to account for those full costs.²³

B. The *Decision* Materially Erred by Not Accepting Reasonable NS Evidence of Costs That SunBelt Omitted.

1. The *Decision* Materially Erred By Refusing to Accept NS's Conservative Estimate of the SBRR's Equity Flotation Costs.

The Board should reconsider its refusal to adopt NS's evidence of the equity flotation cost for the SBRR, which was the best (and only) evidence of record. The *Decision* accepted that the SBRR would be required to pay an equity flotation fee in order to raise \$1.4 billion in equity capital, but concluded that NS had not adequately shown that its proposed equity flotation fee would be commensurate with the fees that the SBRR would have had to pay. *See Decision* at 183-85. NS presented the only evidence in the record of what equity flotation fee SBRR would incur and showed that its estimate was extremely conservative. The Board's rejection of that evidence is material error, for two reasons.

²² *See* SunBelt Reb. Ex. III-D-2 at 7; *see also* SunBelt Opening at III-F-29 (indicating that SunBelt's bridge evidence was based in part on its engineers' "observ[ations of] bridges on the lines being replicated by the SBRR").

²³ Even if SunBelt had requested that NS produce general data on systemwide rip-rap quantities rather than specific data on "construction projects," NS was obligated only to produce documents in its possession, not to perform a special study to calculate rip-rap quantities for SunBelt. *See, e.g., Entergy Ark., Inc. v. Union Pac. R.R. Co.*, STB Docket No. 42104 (May 19, 2008) (parties responding to discovery requests need not "conduct special studies or attempt to recreate information that was not kept in the ordinary course of business").

First, the Board should have accepted NS's evidence because it was the only evidence in the record of a cost that the SBRR plainly would incur, as the Board found. The Board made clear that equity flotation costs were legitimate and appropriate for SBRR to incur. *See Decision* at 184. Only NS offered evidence of this legitimate cost. Where only one party offers relevant evidence of a necessary cost, the Board has adopted that evidence as the best evidence of record.²⁴ Indeed, the Board's omission of this legitimate cost means that its SAC analysis incorporates no equity flotation cost at all, which directly contradicts its express conclusion that "it would be unreasonable to assume that the SARR would raise . . . capital . . . without paying some form of equity flotation fee." *Id.*

Second, the Board's concern that the 2.1% equity flotation fee NS presented might not correlate to what a SARR would have to pay ignores the fact that the SBRR's equity flotation costs would almost certainly be higher than 2.1%. NS presented evidence that equity flotation costs typically range between 2% and 7% of the total amount of equity raised. *See NS Reply* at III-G-1 & n.1. And NS showed that equity flotation costs were 3.9% in the most recent instance of a railroad issuing large amounts of common stock. *See id.* at III-G-2. Assuming that the SBRR would only pay 2.1%—rather than 3.9%—was thus extremely conservative. It is telling that SunBelt pointed to no evidence suggesting that the SBRR would likely pay an equity flotation fee lower than 2.1%.

²⁴ *See, e.g., Duke/NS*, 7 S.T.B. at 161 ("As NS's evidence on travel expenses is the only evidence of record, NS's proposed travel allowance costs are accepted"); *McCarty Farms*, 2 S.T.B. at 496 ("Because BN's data . . . is the only documented evidence, we use it as the best evidence of record"); *Nevada Power*, 6 I.C.C.2d at 55 ("Since the railroads present the only evidence of record . . . we accept their estimates for the road property investment accounts"); *id.* at 62 (because UP did not include costs for trackage rights, accepting "NPC's cost as the only evidence of record").

The *Decision* is certainly correct that the Facebook IPO would be different from the SBRR's capital-raising activities. But the only relevant differences are ones that would lead to lower equity flotation fees for Facebook. The Facebook IPO was subject to robust investor demand and underwriter interest that led to unusually low flotation fees. See NS Reply at III-G-4 n.6. And any comparison of "credit ratings" or "risk profiles" would surely favor an established company with worldwide recognition over a startup railroad seeking \$1.4 billion dollars to fund greenfield construction three years before it realized a cent of income. But, importantly, SunBelt offered no evidence that the SBRR would have a lower equity flotation cost than Facebook.

Having found that a SARR must pay some form of equity flotation fee, it would be patently unfair to require a defendant railroad to produce evidence of an equity flotation fee incurred by a railroad meeting the exact description of the SARR at issue, because no such evidence will ever exist. A reasonable and conservative approximation of SARR equity flotation costs based on companies that secured unusually low equity flotation fees is the best evidence that the Board can reasonably expect parties to submit, and that is exactly the evidence that NS submitted here.

For these reasons, the Board should reconsider its decision to find that the SBRR would have no equity flotation costs, and it should adopt NS's evidence of a reasonable estimate of the SBRR's equity flotation cost.

2. The *Decision* Materially Erred By Not Accounting for the SBRR's Costs to Transport Rail Over the Residual NS.

The *Decision* incorrectly found that NS had not justified including all the costs to transport rail from the manufacturer to the SBRR railheads. See *Decision* at 134. As NS explained, however, the rail cost that Sunbelt advocated and the *Decision* accepted accounted

only for the cost of moving rail 3.9 miles from the source to its connection with the residual NS. *See* NS Reply at III-F-140-41. It does not account for the cost to transport the rail over the residual NS system to the SBRR. *See id.* at III-F-141-42. While the real-world NS transports much of its rail over its own lines, the SBRR would not be able to transport rail over its own system during construction because the SBRR lines would not yet exist. Consistent with Board precedent, the SBRR must pay for the cost of transporting rail from the site where it is manufactured to SBRR railheads.²⁵

Sunbelt offered no evidence at all of the costs to transport rail from the short line interchange with the NS system at Harrisburg, PA, *across the NS system, and to SBRR railheads*— a necessary cost the Board has made clear a SARR must pay. *See, e.g., Otter Tail*, STB Docket No. 42071, at D-26.

This omission occurred because SunBelt relied solely on NS’s R-1 costs for transporting rail, which only include costs incurred by NS for transporting rail on a carrier other than NS. *See* NS Reply at III-F-140-41. NS’s costs to transport rail across its own network are not shown in the R-1. *See id.* The costs for the SBRR to transport rail over NS from Harrisburg, PA to the SBRR railheads therefore are not incorporated in the R-1 costs SunBelt used.²⁶ To fill the void

²⁵ *See, e.g., Otter Tail Power Co. v. BNSF Ry. Co.*, STB Docket No. 42071, at D-26 (served Jan. 27, 2006) (“*Otter Tail*”) (“it would not be proper to assume that a SARR could transport materials over the very lines that the SARR would need to build”); *Public Serv. Co. of Col. d/b/a Xcel Energy v. BNSF Ry. Co.*, STB Docket No. 42057, at 17-18 (served Jan. 19, 2005).

