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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E.I. DUPONT DE NEMOURS & COMPANY

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

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) **Docket No. NOR 42125**
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SUNBELT CHLOR ALKALI PARTNERSHIP

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

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) **Docket No. NOR 42130**
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**NORFOLK SOUTHERN RAILWAY COMPANY’S RESPONSE TO
COMPLAINANTS’ JOINT REPLY TO PETITION FOR CLARIFICATION**

Pursuant to 49 C.F.R. §§ 1100.3 & 1117.1, and its Motion for Leave to File a Reply to a Reply, Norfolk Southern Railway Company (“NS”) respectfully submits this Response to Complainants’ Joint Reply to NS’s Petition for Clarification. On January 25, 2013, NS filed a 14-page Petition for Clarification in the above-captioned rate cases, seeking a ruling from the Board confirming that NS is not obligated to pay the cost of additional licenses and training for commercially available software that Complainants wish to use in preparing their Rebuttal Evidence. See Norfolk Southern Railway Company’s Petition for Clarification (Jan. 25, 2013) (“Petition”). On February 14, 2013, Complainants E.I. du Pont de Nemours and Company (“DuPont”) and SunBelt Chlor Alkali Partnership (“SunBelt”) filed a 36-page “response” brief,

accompanied by equally voluminous supporting statements and exhibits. *See* Complainants' Joint Reply to Defendant's Petition for Clarification (Feb. 14, 2013) ("Joint Reply"). The Joint Reply raises numerous claims and issues that are not responsive to the NS Petition, mischaracterizes the facts and law on which it relies, and seeks broad affirmative relief that is far outside the scope of NS's narrow procedural Petition. *See id.* The Board should refuse to consider any of the new, non-responsive claims raised by the Joint Reply because they are outside the proper scope of a reply memorandum, and mis-state the law and important facts. If, however, the Board considers any of Complainants' erroneous and improper new claims and requests for relief, it should also accept and consider this NS response to those new and unforeseeable claims, in the interest of fairness and to provide the Board with a more complete record on the claims raised by the Joint Reply. *See* NS Motion for Leave to File a Reply to Complainants' Joint Reply (filed herewith, showing good cause for leave to file this Response).

BACKGROUND AND SUMMARY

At the outset, it is important to view the Petition and Joint Reply in the proper context. In each of these two cases, Complainants' selected traffic group included extraordinarily large volumes of carload traffic, necessitating complex and detailed SARR operating plans. It was incumbent upon Complainants, as the parties bearing the burden of proof on SAC issues, to present in their opening evidence complete, detailed, and feasible operating plans capable of handling their selected traffic. As NS showed in its Reply evidence, Complainants utterly failed to present and support a complete or detailed operating plan for the complex carload network necessary to serve their selected traffic groups. For example, Complainants' operating plans failed to account for the movement of each individual car from its specific origin, through the blocking and classification process at appropriately sized and configured yards, over the rail network (including necessary intermediate switching), and on to delivery to its specific

destination. Further, in both cases, Complainants' case-in-chief did not provide complete operating plans for the *issue traffic*, and failed entirely to develop, support, and present a rail car blocking plan, a yard plan, or a local service plan. In short, the "operating plans" that Complainants submitted in these cases were grossly incomplete and missing essential components, fundamentally flawed and unsupported, infeasible, and unworkable.¹

As a result of Complainants' fundamental and irremediable failures, NS was required to create a real, workable carload network operating plan for the SARR traffic Complainants selected. Had Complainants satisfied their burden to submit a rational, complete, and feasible carload network operating plan in their cases-in-chief, NS would not have been required to expend substantial time and resources to develop coherent, complete, and feasible SARR operating plans in these two cases. Given this history and context, it is more than ironic that Complainants now not only assert that: (i) NS should be required to pay all costs for Complainants' use of the commercially available MultiRail tool, but also claim that; and (ii) the Board should reject the operating plans NS developed with the aid of that computer tool—the only workable and coherent operating plans available in either case. If the Board were to grant such extreme and unjustified relief, there would be no feasible or adequate operating plan in evidence in either case, SAC analyses of the carload network SARRs would be impossible, and the Board would be compelled to dismiss both cases.

¹ As NS has demonstrated, in each case Complainants' grossly deficient operating plans constitute a fundamental failure of proof that warrants dismissal of the entire case without further consideration. *See, e.g., SunBelt v. NS*, STB Docket No. 42130, NS Reply Evid. at I-3 to I-15, III-C-1 to III-C-12, III-C-50 to III-C-52, III-C-88 to III-C-89 (Jan. 7, 2013); *DuPont v. NS*, STB Docket No. 42125, NS Reply Evid. at I-3 to I-14, I-57, I-71 to I-72, III-C-8, III-C-116 (Nov. 30, 2012). For purposes of this Reply, however, the point is that Complainants' proffered "operating plans" were so deficient that they were unusable. Accordingly, if there were to be feasible operating plans to allow a SAC analysis in these cases, it would have to be those developed by NS.

A. The Only Question Properly at Issue in NS’s Narrow Procedural Petition is Whether It Is Required to Purchase on Behalf of Complainants A Commercially Available Software Application and Related Services.

The Petition concerns a narrow, straightforward procedural question: whether NS is required to pay for its litigation adversaries to obtain full “read-write” access to a commercially available tool that NS used to facilitate its experts’ development of portions of its operating plan evidence. *See generally*, Petition. Again, it is important to bear in mind that NS had to develop carload network operating plans from scratch, using MultiRail and other tools, solely because of Complainants’ abject failure to present a complete, feasible plan in their cases-in-chief.

