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Docket No. NOR 42125

Defendant.

Docket No. NOR 42130

Defendant.

Jeffrey O. Moreno
Jason D. Tutrone
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036
(202) 331-8800

Counsel for E.I. du Pont de Nemours and Company & SunBelt Chlor Alkali Partnership

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E.I. du Pont de Nemours and Company (“DuPont”) and SunBelt Chlor Alkali Partnership (“SunBelt”) (collectively, “Complainants”) hereby submit their joint reply to the Petition for Clarification (“Petition”) submitted by Norfolk Southern Railway Company (“NS”) in the above-captioned proceedings on January 25, 2013. This Reply is supported by the Joint Verified Statement of Robert Mulholland and Timothy Crowley (“Mulholland/Crowley V.S.”), economists and Vice Presidents of L. E. Peabody & Associates, Inc (“LEPA”).

I. SUMMARY OF ARGUMENT.

By its petition, NS asks the Board to endorse its attempt to provide the Board with a fully-functional read-write version of the MultiRail software, which is a necessary tool for reviewing and evaluating its Reply Evidence, while providing Complainants with a read-only version of the software that has only limited functionality. NS also asks the Board to hold that Complainants must pay for the opportunity just to be able to examine and rebut the evidence submitted against them using the MultiRail software. The Board should deny the NS Petition in its entirety.

In Part II, the Complainants provide the background information that is needed to place these issues in context. Specifically, NS did not file MultiRail with its Reply Evidence; NS has attempted to provide the Complainants with a different, less functional, version of MultiRail than either it used or has attempted to provide the Board; and NS has required the Complainants to incur substantial costs just to obtain the read-only version of MultiRail, which would increase five-fold for the fully-functional read-write version.

In Part III, the Complainants assert that NS’s attempt to provide the Board with a different version of MultiRail than it has provided to Complainants would violate the Board’s rules against *ex parte* communications. Moreover, NS’s suggestion that it could present different

evidence to the Board than it does to the Complainants is contrary to legal precedent established by the Board, the judiciary, and other regulatory agencies.

In Part IV, the Complainants show that NS's refusal to incur the costs of providing its Reply Evidence to the Complainants violates the very same "American Rule" that NS invokes to support its Petition. Because the MultiRail software is essential to enable the Board and the Complainants to review, evaluate, and critique the NS Reply Evidence, NS must provide the software as part of its Reply Evidence to both the Board and the Complainants. The American Rule requires NS to bear the cost of providing its own evidence to the opposing party. NS's failure to do so would undermine the Complainants' fundamental right to present rebuttal evidence and establish dangerous precedent that would enable parties to insulate shaky evidence by ensuring that it is too costly for an opponent to access. That would have a chilling effect on rate cases by increasing the costs that a complainant must bear solely to see, much less review, the evidence presented against it.

In Part V, the Complainants contend that it is too late for NS to supplement the record by filing MultiRail with the Board in order to cure the problems identified in Part III. In deciding not to file MultiRail with its Reply Evidence, NS took a knowing and calculated risk that its offer to arrange access to the software would be inadequate. This already has caused prejudicial delay to the Complainants while they spent time and effort pursuing access that NS represented it already had "arranged." Any supplementation of the record at this late date would impose additional delay, which is far more prejudicial to Complainants than to NS. The Complainants should not be penalized for the failure of NS's gambit. Nor should the Board send a signal to future litigants that they could take similar risks without consequences to themselves.

II. BACKGROUND.

NS has relied heavily on a computer modeling program called MultiRail to develop its stand-alone cost (“SAC”) Reply Evidence in both the DuPont and SunBelt rate cases. (Pet. 3.) According to NS, “MultiRail is a sophisticated modeling tool that integrates information regarding a railroad’s traffic, network configuration, and customer service requirements to generate blocking plans and train schedules that are optimized to serve an identified traffic group.” (NS/DuPont Reply at III-C-157 to 58; NS/SunBelt Reply at III-C-122.) NS claims that MultiRail “has been used by all of the North American Class I railroads in connection with their network planning and service design activities.” (NS/DuPont Reply at III-C-158; NS/SunBelt Reply at III-C-122.) But, NS acquired its license to MultiRail “[i]n order to use MultiRail in preparing its Reply Evidence,” (Pet. 4.) which suggests that NS does not use MultiRail in the ordinary course of its business. Nevertheless, MultiRail is the foundation upon which NS has built all of its SAC evidence.

MultiRail is the proprietary software of the Oliver Wyman business consulting firm. NS claims that that MultiRail is “commercially available software,” but Oliver Wyman has indicated that, until now, it has only licensed MultiRail for use by railroads:

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

(Pet. Ex. 1, at 4 (Email from Kevin Foy, Oliver Wyman, to Robert Mulholland, LEPA (Jan. 10, 2013))).)

MultiRail generates data sets, which can be used as inputs to operating plans, through an iterative process that incorporates the following steps: input, simulation, review of inputs. (See NS/DuPont Reply at III-C-158 to 167; NS/SunBelt Reply at III-C-123 to 130.) After the outputs are reviewed, revisions are made to the inputs and the process is repeated until the desired outputs are obtained. Id. The main inputs include network configuration, traffic, blocks, and trains. Id. MultiRail also accounts for a variety of other inputs, such as routing penalties. Mulholland/Crowley V.S., Attach. A § A.3.

Analyses conducted by MultiRail are at the heart of NS's SAC evidence. NS used MultiRail to calculate necessary track configuration (NS/DuPont Reply at III-B-12.), develop the SARR's carload blocking plan and train service plan (NS/DuPont Reply at III-C-157; NS/SunBelt Reply at III-C-122), and determine the SARRs' operating expenses (NS/DuPont Reply at III-C-166; NS/SunBelt Reply at III-C-130). These analyses produced a substantial volume of outputs that NS incorporated into its SAC evidence. For example, NS's RTC model in the DuPont case "utilized a variety of outputs from the MultiRail process, including (1) the track network as developed in MultiRail; (2) a list of the DRR's road and local trains and train schedules; (3) the number of cars, trailing tons and trailing length of each train; (4) the number of locomotives on each train based on NS tonnage ratings and helper locomotive requirements provided by witness Clark Cheng; and (5) the work events performed by each train as it travels along the DRR's network." (NS/DuPont Reply at III-C-167; see also NS/SunBelt Reply at III-C-130.)

A. NS Did Not Submit MultiRail With Its Reply Evidence.

Although NS noted in its Reply Evidence that it has arranged for the Board and Complainants to have access to MultiRail, NS did not provide MultiRail with its Reply

Evidence. Nor has NS explained why it failed to provide MultiRail simultaneously with filing its Reply Evidence.

In fact, Complainants have encountered substantial delays in obtaining the access to MultiRail that NS promised to provide. The only information that NS provided in its Reply Evidence concerning access to MultiRail, in either the DuPont or the SunBelt case, was a general statement buried in a footnote on pages III-C-158 of its DuPont Reply and III-C-122 of its SunBelt Reply. NS made no attempt to bring this fact to Complainants' attention or otherwise provide any instructions for obtaining the referenced "access" until Complainants contacted NS to inquire about the promised access on December 19, 2012. Email from Jeffrey Moreno, Counsel for Complainants, to G. Paul Moates, Counsel for NS (Dec. 19, 2012) (attached as Ex. A). In response to that request, NS directed the Complainants to contact Mr. Kevin Foy of Oliver Wyman. Email from G. Paul Moates, Counsel for NS, to Jeffrey Moreno, Counsel for Complainants (Dec. 19, 2012) (attached as Ex. B). Complainants' consultant, LEPA, first attempted to contact Mr. Foy by phone on December 21, 2012, and several times thereafter during the ensuing two weeks. (Pet. Ex. 1, at 8 (Email from Robert Mulholland, LEPA, to Kevin Foy, Oliver Wyman (Jan. 2, 2013)).) However, due to the Christmas and New Year's holidays, Mr. Foy did not respond until January 3, 2013. (Pet. Ex. 1, at 7 (Email from Kevin Foy, Oliver Wyman, to Robert Mulholland, LEPA (Jan. 3, 2013)).) Exhibit 1 of the Petition contains copies of the email communications between Complainants and Oliver Wyman about securing access to MultiRail. See also, Mulholland/Crowley V.S. 4-7.

B. NS Is Not Providing Complainants with the Same Access to MultiRail, Including Training and Set-Up, as It Is Providing the Board.

In its Reply Evidence, NS asserted that it "has arranged with Oliver Wyman for both the [Complainants] and the Board to be permitted limited access to MultiRail for purposes of this

case.” (NS/DuPont Reply at III-C-158 n.245; NS/SunBelt Reply at III-C-122 n.191.) Since filing its Reply Evidence, NS has clarified that only Complainants will be provided limited access, while the Board will be provided full access. Letter from G. Paul Moates, Counsel for NS, to Jeffrey O. Moreno, Counsel for Complainants (Jan. 28, 2013) (“The access that NS has arranged to MultiRail for the Board is different from that which NS has arranged (and agreed to pay for) in order to provide MultiRail to Complainants.”) (attached as Ex. C).

NS is providing the Board with a “read-write,” or “fully-functional,” version of MultiRail. Letter from G. Paul Moates, Counsel for NS, to Rachel D. Campbell, Surface Transportation Board 1-2 (Jan. 25, 2013) (attached as Ex. D). The fully-functional version “will contain full ‘read-write’ access that will enable the Board to review and verify MultiRail-related evidence, and if the Board so chooses, to make adjustments to such evidence.” Ex. C. NS is also providing the Board with a laptop loaded with MultiRail (Ex. D) and the MultiRail-related evidence (Ex. C). In addition, “NS has also agreed to pay for some training for Board staff should the Board desire it.” Ex. C.

In contrast, NS has only arranged to provide Complainants with a read-only license. Ex. C. NS will not provide Complainants with the same training and set-up as the Board.

The read-only version of MultiRail subjects Complainants to multiple limitations that do not exist in the fully-functional version of MultiRail that NS is providing to the Board. The key limitations that Complainants have identified are:

- Complainants cannot modify the model data inputs or assumptions and quantify the effect of the modification.
- Complainants cannot save changes to model data that would demonstrate errors and/or inefficiencies in NS’s modeling exercise.

Mulholland/Crowley V.S. 8, Attach. A. Messrs. Mulholland and Crowley have provided a more complete outline of the limitations that they were able to identify during two days of training provided by Oliver Wyman, in Attachment “A” to their Verified Statement.

C. Complainants Must Incur Substantial Costs to Use Both the Limited and Full Access Versions of MultiRail.

Although NS has arranged for the Complainants “to be permitted limited access to MultiRail for purposes of [the Rate Cases,]” (NS/DuPont Reply at III-C-158 n.245; NS/SunBelt Reply at III-C-122 n.191.) such access is subject to substantial costs and limitations. Moreover, NS has refused any responsibility for providing the Complainants with full access to MultiRail. Ex. C.

Although the Complainants do not have to pay any software license fees to use the limited access read-only version of MultiRail that NS is providing, “there are costs associated with the software and data deployment.” (Pet. Ex. 1, at 6 (Email from Kevin Foy, Oliver Wyman, to Robert Mulholland, LEPA (Jan. 8, 2013)).) Indeed, Oliver Wyman has discouraged the Complainants even from attempting to load the software on their own computers, “[t]o reduce the possibility of hardware and operating system complications” *Id.* This concern proved accurate while Oliver Wyman was providing training to Complainants and the MultiRail program repeatedly locked-up when Oliver Wyman demonstrated how to view the MultiRail data. Mulholland/Crowley V.S. 3.