²⁶ Thus, SunBelt’s “double-counting” argument is a red herring. Accounting for the cost of transportation of rail from the interchange with foreign lines to the SBRR railheads would not “double-count” foreign line transportation costs. Rather, it would simply account for the full SBRR cost of transporting rail from its source to the SBRR railheads. To the extent that rail used by NS in the real world is transported over foreign lines, that portion of the rail transportation cost is included in the R-1 rail cost reported in Schedule 724 and included in the agreed portion of SBRR rail costs. NS calculated and supported a reasonable estimate of the cost of transporting rail over the residual NS to the SBRR railheads. *See* NS Reply at III-F-142. The

left by Sunbelt’s SAC presentation, NS developed and supported evidence of the cost of transporting rail from the SBRR source in Steelton, over NS lines, and to SBRR railheads.²⁷ NS’s evidence was the only evidence of record that accounted for the costs of moving the rail all the way from the source to the SBRR railheads. Because Board precedent makes clear that a SARR must account for the full cost of transporting rail—including “haulage” over the lines of the residual incumbent²⁸—and only NS has presented evidence of the cost of such transportation that is not reported in the R-1 (*i.e.*, the cost of haulage over the lines of the residual NS), the Board should accept NS’s evidence as the best—and only—evidence of record regarding that significant road property investment.²⁹

Contrary to the *Decision*’s ruling, NS fully justified inclusion of costs for SBRR to transport rail on the residual NS, which are costs that are not included in the NS R-1. As discussed above, SunBelt did not claim that SBRR rail transportation costs not captured by the NS R-1 (*i.e.* for the cost of transportation of rail over the NS system) would not be incurred by the SBRR, just that it disagreed with how NS calculated those costs. Thus, while the parties disagreed as to the appropriate amount of those transportation costs, there was no dispute that under clear Board precedent, the accurate amount of those costs was “justified” and properly included as a necessary SBRR capital investment. The Board’s omission of these costs entirely is material error.

combined cost of transportation of rail developed by NS therefore fully accounts for SBRR rail material and transportation cost, but does not double count.

²⁷ See *Decision* at 134 (summarizing NS’s rail transportation cost evidence); NS Reply at III-F-141-42.

²⁸ *Otter Tail*, STB Docket No. 42071, at D-26.

²⁹ See, e.g., *Duke/NS*, 7 S.T.B. at 161; *McCarty Farms*, 2 S.T.B. at 496; *Nevada Power*, 6 I.C.C.2d at 55, 62.

Although SunBelt vaguely complained about certain other aspects of NS's non-R-1 rail transportation cost calculations and evidence, it offered *no* alternative evidence regarding the amount of those real and essential costs or how they should be accounted for or calculated. *See* SunBelt Reb. at III-F-82. Where, as in this case, one party presents reasonable and supported evidence of a necessary cost or investment and the other party presents no evidence, the Board accepts the only reasonable evidence proffered as the best evidence of record.³⁰ The Board should reconsider its ruling and adopt NS's evidence of the cost of transportation of rail because it is the only evidence that includes the necessary costs of moving rail from its source all the way to the SBRR railheads.

3. The *Decision* Materially Erred by Excluding Necessary Costs of Lighting for Construction of the SBRR.

The *Decision* made a material error by refusing to include in SBRR road property investment the costs of lighting that would be necessary to complete the construction of the SBRR on the compressed time scheduled posited by SunBelt. *See Decision* at 126-27. In order to complete construction of the SBRR roadbed in the short seven months posited by SunBelt, it would be necessary for SBRR construction crews to work at night.³¹ Accordingly, NS developed reasonable costs for lighting necessary to allow construction crews to work at night and to complete SBRR roadbed construction within SunBelt's aggressive schedule. *See* NS Reply at III-F-118-19; NS Brief at 38-39. The Board made two material errors in rejecting these necessary costs.

First, the Board erroneously found that requiring SunBelt to pay necessary costs of construction would represent a "barrier to entry" because "the SBRR would be able to utilize

³⁰ *See Duke/NS*, 7 S.T.B. at 161; *McCarty Farms*, 2 S.T.B. at 496; *Nevada Power*, 6 I.C.C.2d at 55, 62.

³¹ *See, e.g.*, NS Brief at 38-39 (responding to SunBelt rebuttal claim that night work would not be necessary to construct SBRR on SunBelt's compressed schedule).

additional resources necessary to complete construction within the specified time period.”

Decision at 127 (citing *McCarty Farms*, 2 S.T.B. at 484 n. 52). This finding misapprehends both the argument and the nature of the costs at issue. Previously, the Board has used the theory of “unconstrained resources” to reject arguments that a SARR could not be constructed on a compressed time schedule because available construction resources (equipment, etc.) and material would be insufficient to meet that schedule. *See, e.g., McCarty Farms*, 2 S.T.B. at 484 n.52. Here, however, NS did not contest the aggressive construction schedule posited by SunBelt. Nor did NS contend there would be insufficient resources or material to complete the job in that compressed time frame. Rather, NS merely sought to account for the costs necessary to complete construction on the schedule that SunBelt specified. *See* NS Reply at III-F-118-19. Requiring SunBelt to account for the reality of night construction is therefore not analogous to prior cases in which a defendant argued that the construction schedule assumed by the complainant was unachievable or that there were not sufficient construction resources available to complete construction on a compressed schedule. Further, NS did not claim that constrained resources meant that the SBRR would have to pay a “premium” in order to obtain the necessary additional equipment. Instead, NS requested only that the SBRR be required to pay standard, reasonable costs it would necessarily incur to complete construction in the allotted time.³² NS’s position is thus unexceptional and consistent with settled SAC theory.

Second, the Board stated that any lighting costs the SBRR might incur would be covered by the contingency factor. *See Decision* at 127. By definition, however, a contingency factor

³² Had SunBelt argued that it could avoid working at night by deploying additional construction crews, equipment, and material, the SBRR would have been required to account for the attendant additional costs, including more construction crew wages and the purchase or rental of additional equipment. SunBelt did not make this argument, but it could hardly have argued that the SBRR should not be required to bear the costs of such basic construction work.

accounts for costs that are unknown and unanticipated at the outset, but arise unexpectedly during the construction project.³³ The need for light to allow night work is entirely foreseeable and would not be considered an unexpected contingency. The facts that the sun sets every day and that there are hours of daylight and of darkness in a given geographic region in a given period are known, foreseeable, and can be accurately predicted and accounted for in advance.³⁴ The Board materially erred when it excluded reasonable costs for such lighting, and it should revise the *Decision* to include such costs. See NS Reply at III-F-118-19.