In “response” to NS’s narrow request for Board clarification of who should bear certain litigation costs, Complainants’ Joint Reply raises a variety of non-responsive claims, issues and requests for relief, none of which is properly at issue in NS’s Petition. Apparently recognizing the infirmity of their proffered operating plans, Complainants have seized on NS’s narrow request for clarification as a long shot opportunity to salvage their cases by seeking to undermine NS’s robust operating plans. Indeed, the Joint Reply addresses the sole question properly at issue in the Petition—whether NS should be required to pay for a “read-write” MultiRail license for Complainants’ use—primarily as an afterthought at the end of their 36-page “response” to NS’s 14-page Petition. *See* Joint Reply at 36 (seeking, as alternative relief in the event the Board does not grant the various other forms of relief Complainants seek, an order directing NS to provide to Complainants expeditiously a read-write version of MultiRail). Below, NS summarizes some of the non-responsive, inappropriate, and erroneous claims asserted in the Joint Reply.

B. The Joint Reply Presents Several Claims and Requests for Affirmative Relief That Are Not Responsive to the Petition, Factually or Legally Erroneous, Irrelevant, or a Combination Thereof.

Complainants' most audacious non-responsive claim swings for the fences by arguing that the Board should reject NS's operating evidence, purportedly because the version of the MultiRail tool that NS voluntarily purchased for Complainants' use does not allow them to change the assumptions, parameters, and inputs used by NS. *See* Joint Reply at 11-23. This is nothing less than a *de facto* new motion by Complainants for radical affirmative relief, presented in the guise of a reply. If the Board is inclined to give this non-responsive claim and cross-motion any consideration at all, NS is entitled to respond. NS addresses this radical claim in more detail below. However, perhaps the simplest response to Complainants' inappropriate demand is that even if the Board were to determine that Complainants are somehow entitled to a full "read-write" version of MultiRail at NS's expense, the remedy would be to direct NS to procure such a version for Complainants, *not* to reject the only viable operating plans in evidence in these cases.

The Joint Reply further asserts an equally unresponsive request for affirmative relief that directly contradicts Complainants' claim that use of a read-write version of MultiRail is essential to their review of NS's operating evidence. Complainants assert that because they did not have immediate use of a read-write version of the commercially available MultiRail tool at the time they received NS's SAC reply evidence, NS now should be *prohibited* from providing that MultiRail tool to either the Board or to Complainants. *See* Joint Reply at 31-34. Thus, in one breath Complainants claim that a version of that tool with additional functionality is essential to their review of NS's reply submissions, and in the next they assert that NS should be prohibited from making any version of the MultiRail tool available to the Board or to Complainants. This

claim raises another request for affirmative relief unrelated to the ruling sought by the Petition, to which NS responds below. *See*, 12-15, *infra*.

Several of Complainants' assertions in the Joint Reply are factually incorrect or misleading. For example, it is not correct that "scenario files" cannot be created on the version of MultiRail that NS arranged to be licensed to Complainants. Further, Complainants erroneously assert that the MultiRail tool is "evidence." Not so. Like many computer applications, MultiRail is a commercially available computer tool used to organize and arrange data—it is no more substantive evidence than are MS Excel, SQL, or other computer applications and tools used by Complainants in developing their opening evidence. This Reply corrects these and similar erroneous claims of the Joint Reply.

The Joint Reply further erroneously asserts that NS and the Board have engaged in prohibited *ex parte* communications in violation of the Board's rules, and therefore the Board is prohibited from using MultiRail to review NS's evidence. This claim is baseless, irresponsible, and belied by the evidence. At best, Complainants demonstrate a serious misunderstanding of the concept of *ex parte* communications. NS responds herein to this specious, reckless, and unwarranted claim.

The Joint Reply also mischaracterizes applicable law. For example, contrary to Complainants' assertions, neither due process nor any governing precedent requires one party to litigation to purchase a commercially available litigation tool on behalf of the opposing party. As NS explains below, the cases cited by Complainants do not support their position and in some instances actually stand for the opposite proposition.

Finally, NS demonstrates that Complainants' other extraneous legal arguments are irrelevant, erroneous, or both.

ARGUMENT

I. THE JOINT REPLY MIS-STATES IMPORTANT FACTS AND MISUNDERSTANDS THE OPERATION AND FUNCTIONALITY OF THE MULTIRAIL TOOL NS PROCURED FOR THEIR USE.

Most of the claims and arguments raised by the Joint Reply are premised on a misunderstanding of the MultiRail tool, mis-statement of relevant facts, or both.

First, Complainants assert in several ways and places that the use of a “read-write” version of the MultiRail tool is essential to allow them to review NS’s operating plan. *See, e.g.*, Joint Reply at 1 (a “read-write version of the MultiRail software . . . is a necessary tool for reviewing and evaluating [NS’s] Reply Evidence”). Indeed, Complainants’ purported inability to review NS’s operating plan unless they have a license for MultiRail functionality beyond what NS has provided is a predicate for most of the various new claims and issues Complainants raise in their reply. However, Complainants oft-repeated assertion cannot withstand scrutiny.

The version of MultiRail that NS licensed for Complainants allows them to review all of the data, inputs, assumptions, parameters, and workpapers NS used to generate car blocking plans and train schedules, the two primary operating plan components that NS’s operating experts developed with the assistance of MultiRail. Thus, all relevant data, inputs, operating parameters, and assumptions that NS relied upon to generate those operating plan building blocks are fully available for Complainants’ review and analysis using the MultiRail version, data, and workpapers that they presently have. This transparency allows Complainants the ability to review, critique, and challenge any operating parameter, input, or assumption that NS’s experts used in developing the components of its operating plans using the MultiRail tool. Complainants thus have all of the evidence they need to challenge any parameter or element of NS’s operating plans. If Complainants contend that some of the operating parameters and

assumptions used by NS are erroneous, they may present those criticisms in their Rebuttal evidence.