Thus, for MultiRail setup, Complainants must incur two fees: a Base Hardware & MultiRail Setup and Initial Support fee (“Base Fee”); and a Continued User Support and Hardware Lease fee (“Support Fee”). (Pet. Ex. 1, at 6 (Email from Kevin Foy, Oliver Wyman, to Robert Mulholland, LEPA (Jan. 8, 2013)).) Under the Base Fee, Oliver Wyman will provide a laptop computer for two months for the purpose of using MultiRail, prepare the laptop computer

and application software, prepare and load the NS Reply databases, and provide other critical services to ensure that MultiRail functions. Id. The Base Fee is \$12,000, plus expenses, per case. Id. The Support Fee is a monthly fee that enables Complainants to continue to use the laptops provided by Oliver Wyman and receive technical support after the first 2 months of MultiRail use. Id. Oliver Wyman is charging \$2,000, per month and per case, as the Support Fee. Id. To be clear, Complainants will begin incurring this fee two months after Oliver Wyman delivers MultiRail to Complainants. Id.

Already, the Base Fee has proven to be essential. Under the Base Fee, Oliver Wyman created the scenario files that are necessary to load any data into MultiRail. The scenario files, which bear a .sc3 extension, provide linking conventions for the myriad of MultiRail data files in NS's MultiRail evidence. See NS Reply Elect. Wp. Folder "MultiRail" (containing four scenario folders, identified by the "NS_Reply_2" prefix, with multiple subfolders and multiple data files within each subfolder). NS did not provide the scenario files in its Reply Evidence. And Complainants cannot generate the scenario files in the read-only version of MultiRail. Mulholland/Crowley V.S. 3. Accordingly, had Complainants not paid the Base Fee and simply received an installation disk with MultiRail, they would not have been able to "review and verify" NS's MultiRail evidence, as NS has represented. Ex. C. That is, Complainants had to pay the Base Fee just to view NS's MultiRail evidence.

Although Oliver Wyman "strongly recommend[s]" that Complainants receive training just to understand how to operate MultiRail (Pet. Ex. 1 at 6 (Email from Kevin Foy, Oliver Wyman, to Robert Mulholland, LEPA (Jan. 8, 2013))), NS is not providing training. Complainants and their consultants have almost no experience with MutiRail.¹ Indeed, because

¹ NS inaccurately claims that LEPA personnel received MultiRail training from Oliver Wyman in the *Seminole v. CSXT* rate case, and thus would not require further training (Pet. Ex. 2, at 4, n.5). Mulholland/Crowley V.S. 3.

of the proprietary history of MultiRail, it appears that only individuals associated with Oliver Wyman would have such training. Consequently, the Complainants need software use training from Oliver Wyman in order to understand and use MultiRail. The software training offered by Oliver Wyman costs \$15,000 plus expenses and involves introductory training and training on navigating the MultiRail program. Id.

In summary, the costs that Complainants must incur to review and verify NS's MultiRail evidence are:

- \$12,000 Base Fee, per case (plus expenses).
- \$2,000 Support Fee, per case, per month after the initial 2 months of use (plus expenses).
- \$15,000 (plus expenses) for training.

Thus, just to get set up and properly trained on the limited access version of MultiRail, the Complainants must spend \$39,000, which is \$19,500 each. Finally, because this case certainly will last longer than two more months, Complainants are facing an additional \$2000 per month expense each for on-going use of the laptop and technical support.

Even after paying these sums for MultiRail training, setup, and continued support, Complainants will only have access to the read-only version of MultiRail. To obtain the fully-functional read-write version of MultiRail that NS itself used and will provide the Board, Complainants' costs would increase by at least five-fold. Oliver Wyman has offered two options for obtaining the full version:

- Purchase Option: Complainants may purchase the full version of MultiRail for a one-time purchase price of \$190,000, plus an annual maintenance fee of \$28,500, with the first annual installment due just 90 days after purchase. This covers only one Complainant. Oliver Wyman would charge a \$45,000 royalty for the second case and any other case thereafter. This essentially brings the

total cost to \$263,500, even if the Complainants elect not to purchase maintenance after their cases are over.

- Lease Option: An annual lease cost of \$99,000, plus a royalty of \$45,000 per case. At \$189,000 for both cases, this is the lower cost option, but by no means a low-cost option.

(Pet. Ex. 1, at 4 (Email from Kevin Foy, Oliver Wyman, to Robert Mulholland, LEPA (Jan. 10, 2013))).)

D. Complainants Have Incurred the Costs Associated With the Limited Access Version of MultiRail So They Can Determine its Adequacy for Reviewing and Verifying NS's MultiRail Evidence.

Before NS filed the Petition, Complainants elected to proceed with access to the read-only version of MultiRail and incur the attendant start-up and training costs so that they could first determine the scope and functionality of the limited access version. (Pet. Ex. 3, at 1.) By their decision, Complainants did not concede their right to obtain full access to MultiRail at NS's expenses, nor did they prejudice their rights to seek reimbursement of the start-up and training costs from NS. (Pet. Ex. 3, at 1-2.) Rather, they considered it prudent to evaluate the limited access provided by NS before submitting these issues to the Board. Complainants' decision to assert their claims after seeing and using MultiRail would enable them to avoid coming to the Board twice—once to address start-up and training costs and again to address the limited-access license—and the attendant delays that would result.

Now that NS has clarified that it will provide the Board with a fully-functional read-write version of MultiRail, even though it has only provided the Complainants the read-only version, the access issues have become even more clear. Also, the Complainants recently completed two days of training on MultiRail with Oliver Wyman, from which they have learned more about the limitations of the read-only version. The Complainants address those issues in Parts III and IV of this Reply to the NS Petition.

E. The Board Has Rejected NS's Attempt to Provide MultiRail.

On February 11, 2013, the Board issued a letter declining NS's offer to provide the MultiRail program to the Board. Letter from Rachel D. Campbell, Surface Transportation Board, to G. Paul Moates, Counsel for NS (Feb. 11, 2013) (attached as Ex. D). This letter confirms that the process by which NS has attempted to "arrange" for the Board to have access to MultiRail is improper and full of pitfalls.

However, the letter is less clear as to whether NS might "cure" this defect by actually filing the MultiRail software as part of its Reply Evidence in these cases, which is what Complainants contend should have been done from the outset. Because, as Complainants set forth in this Reply to the NS Petition, NS must serve upon the Complainants all material that it files with the Board, NS would be required to provide a full access, read-write version of MultiRail to the Complainants and incur all the costs of doing so, including the provision of any hardware, database set-up expenses, and training expenses. If NS cannot cure the defect identified by the Board, then all portions of its Reply Evidence based upon MultiRail are unsupported and cannot be used by the Board in these proceedings.

III. NS MUST PROVIDE THE BOARD AND COMPLAINANTS WITH THE SAME ACCESS TO MULTIRAIL.

A. The Board's *Ex Parte* Rules Require NS to Provide Complainants with the Same Version of MultiRail and Training as It Provides the Board.

By providing the Board with access to a fully-functional version of MultiRail and critical training, without providing the same to Complainants, NS is acting in violation of the Board's rules concerning *ex parte* communications and with complete disregard for Complainant's due process rights under the Constitution. Specifically, NS is providing the Board with information that has not been filed in the Complainants' cases or provided to the Complainants, and NS intends that the Board rely upon this information in deciding those cases. This jeopardizes the

“efficiency, fairness, and public confidence in the Board’s decisional process.” Petition of Fieldston Co., 1 S.T.B. 1083, 1084 (1996) (applying the Board’s *ex parte* rules to promote efficiency, fairness, and public confidence, even though not required to by statute).

An *ex parte* communication is “an oral or written communication by or on the behalf of a party which is made without the knowledge or consent of any other party that could or is intended to influence anyone who participates or could reasonably be expected to participate in the decision.” 49 C.F.R. § 1102.2(a)(3). Providing MultiRail and MultiRail training to the Board is clearly an attempt by NS to influence the Board’s decision making in these proceedings. NS has stated this fact explicitly:

NS has arranged with Oliver Wyman for that company to provide a copy of the MultiRail program, loaded on a laptop computer, for the Board’s use in evaluating NS’s Reply Evidence (and any related Rebuttal Evidence that Complainants might file). The software provided by Oliver Wyman will be fully functional, enabling the Board both to review and verify MultiRail-related evidence, and should it desire to do so, to make adjustments to such evidence to reflect the Board’s resolution of any evidentiary disputes regarding the data and assumptions utilized by the parties in their respective submissions.

Ex. D. Moreover, training on the operation of MultiRail will provide the Board with an understanding of MultiRail’s underlying logic and how MultiRail generated NS’s evidence. If NS intended for its evidence to stand on its own, it would not need to provide MultiRail to the Board, or training on how it functions.

Although the MultiRail software is essential to permit the Board to fully evaluate NS’s MultiRail-generated evidence, NS has not included the software in its Reply Evidence. But NS knows that, without MultiRail, its evidence is unsupported, and thus in grave danger of being rejected on Rebuttal. Duke Energy Corp. v. Norfolk S. Ry. (Duke), 7 S.T.B. 89, 101 (2003). In fact, the Board has disregarded evidence based on a computer model that a railroad did not

submit to the Board. Tex. Mun. Power Agency v. Burlington N. Santa Fe Ry. (TMPA), 6 S.T.B.573, 646 (2003) (opting to use a grid analysis submitted by BNSF instead of the modified SARR configuration generated by BNSF's computer model, which BNSF did not provide to the Board).

Given that NS is providing the Board with a fully functional read-write version of MultiRail to substantiate its evidence and not providing the same functionality to Complainants, NS is intending to make a prohibited *ex parte* communication. The Board's rules provide that:

No party, counsel, agent of a party, or person who intercedes in any on-the-record proceeding shall engage in any *ex parte* communication concerning the merits of the proceeding with any Board Member, hearing officer, joint board member, employee board member or employee of the Board who participates, or who may reasonably be expected to participate, in the decision in the proceeding.

49 C.F.R. § 1102.2(c)(1). If a fully-functional read-write version of MultiRail is essential to the Board's analysis, NS must also provide it to the Complainants.

NS cannot avoid the *ex parte* rules by asserting that it is not providing MultiRail, but only arranging for Oliver Wyman to provide MultiRail. Email from G. Paul Moates, Counsel for NS, to Jeffrey O. Moreno, Counsel for Complainants (Feb. 7, 2013) (attached as Ex. F). This is a distinction without a difference. The rule clearly prohibits *ex parte* communications by agents of a party to a Board proceeding, and Oliver Wyman would be acting as an agent of NS.

Moreover, the Board is prohibited under its own rules from even entertaining NS's offer to provide or arrange for MultiRail and MultiRail training, even if NS provides or arranges for it through its agent, Oliver Wyman. Under 49 C.F.R. § 1102.2(c)(2):

No Board Member, hearing officer, joint board member, employee board member or employee of the Board who participates, or is reasonably expected to participate, in the decision in an on-the-record proceeding shall invite or knowingly entertain any *ex parte* communication concerning the merits of a proceeding or engage in

any such communication to any party, counsel, agent of a party, or person reasonably expected to transmit the communication to a party or party's agent.

If the Board receives a fully-functional version of MultiRail from NS and is provided any training or documents concerning MultiRail that NS failed to submit in its Reply Evidence, the Board must make that MultiRail software and any training, documents, or other communications concerning MultiRail available to Complainants in their respective dockets. The Board's rule at 49 C.F.R. § 1102.2(e) is clear:

Any person who receives an *ex parte* communication concerning the merits of a proceeding must promptly transmit either the written communication, or a written summary of the oral communication with an outline of the surrounding circumstances to the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board. The Section Chief shall place all of the material in the correspondence section of the public docket of the proceeding.

The critical importance of these rules is reflected in the severity of the sanctions that the Board may apply for violating them. Under 49 C.F.R. § 1102.2(f), the following sanctions are available to the Board for violations of its *ex parte* rules:

- (1) The Board may censure, suspend, or revoke the privilege of practicing before the agency of any person who knowingly and willfully engages in or solicits prohibited *ex parte* communication concerning the merits of a proceeding.
- (2) The relief or benefit sought by a party to a proceeding may be denied if the party, or his agent knowingly and willfully violates the foregoing rules.
- (3) The Board may censure, suspend, dismiss, or institute proceedings to suspend or dismiss any Board employee who knowingly and willfully violates the foregoing rules.