4. The *Decision* Materially Erred By Not Accounting For Swell in a Manner Consistent With Means Engineering Costs.

The Board committed a material error by not accounting for the fact that excavated quantities “swell” when calculating the unit costs applied to earthwork quantities. Regardless of whether the ICC Engineering Reports record earthwork quantities in Bank Cubic Yards (“BCY”), each party’s evidence was predicated on the Means unit cost for excavation of earthwork quantities in BCY.³⁵ And the Board adopted that approach.³⁶ NS demonstrated that Means then calculates the unit cost for hauling excavated material by converting BCY excavation quantities into expanded Loose Cubic Yard (“LCY”) quantities.³⁷ Specifically, NS

³³ See, e.g., *McCarty Farms*, 2 S.T.B. at 521 (“A contingency factor is included to cover *unexpected* costs caused by various *unknown factors* encountered during the construction process.”) (emphasis added); *Arizona Pub. Serv. Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 2 S.T.B. 367, 402 (1997) (“A contingency factor is included to cover unexpected costs encountered during construction.”).

³⁴ In contrast to the time the sun rises and sets each day, *weather* is not accurately predictable in the short- and medium-term. The Board found in this case that weather-related delays and costs should be assumed to be included in the contingency factor, a finding to which NS does not take exception in this Petition. See *Decision* at 167-68.

³⁵ Contrary to the Board’s assumption, the units the ICC used to report these quantities in the Engineering Reports is not directly relevant to the question of unit costs at issue here, which depends on Means cost data that both parties used and the Board accepted.

³⁶ See *Decision* at 111, 113.

³⁷ See NS Reply at III-F-84-85.

demonstrated that Means develops costs for earthwork excavation using a composite sum of unit costs for: (i) excavating, measured in BCY; and (ii) hauling the resulting swelled volume, measured in LCY.³⁸

Accordingly, proper and accurate application of Means earthwork costs must account for excavation using BCY and hauling costs based on swelled volumes measured in LCY. The only evidence that presented these calculations consistent with the way they are developed and compiled by Means is NS's evidence, which the Board should adopt on reconsideration.

In rejecting NS's evidence, the Board erroneously relied on an unsupported, broad-brush claim presented by SunBelt for the first time in rebuttal that some unidentified contractors take additional hauling due to swell into account when they make bids for excavation.³⁹ Even if accurate and supported (which it was not), this fact would be irrelevant. The Board adopted and relied upon Means earthwork unit costs, which account for excavated quantities and swelled hauling quantities separately, and combined them (along with compacted quantities for placement and backfilling) into a composite earthwork excavation and fill unit cost. Whether or not some contractors may include swell-related hauling costs in earthwork bids is irrelevant to the proper development of earthwork unit costs using Means. The critical and dispositive point is that Means accounts for hauling of swelled quantities as a separate component of its unit cost, and failure to include that component in a Means-based cost calculation would result in an incomplete and erroneous cost calculation. The Board should reconsider its analysis of this issue and adjust the parties' earthwork unit costs recorded in BCY to properly account for the application of Means haulage costs measured in LCY.

³⁸ See NS Reply WP "RS Means Site Prep Worksheet-swell and shrinkage factor.pdf"; NS Brief at 23-24.

³⁹ See SunBelt Reb. at III-F-50.

C. The *Decision* Includes Material Errors That Are Inconsistent With the Logic of the Board’s Other Holdings.

1. The Board Erroneously Applied Its Correct Decision About How to Calculate Ad Valorem Taxes.

The *Decision* correctly recognized that each of the states in which the SBRR would operate assesses ad valorem taxes using the unit method and thus that the SBRR’s total ad valorem taxes would be a function of its relative profitability.⁴⁰ The Board also accepted NS’s approach of using a “unit value modifier” to estimate ad valorem taxation, and the Board’s workpapers indicate that it intended to follow NS’s suggestion to calculate a SBRR unit value modifier based on the Board’s determination of SBRR operating expenses and revenues.⁴¹ However, the Board’s ad valorem tax worksheet was not correctly linked to its discounted cash flow analysis. As a result, the Board’s final SAC analysis incorporated ad valorem tax calculations based on NS’s Reply SAC evidence and not the Board’s final SAC determination. In other words, the *Decision* assumes that the SBRR would pay taxes based on the profitability of the NS Reply SBRR and not the increased profitability of the *Decision*’s version of the SBRR. This disconnect is a material error (and likely an unintentional one), because it results in ad valorem taxation levels that are not commensurate with the profitability of the *Decision*’s SBRR.

This material error can be corrected by making two changes to the Board’s workpapers. First, the Board’s ad valorem tax worksheet needs to be properly linked to its final operating expense spreadsheet. This can be done by changing the formula in cell D16 of the “DCF Transfer” tab of “SBRR Operating Expense STB2.xlsx” from “=[SBRR Ad Valorem Tax_Reply STB.xlsx]Results!\$B\$5” to “=[SBRR Ad Valorem Tax STB.xlsx]Results!\$B\$3.” Second, the ad valorem tax workpaper needs to be updated to reflect the Board’s final construction costs.

⁴⁰ See *Decision* at 67; NS Reply at III-D-210-219..

⁴¹ See *Decision* at 67; STB WP “SBRR Ad Valorem Tax STB.xlsx.”

This can be done by updating the file link to STB workpaper “D43130 Exhibit III-H-1 STB No2.xls” so that the investment amounts in tab “Investment_DCFReply” reflect the final construction amounts in the Board’s DCF model.

2. The *Decision* Materially Erred By Accepting SunBelt’s Evidence of Movable Bridge Approach Spans.

The Board should reconsider its decision to accept SunBelt’s evidence regarding the approach spans and structures for movable bridges.⁴² The *Decision* held that NS submitted the best evidence of record as to bridge heights and lengths, and thus accepted NS’s evidence relating to approach span design and costs (which includes bridge abutments, piers, superstructure, substructure, and other components) for every type of SBRR bridge other than movable bridges.⁴³ But while the *Decision* explained that it was adopting SunBelt’s evidence on the cost of movable spans, its workpapers also adopted SunBelt’s evidence on the fixed approach spans for movable bridges—with no explanation of why SunBelt’s approach span evidence was the better evidence of record. The *Decision*’s adoption of SunBelt’s evidence for the fixed approach spans for movable bridges is irreconcilable with the Board’s rulings on approach spans for other bridges, and indeed it may have been unintentional. Regardless, this is a material error that the Board should reconsider.