As Complainants effectively acknowledge, the only thing they are not able to do with the version of MultiRail they have is change the inputs used by NS and create new MultiRail blocks and analyses. *See, e.g.*, Joint Reply at 22-23. However, Complainants repeatedly assert that they have no intention of using MultiRail to generate alternative operating plan parameters for use in their rebuttal evidence. *See, id.*; *see also id.* at 24 (“Complainants have no wish to use MultiRail . . . [except] in order to rebut the NS evidence.”). If, as they indicate, Complainants intend to attempt to rehabilitate their opening operating plans on rebuttal and seek to use MultiRail only to challenge and attempt to discredit the operating plan evidence offered by NS, they can do so without modifying the parameters NS used, or creating alternative MultiRail “software databases” using “corrected” parameters. *See*, Joint Reply at 23. Such changes and modifications would be necessary only if Complainants sought to create an alternative, “corrected” operating plan using MultiRail, an intention they loudly deny.

Despite Complainants’ conclusory assertions that they “need” a read-write version of MultiRail to evaluate NS’s operating plan, they fail to offer any support or meaningful explanation of that purported need. Having failed to articulate or support any compelling rationale, Complainants fall far short of supporting their extraordinary request that the Board turn the American Rule on its head by requiring NS to pay for their use of additional commercially available software.

Second, Complainants assert that the version of MultiRail paid for by NS and provided to Complainants could not be used because NS did not supply “Scenario files,” which could “only

be created using the read-write version of MultiRail.”² Joint Reply at 30. This is simply not true. As a senior representative of the owner of the program attests, Scenario files can be created by a user on a read-only version of MultiRail:

Complainants are incorrect in their assertion that “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 reason that NS did not supply scenario files with the data supporting its operating plan evidence is that scenario files are PC-specific. The Scenario files must be created on the PC that is used for the MultiRail application To be absolutely clear: The read-only version of MultiRail can be used to create a scenario file.

Verified Statement of Kevin M. Foy ¶ 3 (“V.S. Foy,” Exhibit 1 hereto). As Mr. Foy explains, the version of MultiRail provided to Complainants did not initially include Scenario files because such files must be created on the computer that is used to run the MultiRail tool.

Complainants’ related claim, that they could only use the MultiRail program to review NS’s evidence if they first paid an additional “Base Fee” for Oliver Wyman to load scenario files and NS data into MultiRail, is similarly false.³ See V.S. Foy ¶ 2. Moreover, as Complainants acknowledge, Oliver Wyman loaded Scenario files onto the PC they are using for MultiRail and Complainants are able to use the version of MultiRail purchased by NS to facilitate their review of NS’s Reply Evidence. Thus, the standard practice of creating Scenario files on the computer that will be used to run MultiRail caused no unfair or substantive prejudice to Complainants.

Third, Complainants attempt to undermine the credibility of MultiRail by speculating that NS apparently “does not use MultiRail in the ordinary course of its business” because NS

² “Scenarios,” or “scenario files” are computer files used by MultiRail to identify, select, and load data and databases. See, e.g., V.S. Foy ¶ 4.

³ See Joint Reply at 30; Joint Reply Verified Statement of Mulholland and Crowley at 6, 8. As Mr. Foy explains, “the ability to create a scenario [file] does exist in the read-only version, and with telephone guidance from Oliver Wyman, [Complainants’ consultants] could have loaded the application and data to their PCs. It is therefore inaccurate to claim that Complainants had to ‘pay the Base Fee just to view NS’s MultiRail evidence.’” V.S. Foy ¶ 2.

purchased a MultiRail license to use the tool for purposes of these cases. *See* Joint Reply at 3. Complainants' assumption is incorrect. NS first purchased a license to use MultiRail in 1994, and has used the tool in its normal course of business for a variety of different projects over the last 19 years. *See* V.S. Foy ¶ 1. NS paid for an updated license for use in these cases in order to ensure that it was able to use the most up-to-date version of MultiRail to assist in its development of the complex carload network operating plans used in these cases. *See id.* Moreover, the MultiRail tool is widely used in the normal course of business by every Class I railroad, and the Board has accepted its use in several prior proceedings. *See id.* ¶ 6; Petition at 4.

Fourth, Complainants' assertion that NS should have included in its Reply Evidence filed with the Board and served on Complainants a MultiRail computer application ignores the fact that NS does not own MultiRail, but rather licenses the application for NS's individual use from owner Oliver Wyman.⁴ MultiRail is valuable third-party software that may be used only pursuant to a license agreement between Oliver Wyman and each particular user. The terms and conditions of such licenses must be determined by agreement of Oliver Wyman and the licensee. Obviously, it was not possible for NS to negotiate or execute software licenses on behalf of the Board or either Complainant.⁵ NS did what it could to facilitate this process by arranging for

⁴ By contrast, NS does own the computer application used by its experts in developing yards of appropriate size and composition in both cases. And because that software application is proprietary and not commercially available, NS provided that application with its Reply Evidence to both Complainants and the Board. *DuPont v. NS*, NS Reply Evid. at III-C-158, n. 245; *SunBelt v. NS*, NS Reply Evid. at III-C-122, n. 192.