The severity of these consequences is attributable to the fundamental need for open and fair proceedings that the Fourteenth Amendment of the Constitution guarantees Complainants. The right to a fair and open hearing is "one of the rudiments of fair play assured to every litigant

by the Fourteenth Amendment as a minimum requirement.” Ohio Bell Tel. Co. v. Pub. Utils. Comm’n, 301 U.S. 292, 305 (1937) (internal quotations and citations omitted). The Supreme Court has proclaimed that “[a] hearing is not judicial, at least in any adequate sense, unless the evidence can be known.” Id. at 304. For these reasons, “[t]he courts have struck down agency decisions that appear to have been made on the basis of influences other than the merits of the case as set out in the record before the agency.” Petition of Fieldston Co., 1 S.T.B. 1083, 1084 (1996) (opting to limit *ex parte* communications even where permitted by statute).

B. Requiring NS to Provide Complainants the Same Access to MultiRail as the Board Is Consistent with Longstanding Precedent and Procedures in Board Proceedings and Other Administrative Proceedings

1. In Board Proceedings, the Board Ordinarily Requires the Proponent of Evidence to Make Underlying Computer Programs Available.

The Board ordinarily requires parties in Board proceedings to make all underlying data, calculations, and computer programs available. Failure to do so requires the Board to disregard such evidence.

For instance, in Canadian National Railway Company—Common Control, STB Docket No. 33842, slip op. at 4 n.12 (Dec. 28, 1999), the Board held:

The results derived from electronic workpapers must be reproducible, i.e., all underlying data bases, computer programs (FORTRAN, COBOL, C++, etc.) and electronic spreadsheets must be submitted in evidence. Program flows and logic trails must also be included. Computer programs must be submitted in both source code and executable modules. Electronic spreadsheets must be executable and all cell inputs must be documented.

Not only did the Board require the filing of such items, but it also required them to be served on other parties in the proceeding. Id. at 4. (requiring each disk of electronic materials filed with the Board to be served on any other party, upon request.). Moreover, in TMPA, STB Docket No. 42056, slip op. at 2 (served May 28, 2002), the Board found that, while the complainant supplied

with its opening evidence a computer model that it used to generate its evidence, the Board needed additional technical instructions about the model. Thus, the Board directed the complainant “to provide a detailed description of exactly how the model works and where the variables (e.g., mine delay times) can be located within the program.” Id.

Indeed, the Board has refused to use computer-generated evidence submitted by a party who failed to submit the source code of the underlying computer program, or otherwise explain its evidence. See AEP Texas North Co. v. BNSF Railway (AEP Texas), STB Docket No. 41191, slip op. at 21 (served Sept. 10, 2007) (deciding to not use transit times that a party generated using a proprietary computer program for which it did not submit the source code to the Board). In TMPA, the Board refused to accept a modified SARR configuration generated by the defendant’s computer model because the defendant did not provide either the modeling program or documentation explaining it. TMPA, 6 S.T.B. 573, 646 (2003). The Board also refused to accept the complainant’s SARR configuration because, although the complainant provided the underlying computer model program that it used to generate the SARR configuration, the complainant failed to provide adequate documentation of how its model operates. Id.

The history underlying the RTC Model is highly relevant to this dispute over MultiRail. Although the RTC Model is considered a standard tool for rate cases today, this was not always so. BNSF first introduced the RTC Model into the Xcel and Otter Tail cases in 2004-05. In both cases, the complainants used proprietary software developed by their consultant, which they provided to the Board and BNSF in their opening evidence. Otter Tail Power Co. v. BNSF Ry., STB Docket No. 42071, slip op. at 3 (Jan. 27, 2006); Pub. Serv. Co. v. Burlington N. & Santa Fe Ry. (Xcel), 7 S.T.B. 589, 611 (2004). In its reply evidence, BNSF used the RTC Model, but initially did not provide a copy to the complainants. Just as DuPont and SunBelt have asked NS

to provide them with full access to the MultiRail software, Xcel and Otter Tail made the same request of BNSF for the RTC Model. As demonstrated by the attached motion from Otter Tail's case (Exhibit G), BNSF provided the RTC model on a laptop computer. There was no cost to the complainants for the software or the laptop set-up and there were no limits upon the functionality of the RTC Model. Indeed, as Exhibit G indicates, BNSF provided assistance to Otter Tail with technical problems getting the BNSF data to run in the RTC Model on the laptop.

The history underlying the RTC Model also undermines the NS claim that it has no duty to provide the MutiRail software to the Complainants because the Complainants had no duty to produce to NS the RTC software (or various Microsoft programs) used in Complainants' opening evidence. (Pet. 9.)² Only after the Board developed experience with the RTC Model, in the Xcel and Otter Tail cases, did it become a ubiquitous tool that all parties are expected to use to develop their evidence in rate cases. In fact, the Board noted that the RTC program "has been thoroughly tested and has gained widespread acceptance among railroads, transit authorities, and government agencies" when it adopted the BNSF's RTC Model over the complainants string model in Xcel, 7 S.T.B. at 614. In Otter Tail, STB Docket No. 42071, slip op. at 3 (Jan. 27, 2006), the Board formally "endorsed" use of the RTC Model, which has become the accepted standard used by every SAC complainant and defendant since then.

Once the RTC model was endorsed by the Board, all parties were on notice that this would be the base standard for rate case operating evidence going forward. Indeed, the Board's endorsement has extended to purchasing its own copy of the RTC Model, which obviates the

² This argument also is disingenuous because NS uses the RTC Model and Microsoft programs in its ordinary course of business, as proven by its production of RTC Model runs and Microsoft documents in response to Complainants' discovery requests, and thus NS would not need a copy of the RTC or Microsoft software from the Complainants.

need for litigants to provide the software to the Board with their evidence.³ Until that endorsement, however, the RTC Model was in fact provided by the litigants as part of their evidentiary submissions. MultiRail has no such endorsement from the Board.⁴

Still, even though it has endorsed the RTC Model, the Board has quashed attempts by parties in the same proceeding to use versions of the RTC Model that are not available to all licensed users. AEP Texas, STB Docket No. 41191 (Sub-No.1), slip op. at 3 (served March 17, 2006) (requiring the parties to agree on a version and release of RTC that is available to all licensed RTC users). Accordingly, the Board has demonstrated that, even with an endorsed computer model, parties should use the same version of the software.

A further distinction between MultiRail and the RTC Model is that MultiRail is not “commercially available” in the same sense as the RTC Model. Anyone can purchase the RTC Model and it has been widely used and thoroughly tested. In contrast, MultiRail is the proprietary software of Oliver Wyman, which prior to these cases has only made MultiRail available to railroads for use by railroad personnel and still strictly controls access to third parties so as not to create competition for its own consulting business. (Pet. Ex. 1, at 4 (Email from Kevin Foy, Oliver Wyman, to Robert Mulholland, LEPA (Jan. 10, 2013)).) For example, Oliver Wyman has imposed very costly restrictions upon the use of MultiRail for rate cases, which precludes Complainants from simply purchasing a license and being able to use the program. Rather, Oliver Wyman would require the Complainants to purchase or lease the software and pay a \$45,000 royalty for each rate case thereafter. Id. This may explain why NS had to “arrange” for Oliver Wyman to provide both the Complainants and the Board with access to MultiRail for

³ The same is true for Microsoft software, which has become so ubiquitous that nearly everyone has their own copies of the software.

⁴ Although NS cites to other STB proceedings in which MultiRail has been used (Pet. 4 n.7.), three of those were merger proceedings, and the only rate case was settled before a final decision. In no decision has the Board endorsed MultiRail as either an accepted or preferred tool for rate cases.

the purposes of these rate cases, whereas no such arrangements were needed to use the RTC Model.

2. Courts Regularly Require Proponents of Computer Model Evidence to Provide a Full Copy to Their Opponent.

The rule that a proponent of computer model evidence must provide a full copy of that evidence to its opponents is well settled. See 8A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 2218 (3d ed. 2010) (“When computerized material generated for trial will be used as evidence, access should be relatively routine to permit the opposing party a fair chance to blunt the probative force of the computerized evidence.”) Indeed, the Second Circuit Court of Appeals exclaimed that it is “quite incomprehensible” that a party could “tender a witness to state the results of a computer’s operations without having the program available for defense scrutiny and use on cross-examination if desired.” United States v. Dioguardi, 428 F.2d 1033 (2d Cir. 1970).

Federal courts regularly give parties access to computer programs that are used by expert witnesses. For example, in a case involving a dispute between a city and an electric utility, the city planned to call experts who would testify based on the result of “various computer simulations.” City of Cleveland v. Cleveland Elec. Illuminating Co., 538 F. Supp. 1257, 1266 (N.D. Ohio 1980). In arguing for production, the defendant utility said that “the program used and the various inputs and assumptions cannot be confidently deduced from the data presented.” Id. The defendant also stated that, as a result, it could not prepare for cross-examination of the experts or even determine if cross-examination was necessary. Id. The court ordered the production of the computer program, stating that authorities “have consistently recognized the discoverability of underlying data as well as plans and programming methods from which a particular system or computer study emerged.” Id. Lastly, the court also agreed that the

discovery of data, calculations, and computer simulations was necessary for the examination of the experts at trial. Id. at 1267.

The rationale for providing access to computer models and simulations used by an expert witness is that “[a]ll of the information used [by a party] in generating the computer simulations is relevant to [a party’s] challenge of this evidence, not merely the information which conforms to [that party’s] theory of the case.” Bartley v. Isuzu Motors Ltd., 151 F.R.D. 659, 660-61 (D. Col. 1993). Thus, “[w]hen one party seeks to present a computer study, in order to defend against the conclusions that are said to flow from these efforts, the discovering party not only must be given access to the data that represents the computer’s work product, but he also must see the data put into the computer, the programs used to manipulate the data and produce the conclusions, and the theory or logic employed by those who planned and executed the experiment.” Id.

Access is further supported by the inherent reliability dangers of computer model evidence. Courts have long recognized these dangers, stating: “computer models analyze only the data provided, which, if ‘inadequate or insufficiently reliable[.]. . . lead to the problem of ‘garbage-in garbage-out.’”” People’s Ins. Counsel Div. v. Allstate Ins. Co., 36 A.3d 464, 481 n.6 (Md. 2012) (quoting Colorado v. U.S. Dep’t of the Interior, 880 F.2d 481, 489 (D.C. Cir. 1989)). This concern is especially prevalent here, because MultiRail derives evidence based on a multitude of inputs and iterative runs of its simulation, where adjustments to the inputs are made at each step. Accordingly, mere production of the output files and/or results of a computer program does not meet a party’s disclosure obligations. E.g., Cleveland, 538 F. Supp. at 1267; United States v. Liquid Sugars, Inc., 158 F.R.D. 466, 472 (E.D. Cal. 1994) (court grants

defendant in pollution discharge case access to testing procedures and methodologies because defense needs to be able to “properly challenge” the government’s case).

The NS Petition is contrary to the foregoing precedent by asking the Board to declare that NS may provide the Complainants with a different, and less functional, version of MultiRail than NS itself used to generate its Reply Evidence or that NS intends to provide the Board. In fact, NS could not have used the read-only version of MultiRail to develop its evidence. Consequently, restricting the Complainants to the read-only version impairs their ability to follow, replicate, and modify the MultiRail inputs through multiple iterations, which prejudices their right to effective cross-examination and rebuttal of the NS Reply Evidence.

3. In Similar Administrative Proceedings, Proponents of Computer Model Evidence Must Submit the Computer Model and Operating Instructions to Their Opponent.