The cost of fixed approach spans for movable bridges are analytically distinct from the cost of the movable span itself.⁴⁴ For that reason, the Board’s decision to adopt SunBelt’s

⁴² NS seeks reconsideration of only that portion of the *Decision* accepting SunBelt’s evidence on *approach spans* for bridges also having movable spans. The Board accepted SunBelt’s evidence regarding SBRR movable structures, and this Petition does not seek reconsideration of the Board’s acceptance of SunBelt’s position regarding the design and costs of those movable spans themselves.

⁴³ See *Decision* at 138-41.

⁴⁴ See NS Reply at III-F-188 (“The costs that NS proposes for the fixed approach spans on Reply are based on calculations that were specifically developed for the fixed approach spans, irrespective of the movable spans.”).

evidence of “vertical lift spans” for SBRR moveable bridges does not explain the fact that its workpapers adopt SunBelt’s cost evidence for fixed approach spans. *Decision* at 142. Because the *Decision* does not separately discuss movable spans and approach spans for movable bridge structures, it does not provide any rationale for treating approach spans for one type of bridge differently from all others. NS submits that there is no logical rationale for doing so.

The Board’s analysis and conclusions regarding all other bridge approach spans and structures applies equally to approach spans for movable bridges. SunBelt’s methodology for approach spans for movable bridges is the same flawed approach it used for approach spans for all other bridges, which the Board rejected.⁴⁵ And SunBelt provided no evidence sufficient to distinguish its movable bridge approach spans or to justify different treatment of those approach spans. Because NS’s bridge approach span evidence is the best evidence of record for such spans for all major bridges (including tall bridges, movable bridges, and non-movable bridges over navigable waters), the Board should amend the *Decision* to accept NS’s approach span evidence for movable bridges.⁴⁶

3. The *Decision* Materially Erred By Modifying the Terminal Value Calculation.

The Board committed a material error by accepting SunBelt’s argument regarding the terminal value adjustment to correct the mismatch between the capital structure implicit in the

⁴⁵ SunBelt’s method for approach spans for all bridges was to assign pier heights unrelated to the specific maximum height of the bridge, thus assuming a bridge design and structure that does not satisfy the fundamental requirement that a SARR’s “bridges must be able to fit geographically” and topographically (including “the area between the span and the topographic feature from which the bridge will extend”) “into the system they are replacing.” *E.I. du Pont de Nemours & Co. v. Norfolk S. Ry. Co.*, STB Docket No. 42125, at 220, 224-225 (served Mar. 21, 2014) (“*DuPont*”); see *Decision* at 138-39. For all types of bridge approach spans and their components—including those for bridges also having movable spans—NS’s Reply Evidence is the only evidence that satisfies the geographic fit requirement.

⁴⁶ See *AEPCO 2011*, STB Docket No. 42113, at 20 (Board’s “role is to decide which party’s . . . [evidence is] the best evidence of record”).

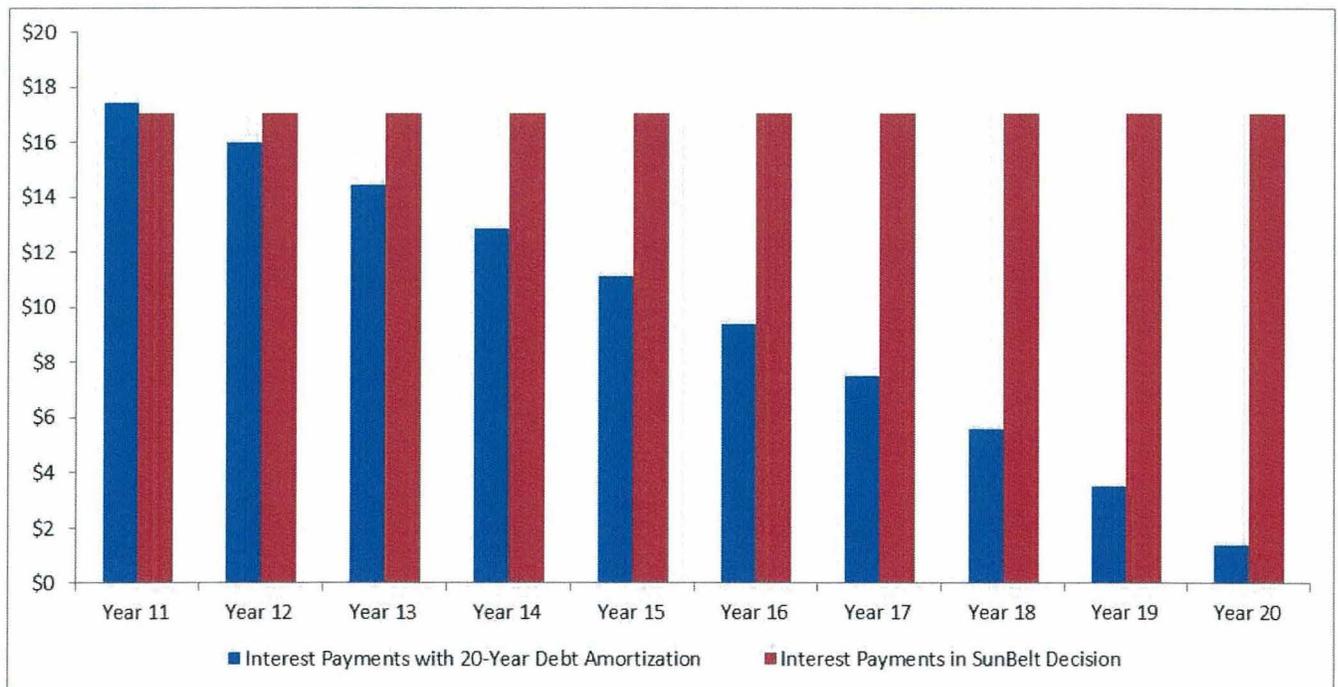
SBRR cost of capital and the treatment of the SBRR's tax benefits. The Board corrects Sunbelt's interest related tax deductions to reflect its holding that Sunbelt must pay down the principal on its capital investments by substituting the straight-line average of the interest payments over the 20-year debt amortization period. *See Decision* at 193-94. But while the Board stated its intent to reconcile its acceptance of SunBelt's terminal value adjustment with its correct holding that the SBRR would be required to pay down the principal on its debt (and thus that interest payments on that dwindling debt would steadily decrease over time), the *Decision's* terminal value calculations actually assume that the SBRR's interest payments would remain constant after Year 10. Thus the *Decision* substantially overstates the SBRR's interest tax benefits for Years 11 through 20.