⁵ Indeed, as Complainants knew before they filed their Reply, the Board has advised NS that it believes applicable law and regulations prohibit it from accepting even a short-term loan and license of the MultiRail program for its use in these cases. *See* Joint Reply Ex. E (R. Campbell Letter to G. Paul Moates (Feb. 11, 2013)). Thus, if NS had filed the MultiRail tool with its Reply Evidence (which it was not permitted to do under its license agreement), presumably the

Oliver Wyman to offer licenses to Complainants (and the Board) upon request. NS's Reply Evidence also expressly advised Complainants of this arrangement, which would allow Complainants and the Board to license the MultiRail tool at NS's expense. Any delay in the execution of the necessary license or delivery and installation of the MultiRail software tool cannot be blamed on NS, which had no control over that process.⁶

II. THE ONLY QUESTION PROPERLY AT ISSUE IN THIS PETITION IS WHETHER NS SHOULD BE REQUIRED TO PURCHASE FULL MULTIRAIL LICENSES, TRAINING, AND SERVICES FOR COMPLAINANTS TO USE IN THESE CASES.

The narrow Petition for Clarification pending before the Board seeks a ruling that NS is not required to purchase additional "read-write" licenses, training, and other services that Complainants have requested. See Petition at 1-2, 7-14. The sole question properly at issue in this Petition is whether NS is required to purchase additional commercially available computer tools and services for Complainants' use in these cases. The various additional claims and requests for expansive relief raised by Complainants in their Joint Reply are not properly at issue and should not be decided in the context of this Petition. Such claims and relief requests may be raised, if at all, only in separate motions.⁷

Board would have determined it was precluded from using the tool in its consideration of these cases and returned it unused.

⁶ If Complainants believe they would be unfairly prejudiced by the time that elapsed during their negotiation of a license and the installation of the MultiRail tool for their use in either of these cases, they may file a motion for modification of the applicable procedural schedule.

⁷ The scope of reply briefs is properly confined to the claims and issues in the motion to which they are responding and may not raise new claims or affirmative requests for relief. See 49 C.F.R. § 1104.13(a) ("A party may file a reply or motion *addressed to any pleading...*") (emphasis added). If new claims and issues are raised by an opposing party's reply, the Board should refuse to consider them. Alternatively, the Board must allow the movant an opportunity to respond. Federal courts have addressed this in the analogous context of allowing surreplies under rules that authorize an opening brief, an opposition brief, and a reply by the movant. See, e.g., *MBI Group, Inc. v. Credit Foncier du Cameroun*, 616 F.3d 568, 575 (D.C. Cir. 2010) ("district courts, like this court, generally deem arguments made only in reply briefs to be

Because the broad new claims and issues raised by Complainants in their Reply are beyond the scope of the Petition, the Board should confine its ruling to NS's narrow request for a determination of whether NS is required to pay for Complainants' use of a commercially available tool in their prosecution of these cases and decline Complainants' requests for rulings on issues not properly presented in the context of this Petition. However, if the Board were inclined to consider any of the extraneous claims raised by the Joint Reply, it should consider them in light of the following context and responses.

A. The MultiRail Program Is Not Evidence, But Merely A Tool Used To Aid NS's Experts in Their Development Of Components of NS's Reply Evidence.

Because MultiRail is a data organization and sorting *tool* and not evidence, NS was not obliged to file or serve that tool with its substantive evidence. Complainants claim in their Joint Reply that the MultiRail tool is "evidence" that NS was required to file with its Reply Evidence. See Joint Reply at 31-36. Based on that erroneous premise, Complainants make an extraordinary leap to claim that a minor delay in their receipt of the MultiRail tool from non-party licensor Oliver Wyman (apparently due primarily to the Christmas holidays) requires the Board to reject

forfeited.") (internal citations and quotations omitted); *Novosteel SA v. United States*, 284 F.3d 1261, 1274 (Fed. Cir. 2002) ("reply briefs *reply* to arguments made in the response brief – they do not provide the . . . party [filing the reply] with a[n] . . . opportunity to present yet another issue for the court's consideration.") (emphasis in original). The logic of limiting replies to the issues and claims that have been raised by the opposing party applies equally to the two-filing (motion and reply) procedure used by the Board. See, e.g., *Alcohol Monitoring Sys., Inc. v. Actsoft, Inc.*, 682 F. Supp. 2d 1237, 1242 (D. Colo. 2010) ("The rationale underpinning this rule is tied to the fact that a responding party to a motion ordinarily does not have an opportunity to respond to a reply. Therefore, allowing a party to raise an issue for the first time in a reply brief would prevent the responding party from presenting a counter-argument and force the Court to decide a potentially contentious issue without the benefit of the opposing perspective.") (internal citations omitted); *Spring Commc'ns Co., L.P. v. Vonage Holdings Corp.*, 2007 U.S. Dist. LEXIS 34168 at * 4, n.1 (D. Kan. 2007) (surreply authorized because reply "introduced new arguments and a new prayer for relief.") Here, as in *Alcohol Monitoring*, allowing a party to "raise an issue for the first time" on reply would "prevent the [movant] from presenting a counter-argument and force" the Board to decide claims without "the benefit of the opposing perspective." *Alcohol Monitoring*, 682 F. Supp. 2d at 1242.

NS's use of MultiRail and, potentially, "all portions of [NS's] Reply Evidence based upon MultiRail." Joint Reply at 11, 31-35. Even if Complainants' *de facto* motion to strike NS's evidence were permissible in the context of a response to NS's narrow procedural Petition—which it is not—such a motion could not withstand scrutiny.

As explained in NS's Reply Evidence, the MultiRail application is a tool that NS's operating experts used to assist them in developing car blocking and train service plans.⁸ NS's development of an operating plan from the ground up, including car blocking and train service plans, was necessitated by Complainants' failure to present an adequate operating plan in their cases-in-chief. NS's operating experts used the MultiRail tool to expedite and facilitate the organization, collating, and sorting of the large volumes of data and information necessary to develop certain elements of an operating plan capable of serving the large and complex traffic groups selected by Complainants. Had Complainants attempted to develop proper operating plans in accordance with the Board's rules and precedents, they almost certainly would have used a labor-saving tool such as MultiRail to develop certain data-intensive elements of their plans.