In similar types of administrative proceedings where the parties routinely submit evidence or expert testimony based on computer models, production of computer models is required. For example, the law governing hearings before the California Public Utilities Commission (“CPUC”) specifies:

Any computer model that is the basis for any testimony or exhibit in a hearing or proceeding before the commission shall be available to, and subject to verification by, the commission and parties to the hearing or proceedings to the extent necessary for cross-examination or rebuttal

Cal. Pub. Util. Code § 1822 (a). Under the CPUC’s rules, any party who sponsors expert testimony or exhibits based on a computer model must also provide, upon request, written instructions on the operation of the computer model and documentation sufficient for an experienced professional to understand the basic logical processes linking the input data to the output data, including a complete description of how the model operates and its logic. CPUC Rules 10.3(a)(3), 10.4(e).

The Nuclear Regulatory Commission (“NRC”) heavily relies on computer models, as do the entities that it regulates. In re Progress Energy Fla., Inc., 72 N.R.C. 692, 703 (2010).

Accordingly, the NRC has deemed that “it is essential that litigants be able to access, evaluate, and challenge the computer modeling work that serves as the basis for a party’s position and/or the grant or denial of a license.” Id. at 704. Thus, the NRC’s rules require that parties in its proceedings disclose “computer models . . . , including the underlying data used in a computer analysis or simulation, the programs and programming methods, the software that embodies the computer program, and the inputs and outputs that comprise the model.” Id. at 704.

C. NS’s Gratuitous Characterizations of Complainants’ Opening Evidence Are Irrelevant.

NS’s suggestion that Complainants do not need access to a fully-functional version of MultiRail due to the procedural posture of this case (Pet. 12-13.) is both incorrect and irrelevant. Throughout its Petition, including its correspondence in Exhibit 2 of the Petition, NS suggests that Complainants desire full read-write access to MultiRail to “cure” their fatally flawed opening evidence. NS seems to believe that the only reason the Complainants could possibly need access to the fully-functional version of MultiRail is to completely redo their opening evidence. Contrary to NS’s characterizations, the Complainants have not suddenly realized that their opening evidence is fatally flawed and decided to use MultiRail to cure those fatal defects. That does not mean, however, that Complainants are only entitled to the limited-access version of MultiRail.

NS claims that the limited-access version of MultiRail will enable the Complainants “to review and analyze the Reply Evidence that NS submitted, and to identify any operating parameters and assumptions with which they might disagree.” (Pet. 13.) Even if that statement is accurate, which remains to be seen, such access is not adequate unless it also permits the

Complainants and the Board to modify those assumptions within the MultiRail software, save the results to the database, and quantify the impact of those modifications. “[W]here the shipper shows that the railroad’s reply evidence is itself unsupported, infeasible or unrealistic, the shipper may supply corrective evidence.” Duke, 7 S.T.B. at 101. Thus, the Complainants must be able not only to challenge operating parameters and assumptions in the MultiRail analysis, but also to correct them in the software database. A read-only license does not permit the Complainants to do that.

Furthermore, if the Board needs the fully-functional version of MultiRail and training to evaluate NS’s MultiRail evidence, clearly the Complainants would have the same, if not a more urgent, need. The purpose of Rebuttal is so that complainants can provide their evaluation of the railroad’s evidence. Where a complainant fails to do this, the railroad’s evidence is accepted. See, e.g., Duke, 7 S.T.B. at 166. Thus, to fulfill their inherent duty to evaluate the evidence presented against them, complainants in rate cases have a critical need for access to the defendant’s evidence and the underlying support. A version of MultiRail with less functionality than NS itself used, or NS provides to the Board, would deny the Complainants their right to fully review and evaluate the NS Reply Evidence and to present rebuttal evidence.

IV. NS MAY NOT REQUIRE COMPLAINANTS TO PAY FOR THE OPPORTUNITY TO REVIEW ITS REPLY EVIDENCE.

A. NS Either Misunderstands or Misrepresents the “American Rule” that Each Litigant Is Responsible for Its Own Litigation Costs.

The heart of the NS Petition is the so-called “American Rule” that each litigant is responsible for its own litigation costs. See Petition at 7-12. Perversely, NS contends that Complainants’ “extraordinary demand” that NS incur the expense of providing its own reply evidence to Complainants is “utterly at odds with the well-established American Rule....” Id. at 1, 2. NS, however, either misunderstands or misrepresents that rule. The NS position would turn

the American Rule on its head by requiring the Complainants to pay for NS's litigation costs. The Complainants are not challenging the "American Rule;" they seek to enforce it.

Because NS is required to submit MultiRail in evidence, as discussed in the preceding sections, it also must serve that evidence upon Complainants. The American Rule requires NS to bear the cost of submitting its evidence, which includes all expenses necessary to enable Complainants to review and evaluate that evidence. Since the NS evidence cannot be reviewed and evaluated without the MultiRail software, NS must submit the software as part of its Reply Evidence. NS has not done so. Moreover, NS cannot avoid its obligations under the American Rule by "arranging" for the Board to have access to MultiRail without filing the software as part of its Reply Evidence, because that would be an impermissible *ex parte* communication. Thus, the very precedent that NS cites in support of its Petition actually imposes upon NS the MultiRail costs that it seeks to avoid.

NS misrepresents the "American Rule" when it asserts that "there is nothing 'unfair' about the longstanding requirement that litigants such as DuPont and SunBelt pay for available third-party goods and services if they wish to use them." (Pet. 9 (underline added).) The Complainants have no wish to use MultiRail. However, NS's choice to use MultiRail in its Reply Evidence has compelled the Complainants to also use it in order to rebut the NS evidence. Thus, the Complainants' requests to NS are dictated by litigation choices made by NS, not by any desire to use MultiRail themselves.

In addition, the costs that NS has shifted to the Complainants are not the costs referred to by the "American Rule." All of the cases cited by NS deal with attorney and expert fees and expenses associated with their services. Complainants' position, however, concerns the costs associated with providing evidence in a form that permits attorneys and experts to review,

understand, evaluate, and respond to the NS evidence. The Complainants believe NS is responsible for providing only MultiRail, including the set-up and training required to use the software, as part of its Reply Evidence. They have not asked NS to pay for the time expended by Complainants' lawyers and consultants for training or to use the software to actually evaluate the NS Reply Evidence and to prepare their Rebuttal Evidence.

NS wrongly suggests that DuPont is being hypocritical because NS was required to purchase an advanced liquid-cooled computer to run the RTC Model:

Tellingly, DuPont did not offer to reimburse NS for the cost of a larger computer to run the RTC Model submitted by DuPont in its Opening Evidence. NS was, in fact, required to purchase an advanced liquid-cooled computer to run the RTC Model on the scale required by DuPont's SARR (*with the modifications to the Model required to reflect a feasible real world railroad operation*). For present purposes, there is no relevant distinction between the hardware that NS was required to purchase in order to respond to the evidence presented by DuPont, and the MultiRail software that Complainants might desire to utilize in responding to NS's Reply operating evidence.

(Pet. 10 (underline in original; italics added).) There is in fact a highly relevant distinction, which NS itself has made in the italicized text above. The RTC Model submitted by DuPont did not require a special computer; the RTC Model, as modified by NS, required the special computer.⁵ If NS needed a special computer, that was due to decisions that NS made in developing its own Reply Evidence; not anything that was necessary to review and evaluate DuPont's Opening Evidence. That fact makes all the difference.

⁵ NS wrongly claims that, in a prior pleading, DuPont told NS that it should buy a larger, more powerful computer. (Pet. 10, n.16.) That is not true. Rather, NS had expressed concern that the RTC Model itself was incapable of modeling a network the size of the DuPont SARR. DuPont responded that "[t]his is not a valid concern because Berkeley Simulation's expansion of the RTC software to a 64 bit system gives the model virtually unlimited capacity that is constrained only by the size of the computer NS uses." (See DuPont Reply to NS Motion for Modification of the Procedural Schedule 4, n.4 (filed May 29, 2012 in NOR 42125).) Even in that pleading, the NS concern was due to modifications that it intended to make to DuPont's opening evidence; NS did not represent that it had any difficulty using the RTC Model, as provided by DuPont. *Id.*

Tellingly, NS provides no example that supports its application of the American Rule to the present situation. Rather, NS's examples cover: professional fees and associated or miscellaneous expenses; attorney fees; and filing fees incurred by a litigant to develop its own evidence. None of these are expenses just to obtain the opportunity to examine evidence submitted by an opposing party.

To be clear, Complainants are not asserting that the American Rule requires NS to pay for Complainants to examine MultiRail or the bases of NS's evidence. Instead, Complainants are merely asserting that their right to rebuttal entitles them to an opportunity to examine MultiRail and the bases of NS's evidence. That is, NS must make MultiRail available at its expense, and Complainants would be responsible for the costs of the examination, such as the costs of their attorneys or experts.

B. Complainants Have a Right to Rebuttal.

In Board proceedings, the party with the burden of proof has a right to rebuttal. E.g. CSX Corp.—Control & Merger—Conrail Inc., STB Docket No. 33220, slip op. at 8 (served Jan. 30, 1997) (“Parties filing inconsistent and/or responsive applications have a right to file rebuttal evidence, while parties simply commenting, protesting, or requesting conditions do not.”) (citing multiple ICC decisions). Indeed, complainants in rate cases have a right to file rebuttal evidence. See Duke, 7 S.T.B. 89, 100-101 (2003) (discussing how a shipper may use rebuttal); see also Potomac Elec. Power Co. v. CSX Transp., Inc. (PEPCO), STB Docket No. 41989, slip op. at 7 (served Nov. 24, 1997) (discussing how a shipper may use rebuttal); General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases (General Procedures), 5 S.T.B. 441, 445-46 (2001) (discussing the presentation for rebuttal evidence).

The right of a rate case complainant to submit rebuttal is consistent with the ultimate goal of the SAC process: “a proper evaluation of whether the rate being charged is reasonable.”

Duke, 7 S.T.B. at 101. Indeed, in Board proceedings, rebuttal takes on the role that cross-examination plays in courtroom proceedings, which is to focus and examine the factual issues.

While Board rules permit cross-examination of witnesses in limited circumstances, the evidence generated by computer models, which is equivalent to an expert opinion (See Pet. 3 (stating that experts would otherwise have performed the role of MultiRail).), is not witness testimony that can be cross-examined in the traditional sense. Accordingly, the Board provides each party in a rate case with a substantial period to probe its opponent's evidence and requires that each party submit its evidence in a format that can be manipulated. See General Procedures, 5 S.T.B. at 444 ("we must be able to access and manipulate all spreadsheets"). Given the close relation of rebuttal in Board proceedings to cross-examination in courtroom proceedings, any act that undermines Complainants right to rebuttal would also infringe upon Complainants' right to cross-examination.

A fundamental tenant of the American legal system is that "[c]ross examination is a trial right." Argentine v. USW, 287 F.3d 476, 486 (6th Cir. 2002) (discussing a civil trial). In fact, the Supreme Court has called cross-examination the "principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316 (1974). And the Court has proclaimed that cross-examination is undoubtedly "the greatest legal engine ever invented for the discovery of truth." Lilly v. Virginia, 527 U.S. 116, 124 (1999). Courts around the nation have echoed these views. See, e.g., N.V. Maatschappij Voor Industriële Waarden v. A.O. Smith Corp., 590 F.2d 415, 421 (2d Cir. 1978) (stating that "cross-examination is an essential element of our system of adversarial advocacy").

Although the right to cross-examination is not absolute, "[a] court must permit a party to substantially and fairly exercise its right to cross-examination." Argentine, 287 F.3d at 486.

While “the proper scope for cross-[examination] is . . . a matter of trial court discretion[,] . . . unduly harsh limitation on cross-examination of a key expert witness can amount to prejudicial error.” Waarden, 590 F.2d at 421 (emphasis added). This prejudicial effect arises because “the full burden of exploration of the facts and assumptions underlying the testimony of an expert witness [is placed] squarely on the shoulders of the opposing counsel’s cross-examination.” Int’l Adhesive Coating Co. v. Bolton Emerson Int’l, Inc., 851 F.2d 540, 544 (1st Cir. 1988) (quoting Smith v. Ford Motor Co., 626 F.2d 784, 793 (10th Cir. 1980)) (internal quotations omitted). That is, “[t]he burden is on opposing counsel through cross-examination to explore and expose any weaknesses in the underpinnings of the expert’s opinion.” Newell P.R., Ltd. v. Rubbermaid Inc., 20 F.3d 15, 21(1st Cir. 1994) (quoting Int’l Adhesive Coating Co. v. Bolton Emerson Int’l, Inc., 851 F.2d 540, 544 (1st Cir. 1988)) (internal quotations omitted).