There are two significant problems with the Board's modifications to the DCF terminal value calculations. The first is conceptual. If implemented, the Board's acceptance of SunBelt's proposed adjustment to the terminal value calculation would introduce a new, unwarranted, and problematic inconsistency into the already complex DCF model by explicitly applying different financial assumptions to a SARR's initial acquisition of assets and its subsequent replacement of assets as they are assumed to wear out. Specifically, before any changes to the terminal value calculations, the DCF was configured to apply the same financial assumptions to the SARR's initial investment and to the subsequent replacement of assets as they are projected to wear out. These assumptions include that the SARR's initial debt and the debt incurred as part of the replacement of worn out assets would be amortized over 20 years. Now the Board assumes that the initial debt would still be amortized over 20 years, but there would be no amortization of debt for assets in the subsequent replacement cycles. Instead there would be an interest-related adjustment for tax purposes based on the average of the interest over the initial 20 year

amortization. The Board provided no explanation of how or why the financial assumptions surrounding the acquisition of SARR assets should differ prospectively from those applied to the initial acquisition.

The second problem is a mathematical one that flows from the Board’s failure to allow the SBRR’s debt to amortize over its full 20-year term. Instead, the *Decision* overrides the scheduled interest payments in years 11 to 20 of the DCF model with the average interest rate over the 20-year amortization period. Because interest payments are lower than average in the later years of the amortization period as the amount of outstanding principal declines, the Board’s substitution of the higher average interest rate over the years 11 through 20 time frame overstates interest. The chart below depicts the interest payment schedule for years 11 through 20 over the 20-year amortization period determined by the Board and shows the amount by which the *Decision* overstates interest.

SARR INTEREST PAYMENTS (\$ MILLIONS)



NS believes that the Board erred by needlessly modifying its long standing DCF structure and that the Board should adopt the approach to terminal value calculations set forth in NS's Reply.⁴⁷ But if the Board intends to adhere to its changed approach, at the very least its formulas should be corrected to eliminate the interest overstatement. This can be done by using the remaining year 11 through 20 interest payments and then applying the 20-year average interest payments beyond year 20.

D. The *Decision* Materially Erred By Rejecting Plainly Superior Evidence Because of Minor Typographical Errors.

1. The *Decision* Materially Erred by Accepting Inferior Evidence on MOW Derailment Costs Because of an Minor Workpaper Error.

The *Decision* materially erred by accepting an estimate of SBRR derailment and clearing costs that the Board previously recognized was deficient because of a minor miscalculation in an NS workpaper. SunBelt proposed to base SBRR derailment and clearing costs on an estimate derived from FRA incident reports filed by NS.⁴⁸ NS's evidence showed that this FRA data significantly understated derailment expenses, both because FRA reporting does not include all derailment costs and because many derailment expenses do not meet the reporting threshold.⁴⁹ NS pointed out that if SunBelt intended to base its derailment costs on NS's own costs, it should use costs reported in NS's R-1 that include the cost items omitted by SunBelt.⁵⁰ Significantly, SunBelt could offer no answer to NS's evidence that FRA incident data understated derailment expenses, and its criticism of NS's R-1 data collapsed upon examination.⁵¹

⁴⁷ See NS Reply at III-H-9.

⁴⁸ See SunBelt Opening Ex. III-D-3 at 25.

⁴⁹ See NS Reply at III-D-195 & n. 354; Federal Railroad Administration Office of Safety, FRA Guide to Preparing Accident/Incident Reports, at 20-22 (May 20, 2011) (explaining threshold for reportable damage and limitations on reportable costs).

⁵⁰ See NS Reply at III-D-195-96.

⁵¹ SunBelt complained that NS's R-1 data included not just the cost of repairing derailments, but also the costs of repairing track damage from other incidents like collisions, fire, and explosions.

After considering a nearly identical record, in *DuPont* the Board determined that using R-1 data was a superior methodology for estimating derailment costs. *See DuPont*, STB Docket No. 42125, at 129. But it came to the opposite conclusion here, apparently for the single reason that NS's workpapers contained a minor calculation error. Specifically, NS's narrative explained that costs should be scaled on the basis of ton-miles, but its supporting workpaper mistakenly scaled derailment costs based on route-miles.⁵² This minor technical error apparently was the cause of the Board's decision to determine this issue differently in *DuPont* and *SunBelt*, since it is the only real difference between the evidence submitted in the two cases.⁵³

The Board's decision to accept inferior evidence based on a workpaper mistake was a material error. Whether one uses route-miles or ton-miles to scale the costs, there is no question that NS's real-world R-1 costs for derailment repairs are more than twice the costs that SunBelt derives from FRA Incident Reports, and that the reason for this discrepancy is that FRA Incident Reports fail to account for all derailment repair costs. It is concerning that the Board would base its decision on this or any issue based on an inconsequential workpaper mistake and not upon an assessment of which party has produced the most realistic evidence of what costs the SARR would incur. The Board has recognized that "errors can occur" in the SAC analysis,⁵⁴ and the

See SunBelt Reb. Ex. III-D-2 at 56. As NS's Brief explained, this quibble ignores the fact that the SBRR would be just as subject to the costs of repair from these other causes as NS or any other railroad. *See NS Brief at 56 n.75.*

⁵² Compare NS Reply at III-D-196 with NS Reply WP "Reply SBRR Derailment and Clearing Wrecks.xlsx."

⁵³ The *Decision* also states that "NS has not shown that the R-1 report's use would be more accurate," but this statement is impossible to reconcile with *DuPont* and is plainly wrong. *Decision* at 94. NS identified specific costs that are not reflected in FRA Incident Reports, and SunBelt did not rebut that evidence.

⁵⁴ *Otter Tail Power Co. v. BNSF Ry. Co.*, STB Docket No. 42071, at 1 (May 26, 2006) ("SAC cases involve the resolution of myriad technical, fact-based issues regarding the construction and operation of a railroad [and] a multitude of complex computer calculations . . . [and] errors can occur.").

appropriate response to an error that plainly does not track with a party's stated reasoning is to evaluate the party's reasoning on the merits, not to automatically disqualify one side's evidence because of an inadvertent mistake.⁵⁵ This is particularly true for defendants who—unlike complainants—are given only one round of evidence and provided no opportunity to correct errors made in their initial submission.⁵⁶ And it is particularly true in cases like this one where an error caused no prejudice to SunBelt, which plainly understood that NS intended to allocate derailment costs based on ton-miles.⁵⁷ The Board materially erred by disqualifying NS's superior evidence of derailment repair costs because of a minor workpaper error, and it should reconsider and reverse its determination of this issue.