What Complainants fail to apprehend is that the MultiRail application is not substantive evidence, it is a tool. NS used MultiRail to create, expeditiously and efficiently, blocking plans and train schedules for the traffic selected by Complainants. NS's operating experts could have developed those components of an operating plan without MultiRail, but due to the unprecedented volume and complexity of the carload traffic posited by Complainants in these cases, such a task would have been extremely labor-intensive, would have taken far longer, and have been less efficient and more susceptible to human error without the use of the MultiRail

⁸ See, e.g., *DuPont v. NS*, NS Reply Evid. at III-C-153 to III-C-169; *SunBelt v. NS*, NS Reply Evid. at III-C-118 to III-C-131.

computer tool. Like most tools, MultiRail makes the performance of certain tasks easier, faster, and more efficient than they would be without the tool. But that merely makes MultiRail a useful and powerful tool, *not* substantive evidence.

Contrary to Complainants' assertion, NS included all of its substantive SAC evidence and support for that evidence in its Reply Evidence filing. The MultiRail tool is not substantive evidence any more than Microsoft Word or Excel, or SQL, or the RTC Model or other computer tools that Complainants used in developing their evidence but neither filed nor provided to NS. Like those computer applications, MultiRail is a commercially available tool that can be used to facilitate the organization of data and development of SAC evidence (here, car blocking and train service plans). Even though Complainants could have purchased a MultiRail license for themselves, NS took the extra step of paying for a license for Complainants to use that tool for purposes of reviewing NS's evidence in these cases. Tellingly, although Complainants protest long and loudly about not being provided a "read-write" version of MultiRail, they fail to cite any NS substantive evidence they are unable to review because they do not have additional MultiRail functionality.

B. A "Read-Write" Version Of MultiRail Is Not Necessary To Evaluate NS's Operating Plan.

Complainants erroneously claim that a "read-write" version of MultiRail is needed to review NS's operating plans. The operating plans that NS filed in its Reply Evidence were developed by human experts with the aid and assistance of the MultiRail tool. NS's actual evidence—not the MultiRail tool—fully supports the detailed and complete carload network

operating plans and expenses presented in NS's Reply submissions.⁹ Thus, Complainants have complete and unimpeded access to all of the evidence on which NS relies in these cases.

Moreover, the version of MultiRail that NS procured for Complainants' use in these cases will further facilitate review of NS's operating plan evidence and supporting workpapers. *See, e.g.,* M. Warren Letter to J. Moreno at 3-5 (Jan. 17, 2013) (Exhibit 2 hereto) and workpapers cited therein; V.S. Foy.¹⁰ Therefore, even under Complainants' dubious theory that one party should be required to pay for an opposing party's use of all tools it needs to evaluate the first party's evidence, NS has fully satisfied its obligation.

C. Because The MultiRail Tool Is Not Evidence, A Decision By The Board Or Complainants Not To Use MultiRail Does Not Undermine NS's Actual Evidence.

Contrary to Complainants' claim, NS's Reply Evidence in these cases is not "based on MultiRail," and the validity of NS's operating evidence submitted in these cases does not depend on the use of the MultiRail tool. *Cf.* Joint Reply at 11. As demonstrated, the MultiRail application is a labor-saving tool, *not* evidence. NS's Reply Evidence in each case makes clear that its operating experts designed and developed the operating plans based on their expert judgments and experience using, among other things, NS data (produced to Complainants in

⁹ *See, e.g., DuPont v. NS*, NS Reply Evid. at III-C-156 to III-C-241; *SunBelt v. NS*, NS Reply Evid. at III-C-121 to III-C-190; *DuPont v. NS*, NS Reply Evid., NS Reply WP Folder "III-C-Yard Sizing Analyses\" (includes detailed files for each yard); NS Reply WP "MultiRail 2010 Train Statistics.xlsx"; NS Reply WP "MultiRail 2010 Deadhead Crew.xlsx"; M. Warren Letter to J. Moreno at 3-5 (Jan. 17, 2013) (Exhibit 2 hereto) and workpapers cited therein. *See also SunBelt v. NS*, NS Reply Evid., NS Reply WP Folder "III-C-Yard Sizing Analyses\" which includes detailed files for each yard; NS Reply WP Folder "III-C\MultiRail\Summary Statistics\" which includes a variety of traffic, train, and crew files"; NS Reply WP "Reply SBRR Train Statistics MultiRail 2011.xlsx"; NS Reply WP "MultiRail 2011 Deadhead Crew.xlsx."

¹⁰ *See also DuPont v. NS*, NS Reply Evid. at III-C-153 to III-C-241, NS Reply WP Folder "MultiRail"; *SunBelt v. NS*, NS Reply Evid. at III-C-118 to III-C-190, NS Reply WP Folder "MultiRail" ; and n. 9 *supra*.

discovery) organized and sorted by the MultiRail tool. Accordingly, if the Board, Complainants, or both ultimately decide not to use MultiRail to review NS's Reply Evidence in these cases, NS's *evidence* would be unaffected—the narrative evidence, data, workpapers, and other actual evidence NS submitted in its Reply evidence filing are complete, detailed, and fully support the operating plans and all other components of NS's SAC analyses and results.¹¹

A recent letter from Board staff to NS counsel indicated that the agency believed it could not accept the temporary use of MultiRail to facilitate its review of NS's Reply Evidence in these cases. *See* R. Campbell Letter to G. Paul Moates (Feb. 11, 2013).¹² If the Board were to maintain this position, it obviously would not use the MultiRail tool in its review of the evidence and its SAC analyses and decisions in these cases. Because MultiRail is not evidence, the strength and support for NS's operating plan and evidence will be the same regardless of whether the Board decides to use MultiRail. NS is confident that when the Board reviews its Reply Evidence, it will conclude that NS's operating plans are not only vastly superior to the incomplete and unworkable "plans" Complainants submitted in their cases-in-chief, but also are fully supported by the evidence NS submitted. The Board can review and analyze NS's SAC evidence, compare it with Complainants' evidence, and render a decision without the use of MultiRail. Thus, if the Board or Complainants choose not to use MultiRail, the absence of that tool provides no basis for rejection of any component of NS's operating plan evidence.