Accordingly, “[w]ide latitude in cross-examination should be allowed.” Standard Oil Co. v. Moore, 251 F.2d 188, 222 (9th Cir. 1957); Gwathmey v. United States, 215 F.2d 148, 158 (5th Cir. 1954) (“[A] rather broad latitude should have been allowed for cross-examination to enable the jury to judge the witness as to his fairness.”). For the purpose of cross-examination, “counsel may probe the witness’s qualifications, experience, and sincerity; weaknesses in the opinion’s basis, the sufficiency of assumptions, as well as the strength of the opinion. Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 141 F. Supp. 2d 320, 324 (E.D.N.Y. 2001).

In Novartis Corp. v. Ben Venue Labs, Inc., 271 F.3d 1043, (Fed. Cir. 2001), the Federal Circuit Court of Appeals dealt squarely with the issue of challenging computer simulation evidence:

There is nothing inherently unreliable or suspect about computer simulations as evidence. But every simulation of a physical process embodies at least some simplifying assumptions, and requires both a solid theoretical foundation and realistic input parameters to

yield meaningful results. Without knowing these foundations, a court cannot evaluate whether the simulation is probative, and it would be unfair to render an expert's opinion immune to challenge because its methodology is hidden in an uncommented computer model.

The Complainants thus have a right to review and critique the MultiRail evidence, which includes the software itself with all the functionality that was used by NS and made available to the Board. If NS does not provide this to the Complainants, its evidence is unsupported and may not be considered. Otherwise, the Complainants will have been denied their right to rebuttal.

C. Requiring Complainants to Pay for MultiRail Access and Training Undermines Their Right to Rebuttal.

By requiring Complainants to pay for MultiRail access and training, NS has erected an unfair obstacle to the Complainants' exercise of their right to rebuttal. Not only is this inconsistent with the so-called "American Rule" referenced by NS, but if permitted, it will have a chilling effect on the use of rate cases.

Although NS has provided a limited-access license to MultiRail for the Complainants' use, Complainants must still incur costs assessed by Oliver Wyman that are essential to being able to use the license. NS inaccurately describes these as optional charges that Complainants need not incur. (Pet. Ex. 2 at 4 n.5.)

Complainants and their consultants have almost no experience with MultiRail. Mulholland/Crowley V.S. 3-4. Consequently, they need the Software Use Training and perhaps additional training from Oliver Wyman in order to understand and use MultiRail in an efficient and timely manner, as provided by the procedural schedules in these cases.

Furthermore, although the Complainants could install the MultiRail software on their own computer, Oliver Wyman has discouraged the Complainants from doing so "[t]o reduce the possibility of hardware and operating system complications" (Pet. Ex. 1, at 6 (Email from

Kevin Foy, Oliver Wyman, to Robert Mulholland, LEPA (Jan. 8, 2013)).) Given the complexity of the software and Oliver Wyman's suggestion, requiring Complainants to load the software on their own, rather than having Oliver Wyman do it correctly in the first instance, could lead to problems with functioning of the software, would be unduly burdensome on Complainants who have no experience with the software and must adhere to the procedural schedule despite any MultiRail software issues, and could ultimately be even more expensive than paying Oliver Wyman to install it correctly in the first instance.

Most significantly, NS is simply wrong to claim that Complainants could upload the case data files into the read-only version of MultiRail on their own. The case data files are linked together by a scenario file that contains linking conventions. Without the scenario file, which can only be created using the read-write version of MultiRail, it is impossible to load the data files into MultiRail for review. Mulholland/Crowley V.S. 3. NS, however, did not supply the scenario files with its Reply Evidence. Instead, Oliver Wyman created them, using the read-write version of MultiRail, under the Base Fee services package that Complainants purchased for \$12,000 each. Mulholland/Crowley V.S. 3. Complainants would not have been able to evaluate NS's MultiRail evidence had Complainants simply opted to receive the MultiRail installation disk, with installation instructions, which is the no-cost option that Oliver Wyman offered (Pet. Ex. 1, at 5 (Email from Kevin Foy, Oliver Wyman, to Robert Mulholland, LEPA (Jan. 9, 2013))).

Incurring \$39,000, which is \$19,500 each, with the potential to incur an additional \$2,000 per month expense each if these cases last for more than another 2 months, just for the opportunity to evaluate NS's MultiRail evidence places a patently unfair burden on Complainants' right to rebuttal. Under Board precedent, if a complainant's Rebuttal does not comment upon an issue in a defendant's Reply, the Board will use the defendant's evidence on

that issue. See, e.g., Duke, 7 S.T.B. at 166. NS's choice to use expensive black-box software to develop its evidence should not require Complainants to do the same to merely obtain the opportunity to examine that evidence. The American system of justice eschews requiring a party to pay for an opportunity to examine the evidence that is presented against it. If it did not, litigants could avoid attacks on their evidence by ensuring that the cost of the evidence is sufficiently high. Cases would ultimately turn on the cost of the evidence rather than the weight of the evidence. Accordingly, if the Board requires Complainants to pay for MultiRail access and training, it would establish a dangerous precedent.

V. THE BOARD SHOULD REJECT ANY ATTEMPT BY NS TO FILE MULTIRAIL SO FAR AFTER THE DEADLINE FOR REPLY EVIDENCE BECAUSE IT WOULD BE HIGHLY PREJUDICIAL TO COMPLAINANTS.

NS has shown a complete disregard for the procedural schedule in these proceedings by attempting to provide MultiRail well after the deadline for it to file Reply Evidence, without any explanation. Consequently, the Board should refuse any attempt by NS to supplement the record by filing a fully-functional, read-write version of MultiRail with the Board and serving it upon the Complainants at this late date, when NS should have done so as part of its Reply Evidence in the first instance.

The Board's procedures require each party to serve copies of its electronic evidence on its opponent. 49 C.F.R. § 1104.3(b) ("One copy of each diskette or compact disc submitted to the Board should, if possible, be provided to any other party requesting a copy.")⁶; see also 49 C.F.R. § 1104.12(a) ("Every document filed with the Board should include a certificate showing simultaneous service upon all parties to the proceeding."). NS, however, neither filed a read-write or read-only version of MultiRail with the Board nor served it upon Complainants.

⁶ In rate cases, it is understood that each party requests copies of all electronic evidence submitted by any other party.

NS has offered no explanation for this failure. Instead, NS inappropriately has attempted to deal with the Board and the Complainants separately, and differently, and without ever putting the MultiRail software in the record of these proceedings. The failure of NS to serve even the limited access version of MultiRail with its Reply Evidence has been extremely prejudicial to Complainants, which have spent substantial time and effort negotiating with Oliver Wyman for access to MultiRail that NS should have provided as part of its Reply Evidence. If NS were now to request leave to supplement the record by filing MultiRail with the Board and serving it upon Complainants, that will require even more delay.

The current delay is not due to any lack of diligence on Complainants' part. NS filed reply evidence in the DuPont case on November 30, 2012. Buried in footnote 245 on page III-C-158, NS stated that it "has arranged with Oliver Wyman for both DuPont and the Board to be permitted limited access to MultiRail for purposes of this case." No separate notification was provided to bring this fact to Complainants' attention and no instructions were provided as to when and how such access had been arranged. Indeed, no instruction was provided at all until Complainants' counsel asked NS for information on December 19, 2012, and NS advised Complainants' counsel to contact Kevin Foy at Oliver Wyman.

Complainants then made several attempts to contact Mr. Foy, but received no response until January 3, 2013. The ensuing exchange between Mr. Foy and LEPA is documented in the e-mail chain that is attached to the Petition as Exhibit 1 and also in the Mulholland/Crowley V.S. at pages 4-7.⁷ One of the first things that Mr. Foy noted in his January 3rd e-mail was the need to prepare a license agreement with Complainants because, although NS was paying the read-

⁷ In the midst of these communications, NS filed its Reply Evidence in the SunBelt case on January 7, 2013. Having been attuned to the MultiRail issue in the DuPont case, Complainants' counsel immediately reviewed the NS Reply Evidence in SunBelt to determine if NS also had used MultiRail in that case. Finding this to be the case, the discussions with Oliver Wyman were expanded to include SunBelt.

only license fee, it would not be the licensee. (Pet. Ex. 1, at 7 (Email from Kevin Foy, Oliver Wyman, to Robert Mulholland, LEPA (Jan. 3, 2013))).) The next communication was a January 8, 2013 e-mail from Mr. Foy, in which Complainants learned for the first time that they were responsible to pay Oliver Wyman for set-up and training and that they would receive a version of MultiRail with just read-only functionality. (Pet. Ex. 1, at 6 (Email from Kevin Foy, Oliver Wyman, to Robert Mulholland, LEPA (Jan. 8, 2013))).) Because DuPont was concerned over both the cost and restricted software functionality, LEPA inquired about alternatives to set-up and training by Oliver Wyman and asked whether and at what cost Oliver Wyman would make a fully-functional version of MultiRail available to DuPont and SunBelt. Upon receipt of Oliver Wyman's responses, on January 10, 2013, the Complainants immediately sent a letter to NS counsel requesting that NS provide full access to MultiRail, including set-up and training expenses. (See Pet. Ex. 1, at 2.) A full week later, on January 17, 2013, NS declined Complainants' requests. (See Pet. Ex. 2.)

Upon receiving NS's response, Complainants made the difficult decision to incur the cost of proceeding with the limited functionality of MultiRail offered by NS, in order to minimize further case delays, while reserving their rights to seek reimbursement of those costs and to argue on rebuttal that the NS Reply Evidence was unsupported because NS had not provided the read-write version of MultiRail that was essential to their ability to completely review and evaluate the NS Reply. Oliver Wyman provided a draft of the license agreement on January 27, 2013, and after exchanging drafts, the license was finally signed by all parties on February 7, 2013. Training to use MultiRail occurred on February 4-5, 2013, which was over two months after the filing of Reply Evidence in the DuPont case and nearly one month in the SunBelt case.

NS has not attempted to justify its failure to file MultiRail as part of its Reply Evidence, and instead imposed upon Complainants the foregoing 6-week process to obtain the access to MultiRail that supposedly already had been “arranged” by NS. Nor has NS provided any explanation as to why it could not have provided access to MultiRail simultaneous with the filing of its Reply Evidence. NS knew all along that it was going to substantiate its MultiRail-generated evidence by providing MultiRail to the Board and the Complainants. Indeed, NS expressly stated in its Reply Evidence that it had arranged for access to MultiRail. (NS/DuPont Reply at III-C-158 n.245; NS/SunBelt Reply at III-C-122 n.192.) Despite this representation that arrangements already had been made, NS failed to submit MultiRail with its Reply Evidence, and in fact, made no attempt even to provide the details of this “arrangement” until Complainants requested instructions on how to obtain the access referenced in the NS Reply Evidence. If NS had taken even those basic steps, the issues presented in the Petition could have been identified and presented to the Board much sooner.