2. The *Decision* Materially Erred By Rejecting Superior Evidence of the Transportation Costs of Plates, Spikes, and Anchors Because of a Misplaced Decimal Point.⁵⁸

The *Decision* accepted plainly inferior evidence of the transportation costs of plates, spikes, and anchors for the single reason that NS's Narrative Evidence contained an inconsequential typographical error. SunBelt claimed that material transportation costs for plates, spikes, and anchors (and other track materials like ballast and cross ties) should be

⁵⁵ *Cf. Pub. Serv. Co. of Col. d/b/a Xcel Energy v. BNSF Ry. Co.*, STB Docket No. 42057, at 5 (Jan. 19, 2005) (because Board's adjudication of SAC cases is intended to serve "our interest in the SAC test serving its intended purpose" and "the public interest," the Board is reluctant to reject a party's evidence "solely because of correctable defects").

⁵⁶ *Cf. DuPont*, STB Docket No. 42125, at 192 (allowing complainant to correct "two mistakes in its opening evidence").

⁵⁷ *See SunBelt Reb. Ex. III-D-2* at 55 (arguing that using route miles to scale costs was superior to NS's ton-mile approach, and thus demonstrating a clear understanding of NS's argument).

⁵⁸ NS has jointly submitted with SunBelt a petition for technical correction of this issue because the Board's workpaper calculations accepting NS's evidence on plates, spikes, and anchors transportation do not align with the Board's statement in the *Decision* narrative indicating that it intended to accept SunBelt's evidence on this issue. If the Board adheres to the *Decision* narrative, then the technical correction outlined in the joint petition will align the Board's workpapers with its narrative intent. For the reasons set forth in this section, however, the Board should reconsider its *Decision* to accept SunBelt's evidence on this issue. If the Board does so, the technical correction described in the joint petition will be moot.

estimated at \$0.035 per ton-mile, a price SunBelt derived from *AEPCO 2011*. NS showed that SunBelt's price was an outdated estimate ultimately dating from 1994 and that it represented the cost of a railroad shipping materials over its own lines—not the cost of shipping materials over other railroads' lines. *See* NS Reply at III-F-131-132. As an alternative to this patently unreliable estimate, NS presented current quotes from suppliers to determine off-line transportation costs of ballast, cross-ties, and plates, spikes, and anchors. *See id.* at III-F-132, III-F-140, III-F-152; NS Reply WP “Scanned OTM transportation calculation.pdf” (containing detailed quote on which NS based its evidence).

The Board agreed with NS on the merits, finding that NS's estimates of “current market conditions that would be applicable to the construction of the SBRR” were superior to SunBelt's outdated number from *AEPCO 2011*, and rejecting use of the *AEPCO 2011* estimate for ballast and cross-tie transportation.⁵⁹ The only reason the *Decision* gave for resolving plates, spikes, and anchors differently was that NS's narrative on plates, spikes, and anchors contained a misplaced decimal point—*i.e.*, NS's narrative described NS's real-world estimate as \$0.934 per ton-mile, while the estimate itself and NS's workpaper calculations showed the cost as \$0.0934 per ton-mile. *See Decision* at 136.

Basing a critical fact determination on an obvious and irrelevant typo is a material error, particularly because SunBelt did not rely on the error to its detriment. On the contrary, SunBelt clearly understood that NS based its estimate on the “quote” it submitted. SunBelt Reb. at III-F-87. Indeed, SunBelt did not even submit an independent argument on unit costs for plates, spikes, and anchors—instead, its Rebuttal simply incorporated its argument from the ballast

⁵⁹ *See Decision* at 131 (accepting NS unit costs for offline ballast transportation); *id.* at 133 (accepting NS unit costs for offline cross tie shipping because NS's “real world quote is superior evidence to the 2000 figure SunBelt cites from *AEPCO*”).

section advocating a \$0.035 per-ton-mile cost (an argument that the Board rejected). *Id.*

SunBelt plainly was not prejudiced by the misplaced decimal point.⁶⁰

The *Decision*'s determination to reject NS's evidence because of a typo is particularly indefensible in light of *DuPont*. There the Board accepted the exact same plates, spikes, and anchors estimate that NS proffered in *SunBelt*,⁶¹ recognizing that NS's estimate was "current" and thus a "more accurate reflection" of the costs the SARR would incur.⁶² In *SunBelt*, however, the Board rejected the same "current" and "more accurate" evidence in favor of a less current and less accurate SunBelt estimate—simply because NS inadvertently misplaced a decimal point. This was an arbitrary decision to accept plainly inferior evidence for no good reason, and the Board should reconsider it.

E. The *Decision*'s Assignment of Positive Train Control ("PTC") Costs and Investments is Materially Erroneous and Unsupported by Substantial Evidence.

The *Decision* assumed that the SBRR could implement "an initial PTC system" in 2011, and that subsequently the SBRR would upgrade that initial system "to [comply with] RSIA requirements" between 2011 and 2015. *Decision* at 145. However, the evidence submitted by the parties simply did not allow such a hybrid approach. SunBelt's evidence assumed the SBRR would install a fully interoperable, RSIA-2015-compliant PTC system before it commenced operations in mid-2011. *See id.* at 144; SunBelt Opening at III-F-35. NS's evidence

⁶⁰ Ironically, SunBelt's discussion of plates, spikes and anchors itself contains a typographical error. SunBelt claimed that NS's quote was for "\$0.0906 per ton-mile"—a number that did not appear anywhere in NS's Narrative or workpapers. SunBelt Reb. at III-F-87. SunBelt's error is further evidence of both the fact that SunBelt was not prejudiced by the misplaced decimal point in NS's evidence and of the unfairness in punishing NS for a typographical error when SunBelt's evidence contained a typographical error when describing the exact same issue.

⁶¹ The slight cost difference between the unit costs NS proffered in *SunBelt* and *DuPont* is attributable to indexing NS's estimate to different construction dates.

⁶² *DuPont*, STB Docket No. 42125, at 198.

demonstrated the flaws in SunBelt's approach and assumed—consistent with the still-ongoing development and evolution of PTC-related technology and components and the interoperability challenges experienced by U.S. rail carriers—that the SBRR would install a CTC system in 2011 and overlay that system with a PTC system by the end of 2015. *See* NS Reply at III-F-200-206. Because the Board adopted a third, separate, and distinct approach that neither party advocated, the parties did not present evidence that addressed which PTC system development, deployment and testing costs might be incurred in 2011 and which might be incurred between 2011 and 2015 (some for a second time) as interoperability standards solidify, technological solutions are found, and new RSIA-compliant components are developed. Not surprisingly, neither the *Decision* nor the Board's workpapers provides a rational or consistent explanation of how its hybrid approach might (or could) be implemented. Although the *Decision* ruled that the SBRR would implement an initial PTC system in 2011, the Board's workpapers include no PTC-related development, deployment, back office or testing expenditures as part of the initial SBRR investment. As it stands, therefore, the *Decision*'s assignment of PTC system costs is arbitrary, capricious, and unsupported by the evidence.