¹¹ *See supra*, n. 9-10 (citing illustrative examples of NS Reply Evidence regarding operating plan and its components).

¹² NS does not agree with the conclusions of Director Campbell's February 11 letter indicating that cited laws and policies prohibit the Board from using a computer tool provided by a party for a limited time and for the sole purpose of facilitating the Board's review of the evidence in a rate case. Moreover, the letter's analysis and explanation of those conclusions are insufficient to allow meaningful review. *See generally*, G. Paul Moates Letter to R. Campbell (Feb. 13, 2011). However, this Reply is not the place to discuss those issues.

Moreover, the Board's refusal to accept or use MultiRail would moot Complainants' various objections to the Board having the use of a version of MultiRail that has additional functionality beyond that supplied to Complainants at NS's expense. *See, e.g.*, Joint Reply at 10-19, 31-36. There is nothing unfair or inappropriate about requiring Complainants to bear their own litigation costs, including the discretionary purchase of additional MultiRail licenses that are not necessary to evaluate or critique NS's Reply Evidence. However, the fact that the Board would have no version of MultiRail would obviate any possible argument that Complainants would be unfairly disadvantaged because the version of MultiRail purchased for them by NS is less powerful than the version possessed or used by the Board.

D. Complainants' Real Objection Is Not That The MultiRail Tool Is Not Available To Them, But Rather That If They Wish To Make Broader Use Of That Tool, They Would Be Required To Pay For That Use.

Stripping away Complainants' irrelevant and erroneous arguments, mis-statements, baseless accusations and unresponsive requests for affirmative relief, their real grievance is that if they wish to use the "read-write" version of MultiRail to develop their Rebuttal Evidence, they will have to pay the cost of that additional functionality. Unlike virtually all of Complainants' other claims and arguments, the question of whether NS should be required to pay for Complainants to obtain this additional MultiRail capacity actually is at issue in this Petition.

Distilled, Complainants' position is that a party that brings a legal action seeking many millions of dollars of relief is entitled to free use—financed by the defendant from whom it seeks that relief—of any tool the defendant used in the course of developing its defense and responsive evidence.¹³ This is not the rule, and has never been the rule, in American litigation. To the

¹³ Complainants apparently would make an exception for any tool—such as the RTC model—that they or their consultants have previously purchased for other cases or other purposes. *See* Joint Reply at 17-18.

contrary, the American Rule holds that each party must bear its own litigation costs, including the costs of commercially available tools it may wish to use to evaluate an opposing party's evidence or to develop responsive evidence. *See, e.g.*, Petition at 2, 7-8. Complainants DuPont and Olin (SunBelt), two of the largest chemical companies in the United States, are surely well aware of this standard litigation rule and were under no illusion when they filed these cases that NS would be required to pay their litigation costs.

NS has already done more than it was required to do by paying for licenses to facilitate Complainants' review of all of the evidence (including all of the inputs, assumptions, and parameters used by NS's operating experts) developed with the assistance of the MultiRail tool. Although they do not need it to review NS's evidence, the additional MultiRail functionality Complainants seek is available to them—they simply must pay the non-party owner of MultiRail for that use, just as NS was required to pay for its own use of MultiRail. As NS shows in the following section, Complainants have cited no authority that supports their position that they are entitled to an exception to the bedrock rule of American litigation that each party must bear its own litigation expenses.

E. The Authority Cited by Complainants Does Not Require A Party To Purchase A Commercially Available Litigation Tool For Use by the Opposing Party.

Despite their claims to the contrary, Complainants have not cited any case—let alone a Board decision—that stands for the proposition they advance here: that a court or other tribunal may require a litigant to buy for its adversary a computer application that is commercially available. Instead, Complainants cite several inapposite decisions that generally stand for the entirely different proposition that in some circumstances courts may require a litigant to produce to an opposing party proprietary computer models or data that are *not* otherwise available. That uncontroversial proposition is irrelevant to the question here, which is whether NS is required to

purchase for Complainants licenses for a software tool that is commercially available and that Complainants may readily purchase for themselves should they wish to do so.

Indeed, some of the authorities cited by Complainants make clear that any requirement to produce software does not apply to software that is publicly available. For example, Complainants rely upon the Nuclear Regulatory Commission’s (“NRC”) agency-specific disclosure regulations at issue in *In the Matter of Progress Energy*, but they fail to note that those NRC rules expressly *exclude* publicly available “documents” (including computer models).¹⁴ Other authorities cited by Complainants similarly address the question of whether a litigant may be required to provide an opposing party access to a computer program that is not otherwise available to that opposing party—not with the question of whether a party may be required to buy for its opponent a software tool that is commercially available for the opponent to purchase for itself. For example, the rule for which Complainants cite the Wright and Miller treatise does not hold that litigants must buy publicly available software for their adversary’s use. *See* Joint Reply at 19 (quoting Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2218 (3d ed.) for the proposition that “computerized material generated for trial” should be accessible so opponent can “blunt the probative force of the computerized evidence.”). Here, NS provided both the “computerized material” used to generate its evidence—its extensive MultiRail workpapers and data files—and a software license enabling Complainants to review that evidence. If Complainants wish to purchase a more extensive MultiRail license from its non-party owner they are free to do so, but they cite no authority to support the proposition that NS must pay for such additional licenses. *See generally* Wright & Miller, 10 Fed. Prac. & Proc.