This delay in providing even the limited functionality version of MultiRail has been extremely prejudicial to Complainants, and that prejudice will only be compounded if NS files and serves the fully-functional, read-write version. Already, a substantial portion of Complainants’ time to file their Rebuttals has passed. Yet, given the complexity of MultiRail and its steep learning curve, examining and analyzing NS’s MultiRail-related evidence will be a time consuming process, potentially requiring a further extension of the procedural schedule.⁸

The Board has rejected this type of “unfair gamesmanship” and “abuse of the administrative process” before, and it should do so again. See PEPCO, STB Docket No. 41989, slip op. at 7 (served Nov. 24, 1997) (stating that it was “unfair gamesmanship and an abuse of

⁸ Complainants will decide whether to seek an appropriate extension once they have developed sufficient experience with MultiRail to reasonably estimate how much additional time is needed.

the administrative process” for a party to withhold data that is beneficial to its case and then attempt to introduce it in an errata filing so as to deprive its opponent of an opportunity to respond). A request to supplement the record would be even more prejudicial than the submission of errata evidence, where the party submitting the evidence is making a correction to an inadvertent error that it discovers upon or after filing. Even then, however, the Board “look[s] with disfavor upon the filing of errata that curtail the ability of parties to respond fully and adequately to the record within the time frames we have established.” *Id.*

Complainants submit that it is too late for NS to file the MultiRail program as supplemental evidence. Having chosen a highly suspect and improper method of providing access to MultiRail through *ex parte* communications rather than as part of its Reply Evidence, NS knowingly engaged in a risky procedural maneuver in violation of both Board and judicial precedent for which Complainants should not suffer the consequences. The problematic and troubling nature of NS’s gambit has been further confirmed by the Board’s February 11, 2013 letter declining the NS offer to arrange for Oliver Wyman to provide MultiRail to the Board. When confronted by the Complainants and offered the opportunity to correct its error, NS refused and then doubled down on its original strategy by filing the instant Petition, thereby ensuring further delays to this proceeding until the Board can decide the Petition. But, the very filing of this Petition is evidence that NS itself had some doubt as to the propriety of its offer to arrange access to MultiRail. In light of the foregoing, the Board should refuse any attempt by NS to “cure” its procedural miscalculation by finally filing MultiRail with the Board, and serving it upon Complainants, as part of its Reply Evidence.

VI. CONCLUSION.

For the foregoing reasons, the Board should deny the NS Petition, and require NS to reimburse Complainants for the MultiRail training, set-up, and support costs that Complainants

have paid or will pay to Oliver Wyman. In addition, the Board should clarify that NS should have filed with the Board and served upon the Complainants, at no expense to either, the same fully-functional version of MultiRail that NS used to develop its Reply Evidence. Although Complainants believe that the Board should prohibit NS from supplementing the record by filing and serving a fully-functional, read-write version of MultiRail at this late date, if the Board nevertheless grants NS the opportunity to do so, Complainants ask that the Board require compliance with its decision within 7 days so as to minimize the prejudice of this delay to Complainants. Finally, the Complainants ask the Board to express its willingness to extend the procedural schedules in both cases as reasonably necessary to compensate for the delay caused by NS's failure to provide the MultiRail software with its Reply Evidence, if the Complainants should request such an extension. Although the Board recently has declined NS's offer to provide it with access to MultiRail, the foregoing issues still require resolution.

Respectfully submitted,



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

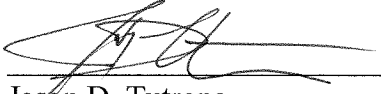
*Counsel for E.I. du Pont de Nemours and
Company & SunBelt Chlor Alkali
Partnership*

Dated: February 14, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February 2013, I served a copy of the foregoing
Complainant's Reply to Defendant's Petition for Clarification, by email and U.S. mail, upon:

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


Jason D. Tutrone

Mulholland/Crowley Verified Statement

E.I. DUPONT DE NEMOURS & COMPANY

V.

Docket No. NOR 42125

Defendant

V.

Docket No. NOR 42130

Defendant.

1

MultiRail Freight Edition (“MultiRail FE” or “MultiRail”) software that the defendant, Norfolk Southern Railway Company (“NS”), has arranged to license to Complainants.

I. The MultiRail Program and the Different Degrees of Access Provided to Complainants and the Board.

MultiRail is proprietary software that has been developed for use by Oliver Wyman in its consulting business to railroads. NS has used MultiRail to develop its Reply Evidence in both of the above-captioned Surface Transportation Board (“Board”) proceedings. NS, however, did not submit the software as part of its Reply Evidence in either proceeding. Rather, NS has “arranged” for Oliver Wyman to provide access to the Complainants and the Board for the purposes of these cases. The access to MultiRail that NS has arranged for the Complainants, however, is vastly different from the access that it has arranged for the Board in several ways.

Although NS has purchased a license for the Complainants to use MultiRail in these proceedings, that license is for only a limited-functionality, “read-only” version of the software. The Complainants must pay Oliver Wyman \$12,000 per case to install both the software and the NS databases onto a laptop computer provided by Oliver Wyman. In addition, they must pay \$15,000 for a 2-day training session plus 12 hours of technical support over the next two months. After two months, the Complainants must either return the laptops to Oliver Wyman or pay \$2000 per month to retain the laptops and obtain 4 hours of additional technical support.

In contrast, NS used a “read-write” (fully-functional) version of MultiRail to develop its Reply Evidence, and has purchased a read-write license for the Board to use in its review of the case evidence. This fully functional version will allow the Board to make a far more detailed and complete evaluation of the NS evidence than DuPont/SunBelt will be able to make using the read-only version provided to them. In addition, NS will incur the laptop lease, set-up, training, and technical support costs for the Board.

In summary, the Complainants have been provided a read-only version of MultiRail whereas the Board has been provided a read-write version. In addition, the Complainants are being required to pay \$39,000 for both proceedings combined for computer hardware and training whereas the Board has been provided these items at no cost.

Although NS has suggested that the Complainants could use MultiRail without incurring any costs, that is not accurate for several reasons. First, during training sessions held on February 4-5, 2013, Oliver Wyman explained that even it could not have loaded the NS case data into MultiRail without the read-write version of the program, because the read-only version does not have the capability to create or modify a "Scenario," or "*.sc3," file, which defines the links between the various databases and input files in the MultiRail program. Second, NS did not provide any "Scenario" files with its Reply Evidence and the Complainants would not have known that those files existed, much less to ask NS for them. Third, even using its own hardware and vast experience and expertise, Oliver Wyman encountered difficulties during the training session with the program occasionally locking up or failing to call certain data on command. Thus, the \$12,000 per case set-up and laptop lease expense cannot in any way be considered discretionary.

Nor is the \$15,000 training cost discretionary. L.E. Peabody & Associates, Inc. personnel do not have any prior experience with MultiRail, because it is proprietary and has only been licensed to railroads in the past. Although NS has claimed that L.E. Peabody & Associates, Inc. received training on MultiRail in Docket NOR 42110, *Seminole Electric Cooperative, Inc. v. CSX Transp., Inc.*, that is not accurate. Seminole had engaged a different consultant in that case both to run the RTC Model and review the MultiRail evidence in that case. Given the complexity of MultiRail, L.E. Peabody & Associates, Inc.'s inexperience with this proprietary

program, and the need to review the NS evidence and prepare rebuttal in a brief period, formal training from Oliver Wyman was absolutely essential. Furthermore, because MultiRail is the proprietary software of Oliver Wyman, only it could provide the necessary training.

II. Events Prior to the NS Petition.

On November 30, 2011, NS filed and served its Reply Evidence in the DuPont rate case. Buried in a footnote on page III-C-158, NS stated that it “has arranged with Oliver Wyman for both DuPont and the Board to be permitted limited access to MultiRail for purposes of this case.” NS, however, did not explain what it meant by “limited access” or what arrangements had been made. The first communication from NS came in response to a December 19, 2012 inquiry from DuPont’s counsel. In its response, NS directed DuPont to contact Mr. Kevin Foy at Oliver Wyman.

On December 21, 2012, Mr. Mulholland attempted to call Mr. Foy and left a voice-mail message. He left several voice mails over the next two weeks without receiving a response. On January 2, 2013, Mr. Mulholland sent an e-mail to Mr. Foy explaining that, “I realize the holidays are a busy time, but we are on a tight schedule and must begin our analysis sooner rather than later.”¹

Mr. Foy responded by both phone and e-mail on January 3, 2013. In his e-mail, Mr. Foy stated that, although there are no software license fees to be paid by DuPont,

we strongly recommend that L.E. Peabody users receive some training for operating MultiRail FE. Additionally, there will be a need for some user support (telephone and e-mail) in the initial stages of use by your firm.

¹ This and the subsequent e-mail exchange between Mr. Mulholland and Mr. Foy are attached as Exhibit 1 to the NS Petition.

Furthermore, although NS was paying the license fee, Mr. Foy stated that the license would need to be with Complainants or their representative, and that he “hope[d] to have a draft...available by the end of next week.”

The next communication from Mr. Foy was a January 8, 2013 e-mail, in which he set forth three sets of additional expenses that Complainants would incur for set-up of the base hardware, installation of the MultiRail program, and uploading the NS database (\$12,000 per case); software user training (\$15,000); and continued support and hardware lease after the first two months (\$2000 per month per case). Mr. Foy indicated that the Complainants’ receiving a preloaded laptop rather than attempting to load the software on their own computers was advisable, “[t]o reduce the possibility of hardware and operating system complications” He also explained that the read-only version of MultiRail “will not allow for making changes that can be saved to the database.”

Both the unexpected expense and vague description of the software limitations were troubling. Therefore, in a January 9, 2013, phone call, Mr. Mulholland asked Mr. Foy about self-installation options and the ability to obtain a fully-functional version of the software. By that time, NS also had filed its Reply Evidence in the SunBelt case, in which NS also used MultiRail. Therefore, we identified the need for a second license for SunBelt and advised Mr. Foy accordingly.

In a January 9, 2013, e-mail, Mr. Foy stated that he could provide a software installation disk to Complainants at no cost. Although his response was somewhat ambiguous as to Complainants’ ability to upload the NS databases into the software without Oliver Wyman’s assistance, Oliver Wyman confirmed that this would not have been possible during the training session that we attended on February 4-5. As discussed above, because NS failed to provide

scenario files in its Reply work papers, and because NS failed to provide read-write access to the Complainants, they would not have been able to load the NS data in a read-only version of MultiRail without the scenario files. Thus, although the Complainants *may* have been able to install the read-only MultiRail program to its computers from a disk, they would not have been able to use the software to evaluate NS' Reply evidence.

In a January 10, 2013 e-mail, Mr. Foy provided a "qualified 'yes'" to the request for a fully-functional version of MultiRail. He stated that:

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

Mr. Foy quoted two pricing options. The lower cost of the two options was a one year lease for \$99,000, plus a \$45,000 per case royalty. That would bring the combined cost for both DuPont and SunBelt to \$189,000, plus set-up and training expenses of \$3500 per day over an estimated 10-15 day period.

The same day that we received this response from Oliver Wyman, DuPont and SunBelt counsel asked NS to provide a fully-functional read-write version of MultiRail, along with the set-up and training expenses.² When NS rejected their requests, in a January 17, 2013 letter,³ Complainants instructed us to proceed with the read-only version in order to minimize the delays to their cases and to learn more about the limitations of the read-only version through training.

² This letter is Exhibit 1 to the NS Petition.

³ This letter is Exhibit 2 to the NS Petition.

We scheduled training with Oliver Wyman for February 4-5 and entered into a license agreement for the read-only version of MultiRail.

Shortly thereafter, on January 25, 2013, NS sent a letter to the Board explaining that Oliver Wyman soon would provide the Board with a “fully-functional” version of MultiRail. This was the first time that NS ever represented that the Board would receive a different version of MultiRail than the Complainants and that NS would incur all of the hardware lease, software installation, and database set-up costs for which the Complainants must pay \$12,000 each. This appears to have been a reversal from the NS Reply Evidence, which represented that NS had arranged for both Complainants and the Board to have “limited access.” That same day, NS also filed its Petition for Clarification. Furthermore, in a January 28 letter, NS indicated that “NS has also agreed to pay for some training for Board staff should the Board desire it,” which is another service for which the Complainants must pay \$15,000.