NS proffers two possible solutions to allow the Board to implement its *sua sponte* finding that the SBRR would install an initial unspecified, non-RSIA-compliant PTC system in 2011 and then upgrade that system to RSIA standards and requirements by the end of 2015.⁶³ The first option, which would rely on evidence in the record, is to assume that the SBRR would incur full

⁶³ NS continues to believe that the approach the Board followed in *AEPCO 2011* is more reasonable, feasible, and consistent with the real world and the state of PTC-related technology during the relevant period. *See, e.g.*, NS Reply at III-F-205. Assuming, however, that the Board does not intend to change its ruling that assumes a SARR could implement some sort of PTC-like system in 2010 or 2011 and then upgrade it to an RSIA-compliant PTC system by the end of 2015, the two options NS proposes in this Petition provide rational ways to implement that ruling.

PTC system costs prior to its commencement of operations in 2011 and then incur many of those costs again between 2011 and 2015 (when necessary technology came into existence) to upgrade the system to comply with RSIA-2015 standards and requirements.⁶⁴ NS has provided workpapers to illustrate how that approach could be implemented using existing evidence submitted before the record closed.

The advantage of the approach described above is that it would not require any new evidence. Instead, this approach would rely on evidence that was both produced in discovery in this case and submitted to the Board before it issued the *Decision*. Following this approach should not cause significant delay and would allow the Board to make a reasoned and supported decision on this issue without additional complexity or imposing further costs on the parties. At the same time, the resulting PTC cost assignment would be rational, defensible, and supported by evidence in the record.

Should the Board determine not to follow the first option, a second alternative approach would be to re-open the evidence in this case for the limited purpose of allowing the parties to submit evidence that addresses the hybrid paradigm adopted by the *Decision*. That is, the Board could allow the parties to submit evidence regarding the implementation of a PTC system under

⁶⁴ It is possible that some PTC components initially installed in 2011 might not require upgrading or replacement between 2012 and 2015 to meet RSIA 2015 standards and requirements. However, the evidence submitted by the parties (prior to the Board's hybrid ruling) provides no way to determine which components installed in 2011 could continue to be used to meet 2015 RSIA standards, including interoperability. Because the record contains no indication of which of the myriad of still-developing PTC technologies would be initially deployed, NS believes that only the antennas and towers installed in 2011 would likely not require replacement in order to upgrade the initial PTC system to RSIA 2015 standards. Even excluding those components from the upgrade is conservative because there is no way of knowing if the initial installation would use the 220mhz spectrum planned for the 2015 deployment. NS's illustrative workpapers assume towers and antennae would not be replaced and excludes the costs of those components from the PTC upgrade the SBRR would undertake to meet RSIA standards and requirements between mid-2011 and the end of 2015.

the two-phase approach hypothesized by the *Decision*, including evidence regarding the costs the SBRR would incur in each phase. Thus, for example, the parties could address which PTC research and development costs, components, and technology they contend could have been implemented by mid-2011, and which would be implemented in the second period from mid-2011 through 2015. The parties' evidence could assign system components, technology, costs, and investments directly to the two periods and provide evidence and argument to support their positions. Based on that evidence—developed and presented to address the paradigm established by the *Decision* rather than the parties' positions before the Board announced that paradigm—the Board could develop a rational and more accurate assignment of PTC costs that would be based on evidence tailored to the approach it announced in the *Decision* and adjust its SAC analysis and results accordingly.

F. The *Decision* Materially Erred By Accepting SunBelt Assumptions That Are Inconsistent With the Realities of Real-World Railroading.

1. The *Decision* Materially Erred by Allowing the SBRR to Obtain Bonus Depreciation Benefits Not Available to NS.

The Board should reconsider its decision to allow the SBRR to obtain bonus depreciation benefits that were not available to incumbent NS. The *Decision* rejected NS's proposal to limit the amount of the SBRR bonus depreciation benefits to the levels available to NS itself as a result of this temporary income tax shield. Responding to the Board's skepticism as to the validity of allowing the full benefits of bonus depreciation in a SAC proceeding, expressed in *AEPCO 2011*, NS explained that SunBelt's treatment of bonus depreciation would place the SBRR at a distinct and unfair financial advantage over the real-world NS. *See* NS Reply at III-H-5-6. Under the SAC assumption of unconstrained resources, the entire SBRR is assumed to be built during a short time frame. In this case, that artificially short construction period happened to coincide with the period in which Congress provided a temporary bonus depreciation tax

benefit. The Board rejected NS's argument that SunBelt's treatment of bonus depreciation would produce an effective reverse barrier to entry that would distort the SAC analysis by conferring a large benefit on the SARR that was not available to the incumbent. Instead, the Board found that NS's approach would require the SBRR to "bear any disadvantages" of its construction timing while denying it the tax advantages available during that same period.

Decision at 188-89 (citing *Coal Trading* and *McCarty Farms*).⁶⁵

The Board should reconsider its rejection of NS's position that permitting the SBRR to enjoy the full benefits of temporary bonus depreciation—benefits exceeding those available to NS in the real world—introduces a reverse barrier to entry, is inconsistent with prior SAC precedent, and distorts the SAC analysis and results. *See* NS Reply at III-H-5-7. The prior decisions cited by the Board in this case addressed the assumption of unconstrained resources as the basis for assuming the SARR could be constructed in an impossible (in the real world) three-year window. *See Decision* at 188. As the Board recognizes, this assumption allows the SARR to obtain substantial "efficiencies unavailable to the incumbent" in the real world. *See id.* Those decisions do not hold that the SARR is also entitled to claim any and all additional benefits and advantages that might be available to it solely as a byproduct of the artificially short construction period assumption. Such a ruling would artificially compound the advantages the SARR has over the incumbent by assuming cost savings that would not be available to even a least-cost most efficient carrier. This in turn would distort the SAC analysis by driving certain SARR investment costs below levels feasible or attainable in the real world. The Board should allow the SARR to assume it would obtain the same tax benefits obtained by the incumbent carrier, but

⁶⁵ The *Decision* did not identify any disadvantages a SARR would face as a result of the SAC assumption of unconstrained resources and the resulting short construction period. To the contrary, the Board acknowledged that the short construction period "may result in efficiencies unavailable to the incumbent." *Decision* at 188.

should not allow the unrelated assumption of unconstrained resources to confer tax benefits on the SARR that were not available to the incumbent.