¹⁴ *See In the Matter of Progress Energy Fla. Inc.*, 72 N.R.C. 692, 711 (2010) (“The mandatory disclosure regulation excuses a party from producing a document if it is publicly available and the party specifies where the document may be found.”); *see also* 10 C.F.R. § 2.336(a)(2)(iii).

Civ. § 2666 (3d ed.) (“‘Expenses,’ of course, include all the expenditures actually made by a litigant in connection with the action. . . . items such as attorney's fees, travel expenditures, and investigatory expenses will not qualify either as statutory fees or reimbursable costs. These expenses must be borne by the litigants.”).

Complainants also cite inapposite Board decisions. Neither the *TMPA* nor the *AEP Texas* decisions they cite involved the question of whether a party was required to pay the cost of the opposing party's use of a computer tool. Rather, both involved the question of whether the Board would accept certain evidence because the sponsoring party failed to make available *to the Board* a computer tool the sponsor had used to generate that evidence. Moreover, in both cases, the issue concerned a *proprietary* computer tool, which presumably was *not* commercially available like MultiRail.¹⁵ Further, what Complainants neglect to inform the Board is that in *AEP Texas*, the Board was not required to decide the issue because the party that used a proprietary model agreed to use the evidence submitted by the opposing party. *See AEP Texas v. BNSF*, STB Docket No. 41191 (Sub-No. 1), Decision at 21 (served Sept. 10, 2007). The one other Board decision Complainants cite was a *pre-filing* Board notice and order in a major merger application proceeding. For purposes of that case only, the Board issued case-specific, exceptional rules that would apply solely to its consideration of myriad filings anticipated in a proposed transcontinental merger proceeding. *See Canadian National Ry. Co., et al—Common Control*, STB Docket No. 33842, Corrected Decision at 4. (served Dec. 28, 1999).¹⁶

¹⁵ *See TMPA v. BNSF*, 6 S.T.B. 573, 645-46 (2003); *AEP Texas v. BNSF*, STB Docket No. 41191 (Sub-No. 1), Decision at 21 (served Sept. 10, 2007) (program in question was proprietary and sponsor did not submit source code to Board).

¹⁶ The Board's decision, establishing unique rules that would apply in that proceeding *before* parties filed the anticipated evidence, made clear that the case-specific requirements were exceptional. *See, e.g., id.* at 4, n.13 (“The electronic submission requirements set forth in this

The other cases Complainants cite are equally unavailing. They rely upon two *criminal* cases, which are inapposite both because of the differing discovery standards and obligations that apply in criminal cases and because neither contemplated the production of commercially available computer software.¹⁷ And in *Bartley v. Isuzu Motors Ltd.*, the plaintiff was required only to produce input and output data for its simulations.¹⁸ That is what NS has done here by providing Complainants with: (i) the data, assumptions, and parameters it input to MultiRail which are sufficient to review the process used to generate car blocks and train schedules; and (ii) access to the data outputs generated by MultiRail in each case. See *DuPont v. NS*, NS Reply Evid. at III-C-156 to III-C-167, NS Reply WP Folder “MultiRail”; *SunBelt v. NS*, NS Reply Evid. at III-C-121 to III-C-131, NS Reply WP Folder “MultiRail.”

Complainants even resort to relying upon a footnote in a concurring/dissenting opinion from *People’s Insurance Counsel Division v. Allstate Insurance Company*, 36 A.3d 464, 480 n.6 (Md. Ct. App. 2012), as though it were the majority opinion.¹⁹ Complainants failed to advise the

decision supersede, for the purposes of this proceeding supersede, the otherwise applicable electronic submission requirements set forth in our regulations.”).

¹⁷ See *United States v. Liquid Sugars, Inc.*, 158 F.R.D. 466, 470-71 (E.D. Cal. 1994) (interpreting Fed. R. Crim. Pro. §§ 16(a)(1)(C) and 16(a)(1)(D) and requiring the production of scientific tests which were within the government’s possession and control); *United States v. Dioguardi*, 428 F.2d 1033, 1037 (2d Cir. 1970) (finding no reversible error in trial court’s failure to require the government to turn over expert witness’s computer program and instructions in criminal proceeding).

¹⁸ See 151 F.R.D. 659, 661 (D. Colo. 1993) (“Plaintiff . . . shall make and preserve an electronic and/or hard copy record . . . of all simulations and iterations performed by his experts, and the data shall be recorded in such a way that Defendants readily can identify *the input and output data for each variable in the program, for each iteration, or each simulation.*”) (emphasis added).

¹⁹ The dissenting footnote cited by Complainants would be inapposite even if it were part of the majority opinion. That footnote discusses the dissenter’s concern about the accuracy of the data that a party used as inputs to its computer model, *not* the reliability of the computer model itself (“Garbage-in, garbage-out”). As NS has explained, here Complainants have available for their review all of NS’s input data, assumptions, and parameters and thus are fully able to review and

Board that they are quoting a section of a dissenting opinion that directly contested the actual opinion and holding of the court. The actual *majority* opinion of the court held that production of statistical data underlying the insurance company's underwriting standard was *not* required because the proponent had demonstrated that reliable historical data was not available. *Id.* at 477. Here, in contrast, NS has provided to Complainants all of the data and inputs its experts used to generate the operating plan, assisted in part by MultiRail, an industry-standard, commercially available computer tool.