III. MultiRail Training Sessions.

On February 4-5, 2013, we attended training sessions on the use of MultiRail provided by Oliver Wyman at the offices of L.E. Peabody & Associates, Inc. in Alexandria, VA. The purpose of the training was to educate L.E. Peabody & Associates, Inc. personnel on the use and capabilities of MultiRail so that they can review, evaluate, and respond to the NS Reply Evidence. This was our first opportunity to see and work with MultiRail.

During the training sessions, we made extensive inquiries regarding the differences between the fully-functional read-write and the read-only versions of MultiRail. Attachment “A” to our Verified Statement is an outline of some of the differences and major limitations of the read-only version. This summary is based solely upon a 2-day hands-on training session with

Oliver Wyman that occurred only one week ago and our limited experience working with MultiRail since then.

Because MultiRail is a large and complex program with many inputs and moving parts, this list undoubtedly is incomplete and more limitations will be discovered and refined over time. However, even this abridged list demonstrates that the Complainants' ability to review, evaluate and rebut the NS Reply Evidence based upon MultiRail is constrained by their inability to modify inputs, quantify the impact of input modifications, and save the results of those modifications. Furthermore, it demonstrates that both NS and the Board have the ability to conduct analyses and make quantitative evaluations that the Complainants cannot. These activities are essential to the ability to test the NS inputs and assumptions, identify inefficiencies in the NS MultiRail model, and to provide rebuttal evidence quantifying the impact of those inefficiencies.

VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

I, ROBERT D. MULHOLLAND, verify under penalty of perjury that I have read the foregoing Verified Statement of Robert D. Mulholland, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.



Robert D. Mulholland

Sworn to and subscribed
before me this 13th day of February, 2013



Diane R. Kavounis
Notary Public for the State of Virginia

My Commission Expires: November 30, 2016
Registration Number: 7160645

VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

I, TIMOTHY D. CROWLEY, verify under penalty of perjury that I have read the foregoing Verified Statement of Timothy D. Crowley, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.



Timothy D. Crowley

Sworn to and subscribed
before me this 13th day of February, 2013



Diane R. Kavounis
Notary Public for the State of Virginia

My Commission Expires: November 30, 2016
Registration Number: 7160645

Limitations of the Read-Only Freight Edition Version of MultiRail in the DuPont and SunBelt Cases**A. Input Limitations**

1. The read-only version of MultiRail Freight Edition ("RO-MultiRail") does not have the capability to create or modify a Scenario or *.sc3 file. The Scenario file defines the links between the various databases and input files in the MultiRail program, i.e. the Category Manager, Network Manager, Block Manager, Traffic Manager, Train Manager, Reports Manager and Trip Plan Manager Databases. These databases cannot be loaded and viewed in RO-MultiRail without a scenario file. Also, a user cannot view the impact of substituting one dataset for another without the ability to modify his *.sc3 file.
 - a. NOTE: NS did not provide any *.sc3 files in its Reply evidence in either DuPont or SunBelt. According to Oliver Wyman, it is only possible to create a Scenario file with the full read/write version of MultiRail. Without the setup of the laptops provided by Oliver Wyman we would not have been able to read/view any of NS' Reply evidence regarding MultiRail.
2. RO-MultiRail does not have the capability to generate a trip plan or "SuperSim" simulation.
 - a. NOTE: NS did not provide the trip plan database or any *.mpt files in its Reply evidence in either DuPont or SunBelt. According to Oliver Wyman, it is only possible to create the trip plan or SuperSim database with the full read/write version of MultiRail. Consequently we cannot read or view any of NS' Reply evidence regarding references to trip plans, SuperSim results or any report generated from this section because nothing was provided.
3. RO-MultiRail does not have the capability to modify inputs¹ in any of the MultiRail databases, quantify the impact of the modification and save the results of that modification. There are five main inputs or databases in the MultiRail program; 1) the rail network, 2) the carload traffic, 3) the car blocks, 4) the train schedules, and 5) operating assumptions.
 - a. Rail Network - RO-MultiRail cannot modify any inputs to the rail network in the Network Manager such as:
 - i. Rail lines (links) included/excluded
 - ii. Stations (nodes) included/excluded
 - iii. Designation of the railroad owner/operator of rail lines
 - iv. Categorization of rail lines to handle or not handle specific traffic e.g. TIH, local traffic, etc.
 - v. Various others

¹ RO-MultiRail does allow the user to adjust some of the user inputs in the software interface however the user is not able to evaluate the impact of those changes or save the changes to the database. This is similar to having multiple excel files that should be linked together, however the links have been broken. In this excel example a user can physically modify a cell in any of the excel files yet the impact that modification has on the other excel files can never be established because the links do not exist.

Limitations of the Read-Only Freight Edition Version of MultiRail in the DuPont and SunBelt Cases

- b. Carload Traffic - RO-MultiRail cannot add or delete database records or modify any inputs to the included carload traffic records in the Traffic Manager such as:
 - i. Origin/destination city
 - ii. Origin/destination railroad
 - iii. Commodity
 - iv. Load/empty status
 - v. Total number of cars included in the database, i.e. size of total traffic selected
 - vi. Release schedule by origin location
 - vii. Various others
- c. Car Blocks - RO-MultiRail cannot add or delete database records or modify any inputs to the included car block records in the Block Manager such as:
 - i. Origin/destination city
 - ii. Origin/destination railroad
 - iii. Minimum/maximum number of cars
 - iv. Permissible traffic types
 - v. Load/empty status
 - vi. Active/inactive block status
 - vii. Routing Penalties
 - viii. Various others
- d. Train Schedules - RO-MultiRail cannot add or delete trains or modify any inputs to the included train schedules in the Train Manager such as:
 - i. Routing
 - ii. Days of operation
 - iii. Block assignments
 - iv. Active/inactive trains
 - v. Train category
 - vi. Departure times
 - vii. Arrival Times
 - viii. Max train size, weight, length
 - ix. Various others
- e. Operating Assumptions – RO-MultiRail cannot modify any inputs to the operating assumptions in the Category Manager such as:
 - i. Pick up time
 - ii. Set out time
 - iii. Crew Change time
 - iv. Inspection time
 - v. Location specific user defined dwell times
 - vi. Routing time and mileage penalties
 - vii. Maximum train length

Limitations of the Read-Only Freight Edition Version of MultiRail in the DuPont and SunBelt Cases

- viii. Maximum train weight
- ix. Maximum car weight
- x. Minimum dwell times by yard type
- xi. Various others

- 4. RO-MultiRail does not have the capability to load new databases into the program.

B. Output Limitations

- 1. RO-MultiRail does not have the capability to generate block sequences in the Block Manager. This ability is one of the primary functions of MultiRail, enabling the user to assign selected traffic to blocks automatically. The full read/write version of MultiRail allows the user to input a traffic set and use the MultiRail sequencer to generate blocks of cars to move that traffic. RO-MultiRail does not have that capability.
- 2. RO-MultiRail does not allow the user to assign blocks to trains and save the results. We cannot make any changes to the assumptions NS made in its manual process of assigning blocks to trains due to the limitations of RO-MultiRail.
- 3. RO-MultiRail does not allow the user to act on the inefficiencies or analyze the impact of opportunities for operational improvements suggested by the various reports that MultiRail provides.
- 4. RO-MultiRail does not have the capability to make revisions of any sort, quantify and analyze the impact of any revision, or save the results of any revision made to the existing scenario.

C. Other Limitations

- 1. The above list was compiled after L.E. Peabody & Associates, Inc.'s staff training on the MultiRail program over a two day period. The MultiRail program is a large and complex program with a lot of inputs and moving parts. It is highly likely there are more limitations with the RO-MultiRail than are described above, however this is a preliminary list of known limitations.

EXHIBIT A

Tutrone, Jason

From: Moreno, Jeffrey
Sent: Wednesday, December 19, 2012 9:31 AM
To: Moates, G. Paul; Hemmersbaugh, Paul A.; Warren, Matthew J.
Cc: Tutrone, Jason
Subject: MultiRail Program

Paul,
At page III-C-158, note 245, of the NS Reply Evidence, NS states that it "has arranged with Oliver Wyman for both DuPont and the Board to be permitted limited access to MultiRail for purposes of this case." I am writing to request the access to MultiRail that is referenced. Please explain the process and timing for obtaining access. Also please confirm that this access will include manuals and any other information typically provided by the vendor to understand and use the program.

Best Regards,

Jeffrey O. Moreno | Partner | **Thompson Hine LLP**
1919 M Street, N.W. | Washington, DC 20036
Office: 202.263.4107 | **Mobile:** 202.615.2494
Fax: 202.331.8330 | **Email:** Jeff.Moreno@ThompsonHine.com
Web: <http://www.ThompsonHine.com>

Ranked a top-tier firm nationally for transportation law by *Chambers USA: America's Leading Lawyers for Business* and by U.S. News Media Group/Best Lawyers.

Atlanta | Cincinnati | Cleveland | Columbus | Dayton | New York | Washington, D.C.



EXHIBIT B

Tutrone, Jason

From: Moates, G. Paul <pmoates@Sidley.com>
Sent: Wednesday, December 19, 2012 10:37 AM
To: Moreno, Jeffrey
Cc: Foy, Kevin
Subject: OliverWyman contact information

Jeff, in response to your request this morning re access to the MultiRail model for the DuPont v. NS case, you should contact Mr. Kevin Foy of OliverWyman directly. Mr. Foy's contact information is attached below.
Regards, Paul

Sent from my iPad

-----Original Message-----

From: Scheib, John M [john.scheib@nscorp.com]
Sent: Wednesday, December 19, 2012 09:05 AM Central Standard Time
To: Moates, G. Paul
Subject: Kevin Foy's contact information

Kevin M. Foy
Oliver Wyman
Surface Transportation Practice
One University Square, Suite 100
Princeton, NJ 08540, USA
Tel: +1 609 520 2182
Mobile: +1 732 558 8933
Fax: +1 609 419 9600
kevin.foy@oliverwyman.com
<http://blog.railplanning.com/>

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EXHIBIT C



SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
(202) 736 8000
(202) 736 8711 FAX

pmoates@sidley.com
(202) 736 8175

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HOUSTON	TOKYO
LONDON	WASHINGTON, D.C.

FOUNDED 1866

January 28, 2013

Via Email and First Class Mail

Jeffrey O. Moreno
Thompson Hine LLP
1919 M Street, NW
Washington, D.C. 20036

Re: STB Docket No. NOR 42125, *E.I. DuPont de Nemours & Company v. Norfolk Southern Railway Company*; STB Docket No. NOR No. 42130, *Sunbelt Chlor Alkali Partnership v. Norfolk Southern Railway Company*

Dear Jeff:

This is in response to your email message to me last Friday evening, January 25, 2013, containing several questions about the letter addressed to Ms. Campbell of the STB that we served on you earlier that same day.

1. The access that NS has arranged to MultiRail for the Board is different from that which NS has arranged (and agreed to pay for) in order to provide MultiRail to Complainants. As you and your consultants are aware, NS has arranged with Oliver Wyman to provide Complainants with a "read only" version of MultiRail that will permit you to review and verify NS' Reply Evidence. As our letter to Ms. Campbell clearly indicates, the laptop that Oliver Wyman will provide the Board will contain full "read-write" access that will enable the Board to review and verify MultiRail-related evidence, and if the Board so chooses, to make adjustments to such evidence.

2. NS is paying Oliver Wyman to provide the Board with the laptop loaded with the MultiRail-related evidence. As we have indicated previously, if Complainants choose to purchase the full MultiRail program from Oliver Wyman, that is certainly your prerogative. However, NS does not assume any responsibility for the cost of whatever arrangement Complainants may negotiate with Oliver Wyman.