In *WTU* the Board accepted complainant WTU's definition of barriers to entry as any costs that the new entrant must incur that were not also incurred by the incumbent, and explained that the definition is consistent with its regulatory purpose of constraining a railroad from monopoly pricing. *West Texas Utilities Company v. Burlington Northern R.R. Co.*, 1 S.T.B. 638, 670 (1996). The Board explained that its interpretation of barriers to entry is consistent with its view of the SARR as a replacement carrier that steps into the shoes of the incumbent carrier for the segment of the rail system that the SARR would serve. *Id.* Because NS did not enjoy the full benefits of the limited-time bonus depreciation provision, a replacement carrier stepping into NS's shoes (the SBRR) should not be assumed to enjoy such additional benefits. The Board should reconsider its finding regarding bonus depreciation and limit the bonus depreciation credited to the SBRR to the amount available to incumbent NS.

2. The Decision Materially Erred By Accepting SunBelt's Quantities of Failed Equipment and Dragging Equipment Detectors.

The Board should reconsider its decision to accept SunBelt's proffered quantities of Failed Equipment Detectors ("FED") and Dragging Equipment Detectors ("DED"), because SunBelt did not demonstrate that the FED and DED placement and quantities used in the real world to meet industry standards are inefficient. *Decision* at 148. The detector spacing⁶⁶ proffered by NS is the spacing it uses in the real world, developed to comply with AREMA industry standards and the location-specific factors they establish for a proper balance of safety and efficient use of the equipment. *See* NS Reply III-F-228-29. SunBelt's proffered detector quantities, in contrast, relied upon 2001 AREMA standards that NS showed have been

⁶⁶ The spacing between detectors is ultimately the determinant of the quantities of detectors that must be installed.

superseded. *See id.* Thus, only NS’s detector spacing and resulting quantities were shown to meet current industry engineering and safety standards. SunBelt failed to demonstrate either that its FED and DED quantities were sufficient to satisfy current industry standards or that the standard-compliant quantities proposed by NS were inefficient.⁶⁷ Contrary to the Board’s finding (*Decision* at 148), NS *did* “explain why its evidence is better”—SunBelt relied on outdated and superseded standards, and only NS provided evidence of detector spacing that would meet current industry standards. *See* NS Reply III-F-227 to 229. Accordingly, the Board should reconsider its adoption of SunBelt’s evidence and instead adopt the evidence presented by NS regarding FED and DED spacing and the FED and DED quantities required to maintain that spacing.

3. **The *Decision* Materially Erred By Not Recognizing the Need for Operations Support Staff.**

The Board also committed material error by not requiring SunBelt to have sufficient staff to support all of the customer interfacing and coordination necessary on a dynamic carload network. On Opening SunBelt proposed that a single person at the single Customer Service Agent/Car Distributor desk would be responsible for responding to 100% of all customer service requests and for “interacting with customers and field personnel to ensure equipment needs are met on a real-time basis.”⁶⁸ NS accepted this staffing for customer service (and indeed reduced

⁶⁷ In rebuttal, SunBelt argued that NS had not shown that the FED and DED spacing and quantities SunBelt had proposed were not “feasible.” SunBelt Reb. III-B-14. This misses the point, as any quantity of detectors down to zero would in some limited sense be “feasible.” What NS showed was that the quantities posited by SunBelt would not be sufficient to satisfy current, safety-based industry standards and criteria. SunBelt ignored NS’s showing that SunBelt had relied on a superseded standard and made no attempt to show that its detector quantities would be sufficient to satisfy applicable standards necessary for safe and efficient train equipment operations and maintenance. Contrary to SunBelt’s “feasibility” assertion, it did not show that its FED and DED quantities would be sufficient to ensure the SBRR complied with industry safety and efficiency standards. Only NS’s evidence made that showing.

⁶⁸ *See* SunBelt Opening Ex. III-D-1 at 4.

it),⁶⁹ but pointed out that SunBelt provided no staff support for other critical functions associated with the first and last mile of a car's movement, such as coordinating equipment orders, setouts, and car placements; working with customers on issues like equipment problems and overloaded cars; and handling matters like demurrage billing and miscellaneous switching fees.⁷⁰ NS provided a small number of Operations Support staff to perform these functions. SunBelt's response was not to add staff to handle the Operations Support needs it ignored on Opening, but rather to claim that its current staff would somehow find the time to also perform those functions.⁷¹

The Board materially erred by accepting SunBelt's claim that the Operations Support staff proffered for the SBRR by NS would be "duplicative" of SunBelt's single customer service desk.⁷² As NS explained, Operations Support would be responsible for a host of first-mile, last-mile functions that are distinct from the customer service response desk functions SunBelt proposed on Opening. On a carload network, functions like coordinating car placements and setoffs, responding to customers' equipment orders (and changes and cancellations to those orders) in a way that best serves the needs of the entire SBRR customer base, and working with customers on problems cannot be delegated to a single person at a single desk—particularly if that desk is also responsible for fielding every single incoming customer request.⁷³ It would of

⁶⁹ NS reduced SunBelt's customer service staff from five to three, reasoning that the SBRR would only need staff to respond to customer queries during regular business hours. *See* NS Reply Ex. III-D-1 at 13.

⁷⁰ *See id.*

⁷¹ *See* SunBelt Reb. at III-D-34.

⁷² *Decision* at 49.

⁷³ SunBelt's assumption on Rebuttal that Operations Support functions will easily be handled by the "entry of data" betrays a continuing misunderstanding of the functions that Operations Support performs on a carload network. SunBelt Reb. at III-D-34. Operations Support is not a matter of "data entry"—it requires intensive, constant communications with operators in the field and customer personnel in order to align SBRR resources and equipment with customer needs.

course be possible to have a single customer service department that would encompass these Operations Support functions, but it is not possible for a single desk staffed by one person at a time to handle all these functions. Customer Service and Operations Support functions have to be performed with minimal delay and maximum responsiveness if the SBRR is to transport carload traffic efficiently and in a manner consistent with its customers' needs, and SunBelt's expectation that one person at one desk could juggle all these responsibilities at once before passing the baton to the next individual is not "consistent with the underlying realities of real-world railroading."⁷⁴ The Board should reconsider this issue and recognize that the SBRR needs at least a minimally sufficient level of Operations Support staff if it is to function effectively.

III. CONCLUSION

For the reasons stated above, the Board should grant NS's Petition for Reconsideration and reconsider certain aspects of its *Decision*.

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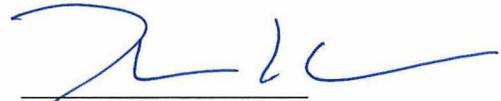
Dated: July 30, 2014

⁷⁴ *Decision* at 12; *AEPCO 2011*, STB Docket No. 42113, at 16.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July 2014, I caused a copy of the foregoing Norfolk Southern Railway Company's Petition for Reconsideration to be served by email and hand delivery upon:

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