Jeffrey O. Moreno
January 28, 2013
Page 2

3. NS has also agreed to pay for some training for Board staff should the Board desire it.

Sincerely,

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

G. Paul Moates

EXHIBIT D



SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
(202) 736 8000
(202) 736 8711 FAX

pmoates@sidley.com
(202) 736 8175

BEIJING	LOS ANGELES
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FOUNDED 1866

January 25, 2013

By Hand-Delivery

Rachel D. Campbell, Director
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

Re: STB Docket No. 42125, *E.I. DuPont de Nemours & Company v. Norfolk Southern Railway Company*,
STB Docket No. 42130, *SunBelt Chlor Alkali Partnership v. Norfolk Southern Railway Company*

Dear Ms. Campbell:

This letter refers to the Reply Evidence filed by Norfolk Southern Railway Company ("NS") in the above-captioned Stand-Alone Cost ratemaking proceedings on November 30, 2012 and January 7, 2013, respectively. In preparing the operating plans posited by NS for the SARRs in those cases, NS utilized a computer program called "MultiRail." As NS explained, MultiRail is a modeling tool that facilitates the development of car blocking and train service plans for "carload" traffic, based upon a railroad's traffic, network configuration and customer service requirements.¹

MultiRail is commercially available from its developer, Oliver Wyman. As indicated in NS' Reply Evidence, NS has arranged with Oliver Wyman for the Board to have access to MultiRail, at no cost to the Board, in connection with the above-captioned rate cases. Specifically, NS has arranged with Oliver Wyman for that company to provide a copy of the MultiRail program, loaded on a laptop computer, for the Board's use in evaluating NS's Reply Evidence (and any related Rebuttal Evidence that Complainants might file). The software provided by Oliver Wyman will be fully functional, enabling the Board both to review and verify

¹ See Docket No. 42125, *E.I. DuPont de Nemours & Company v. Norfolk Southern R. Co.*, ("DuPont v NS"), Reply Evidence filed November 30, 2012 at 157-167; Docket No. 42130, *Sunbelt Chlor Alkali Partnership v. Norfolk Southern R. Co.* ("Sunbelt v NS"), Reply Evidence filed January 7, 2013 at 121-131.



Rachel D. Campbell
January 25, 2013
Page 2

MultiRail-related evidence, and should it desire to do so, to make adjustments to such evidence to reflect the Board's resolution of any evidentiary disputes regarding the data and assumptions utilized by the parties in their respective submissions. The MultiRail software will be delivered to the Board following execution of Oliver Wyman's customary licensing agreement, which we anticipate being able to provide to you early next week.

If you have any questions regarding the foregoing, please contact the undersigned counsel for NS.

Sincerely,

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

G. Paul Moates
Terence M. Hynes

GPM/TMH:aat
Enclosures
cc: Jeffrey O. Moreno, Counsel for Complainants

EXHIBIT E



*Surface Transportation Board
Washington, D.C. 20423*

Office of Proceedings

February 11, 2013

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

Re: E.I. DuPont de Nemours & Company v. Norfolk Southern Railway
Company, Docket No. NOR 42125 and Sunbelt Chlor Alkali Partnership v.
Norfolk Southern Railway Company, Docket No. NOR 42130

Dear Mr. Moates:

I write in response to your letter as a representative of Norfolk Southern Railway Company (NSR) dated January 25, 2013, regarding the "MultiRail" modeling software. In your letter, you state that NSR has arranged with the developer of this software to provide a copy of the MultiRail program, loaded onto a laptop computer, for the Board's use in evaluating evidence in the above-named dockets. Your letter indicates that the software is commercially available and the record further suggests that the commercial price for a full software license is approximately \$200,000.

The Board is declining NSR's offer to provide a laptop loaded with the MultiRail software. In light of the Board's previous experience with arrangements of this nature, it has become apparent that accepting the MultiRail software and hardware would pose significant and novel classification, maintenance, and archiving problems under the records management policies and schedules created by the Board pursuant to 44 U.S.C. §§ 3101-06. Further, at this point, it is the opinion of the agency that acceptance of the MultiRail software, as well as the hardware, would raise issues under the Antideficiency Act, which prohibits the Board from expending funds beyond those specifically appropriated. The Board lacks the statutory authority to accept supplements to its appropriation from outside sources.¹ Finally, due to the threat of sequestration² and

¹ See 2 Principles of Federal Appropriations Law, GAO-06-382SP, at 6-222, 223 (3d ed. 2006); 31 U.S.C. §§ 1341-42 (agencies are barred from accepting voluntary or personal services, gifts, money, or property in excess of that authorized by law).

² See Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240; American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313.

other budgetary issues, the Board is currently unable to purchase a MultiRail license for itself.

Sincerely,

A handwritten signature in cursive script that reads "Rachel D. Campbell".

Rachel D. Campbell
Director

cc: Jeffrey O. Moreno

EXHIBIT F

Tutrone, Jason

From: Moates, G. Paul <pmoates@Sidley.com>
Sent: Thursday, February 07, 2013 4:24 PM
To: Moreno, Jeffrey; Hemmersbaugh, Paul A.
Cc: Tutrone, Jason
Subject: RE: MultiRail

Jeff – As you know, discovery in these proceedings has long been over, and NS has no obligation to continue responding to whatever questions Complainants wish to pose about the railroad's reply evidence. Nonetheless, in an effort to try to minimize misunderstandings about NS' use of the MultiRail model and Complainants' ability to use the model to analyze NS' submissions, we will voluntarily respond to the questions in your February 5 email.

1. NS used the MultiRail Freight Edition version 3.2.6.5 in the operating plan/costs portion of its reply evidence.
2. NS has not provided MultiRail to Complainants but rather, as you know, arranged for Oliver Wyman, the owner of MultiRail, to provide Complainants' consultants, L.E. Peabody & Co., a "read-only" copy of MultiRail Freight Edition version 3.2.6.5.
3. NS will not provide MultiRail to the Board but has arranged for Oliver Wyman to do so. The Board will also be provided with the MultiRail Freight Edition 3.2.6.5.

Regards, Paul

From: Moreno, Jeffrey [<mailto:Jeff.Moreno@thompsonhine.com>]
Sent: Tuesday, February 05, 2013 3:18 PM
To: Moates, G. Paul; Hemmersbaugh, Paul A.
Cc: Tutrone, Jason
Subject: MultiRail

Paul,

I have several questions regarding the MultiRail software in this proceeding. There are two editions of the MultiRail software called MultiRail Enterprise Edition and MultiRail Freight Edition. Each edition also has multiple versions. Please respond to the following questions:

1. Which edition and version of MultiRail did NS use to develop its reply evidence?
2. Which edition and version has NS provided to Complainants in the DuPont and SunBelt cases?
3. Which edition and version will NS provide to the Board in the DuPont and SunBelt cases?

Best Regards,

Jeffrey O. Moreno | Partner | **Thompson Hine LLP**
1919 M Street, N.W. | Washington, DC 20036
Office: 202.263.4107 | **Mobile:** 202.615.2494
Fax: 202.331.8330 | **Email:** Jeff.Moreno@ThompsonHine.com
Web: <http://www.ThompsonHine.com>

Ranked a top-tier firm nationally for transportation law by *Chambers USA: America's Leading Lawyers for Business* and by U.S. News Media Group/Best Lawyers.



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EXHIBIT G



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212957

January 7, 2005

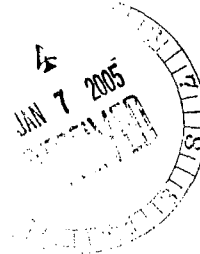
Via Hand Delivery

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K St. N.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings

JAN 07 2005

Part of
Public Record



RE: STB Docket No. 42071, *Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company*

Dear Secretary Williams:

Please find enclosed for filing the original and ten (10) copies of Complainant's Consent Motion for Extension of Procedural Schedule in the above referenced proceeding. Also enclosed is one diskette with a copy of the Motion in PDF format and Word format.

An extra copy of the motion is enclosed for stamping and returning to our offices.

Should you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

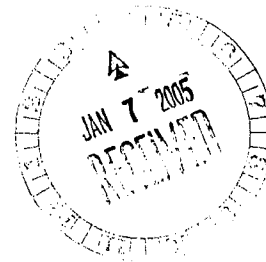
Sincerely,

Nicholas J. DiMichael
Jeffrey O. Moreno
Counsel for Complainant

cc: Counsel for Defendant

212951

BEFORE THE
SURFACE TRANSPORTATION BOARD



OTTER TAIL POWER COMPANY,)

Complainant,)

v.)

Docket No. 42071

THE BURLINGTON NORTHERN AND)
SANTA FE RAILWAY COMPANY,)

Defendant.)

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Office of Proceedings

JAN 07 2005

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COMPLAINANT'S CONSENT MOTION FOR
EXTENSION OF PROCEDURAL SCHEDULE

Otter Tail Power Company ("Otter Tail") hereby moves the Board for an extension of the procedural schedule set by the Board in an order served December 13, 2004. In that order, the Board required the parties to submit supplemental evidence in this case, so that it would have an adequate record upon which to decide the case. The Board also in that order indicated that Otter Tail might submit its evidence based on the Rail Traffic Controller ("RTC") computer model used by BNSF in evidence, rather than on the string model that Otter Tail had previously used. The Board directed the parties to submit the supplemental evidence on January 27, 2005 (45 days after service of its order), with replies due on February 16, 2005 (20 days after the supplemental evidence was due).

Immediately after the service of the order, Otter Tail analyzed whether to use the RTC model in the submission of supplemental evidence, and determined that it would do so. However, Otter Tail did not have a copy of the RTC model, since Otter Tail had returned the model to BNSF, pursuant to an agreement between the parties, after the parties had filed

previous supplemental evidence in April 2004. Therefore, Otter Tail asked the railroad to provide it with the copy of the model that BNSF had previously given to Otter Tail. The parties quickly entered into a new agreement regarding the use and return of the model by Otter Tail, and BNSF delivered the model to Otter Tail's consultants on the evening of December 28. However, Otter Tail experienced difficulties in getting the model that was provided by BNSF to accept and save modified inputs, and, after the parties conferred, BNSF asked Otter Tail to return the RTC model to the railroad so that the carrier could investigate. BNSF, in turn, worked with the model. BNSF resolved the problem with the security program yesterday, January 6, 2005, and Otter Tail has received the RTC model today, January 7, 2005.

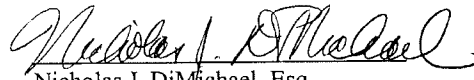
Otter Tail believes that it can submit supplemental evidence using the RTC model in the 45 days permitted by the Board in its December 13th order. However, in spite of the BNSF's cooperation in delivering the RTC model to Otter Tail as quickly as possible, the intervening holidays and difficulties in getting the model to accept modified inputs have unavoidably delayed Otter Tail's use of the model until today. Therefore, Otter Tail respectfully requests the Board to extend the time for both parties to submit supplemental evidence from the current due date of January 27, 2005, to February 22, 2005.

BNSF concurs in this request, on the condition that Otter Tail also requests a short, 7-day extension of the time for both parties to submit reply supplemental evidence, from 20 to 27 days after the submission of opening supplemental evidence. Otter Tail believes that BNSF's request is reasonable, and concurs in that request.

Therefore, Otter Tail respectfully requests the Board to amend its December 13th order to provide for the submission of supplemental evidence on February 22, 2005, with replies due on March 21, 2005.

Respectfully submitted

George Koeck, Esq.
General Counsel
Otter Tail Corporation
4334 18th Avenue, SW, Suite 200
Fargo, ND 58103
(701) 451-3567


Nicholas J. DiMichael, Esq.
Jeffrey O. Moreno, Esq.
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, DC 20036
(202) 331-8800

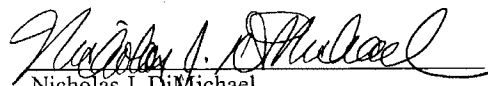
Attorneys for Complainant
Otter Tail Power Company

Dated: January 7, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 2005, I served a copy of "Complainant's Consent Motion for Extension of Procedural Schedule" by hand delivery to counsel for Defendant at the following address:

Samuel M. Sipe, Jr., Esq.
Anthony J. LaRocca, Esq.
Brooke L. Gaede, Esq.
Steptoe & Johnson
1330 Connecticut Avenue, NW
Washington, DC 20036


Nicholas J. DiMichael