An isolated trial court decision from the early days of the use of computers in litigation (before the advent of modern personal computers), *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 538 F. Supp. 1257 (N.D. Ohio 1980), does not advance Complainants' argument more than three decades later regarding a commercially available personal computer application. In the first instance, the court compelled production of only the "data and calculations" underlying the expert reports, because the "data, calculations, and computer simulations" on which the experts based their reports were "neither discernible nor deducible from the written [expert] reports themselves." *Id.* at 1267. Conspicuously absent from the *Cleveland Electric* decision is any mention of a requirement that the opposing party be provided the capacity to modify the data or analyses or conduct different analyses using the data and simulations produced by the sponsoring party. In the present cases, NS has produced to Complainants the "data, calculations, and computer simulations" its experts used to assist them in developing car blocks, train schedules, and related components of its SARR or operating plans. The fact that a litigant in a 1980 case was required to produce the data and computer

challenge the accuracy or validity of any of that data or parameters. In the language of the dissent in *Peoples Insurance Counsel*, Complainants have everything they need to determine whether the data and parameters NS's experts input to MultiRail were "garbage."

calculations (including computer simulations) forming the basis of its expert testimony is unremarkable and entirely consistent with NS's production in these cases. However, the case does not address Complainants' more extensive demands that Defendant NS pay to furnish them with additional computer program functionality that is available for purchase by Complainants should they find it appropriate.

Finally, Complainants' selective account of the history of the Board's acceptance of the RTC model, which they describe as "highly relevant" to this dispute, omits some critical distinguishing facts. *First*, Complainants fail to note that there was no Board decision in either case requiring a party to pay for the opposing party's acquisition or use of the RTC model. *See generally, Otter Tail Power Co. v. BNSF*, STB Docket No. 42071, Decision (served Jan. 27, 2006); *Public Serv. Co. of Colorado v. BNSF*, 7 S.T.B. 589 (2004). Moreover, the complainant in *Otter Tail* used the RTC model to develop, support, and submit its own substantive evidence, not simply to review the defendants evidence as in these cases. *See, e.g., Otter Tail*, Decision (served Dec. 13, 2004) (directing complainant to file supplemental evidence and SAC analysis).

Second, Complainants fail to inform the Board that *the Otter Tail complainant* actually *purchased its own copy of the RTC model* for its use in developing responsive evidence. *See Otter Tail v. BNSF*, STB Docket No. 42071, "Complainant's Reply to Defendant's Petition for an Order Clarifying the Scope of Supplemental Evidence," at 8, n.3 (Feb. 11, 2005) ("In the face of BNSF's refusal to provide the RTC Model on a computer that met even the vendor's recommended minimum requirements . . . *Otter Tail* was required to expend \$45,000 to purchase its own copy of the RTC Model so that it could submit its supplemental evidence . . . ")

(emphasis added).²⁰ These omissions are particularly egregious given that Otter Tail was represented in the case by the very same counsel who represents Complainants and now relies on that case as precedent for forcing the defendant to purchase a computer tool for Complainants. *See id.* at 9 (signed by Otter Tail counsel Jeffrey O. Moreno).

Thus, contrary to Complainants’ assertion, the extraordinary relief they seek—compelling a party to purchase and produce to its litigation adversary a commercially available computer tool to allow the adversary to modify and manipulate the sponsoring party’s data and evidence for the adversary’s own purposes—is *not* supported by a “well settled rule.” Certainly, Complainants have cited no authority to support such a putative “rule.” Moreover, any such rule or ruling would contravene the well established American Rule that each party must bear its own litigation costs. *See, e.g.*, Petition at 7-8. Particularly where, as here, the computer tool at issue is commercially available, a litigant who uses that tool is under no obligation to pay to provide the opposing party with that tool. Here, although it was not obliged to do so, NS has provided Complainants with a version of the MultiRail tool that allows them to review the inputs, data, assumptions, and outputs NS’s experts used to aid in developing its operating plans. But Complainants demand that NS procure for their use in these cases an additional version of the MultiRail tool that would allow them to manipulate and change the evidence NS has presented. As NS has shown, the authorities Complainants have cited, and their misleading characterizations of those authorities provide no support for the extraordinary and unprecedented relief they seek. In sum, Complainants have failed to show that NS should be required to pay for additional software licenses that are readily available for purchase by Complainants or their consultants. Their resort to inapposite cases, misleading citations, factual mischaracterizations,

²⁰ This also belies Complainants’ claim that “there were no limits upon the functionality of the RTC model” that BNSF provided to Otter Tail. Joint Reply at 17.

and elliptical descriptions of Board cases highlights the infirmity of their position that the Board should require NS to finance Complainants' discretionary purchase of additional tools they may wish to use for their own purposes in these rate cases.

III. COMPLAINANTS' OTHER ARGUMENTS ARE CONTRIVED AND UNAVAILING.

The other claims raised by Complainants are not only unavailing, they are contrived and inappropriate. At least two of those claims are not only baseless and frivolous, they inappropriately and unfairly impugn the integrity of NS and its counsel. Below, NS briefly responds to Complainants' remaining arguments.

A. There Has Been No Inappropriate *Ex Parte* Communication and Complainants' Contrived Assertion Is Illogical, Unsupported, and Improper.

Complainants recklessly and erroneously allege that “[b]y 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.” Joint Reply at 11. This claim is utterly unsupported, meritless, and inappropriate and should be rejected out of hand.

As a threshold matter, Complainants themselves acknowledge on the very same page of their Reply that the factual predicate for their immoderate claim *does not exist*. For reasons unrelated to the wild “*ex parte* communication” claim raised by Complainants, the Board has advised NS that it believes it may not accept the limited access to MultiRail (for its potential use in these two cases only) offered by NS. Complainants not only expressly note this fact, they devote more than half a page to discussing it. *See id.* (“The Board issued a letter declining NS’s offer to provide the MultiRail program to the Board.”). Thus, contrary to Complainants’ premise, NS has *not* “provided the Board with access to a fully functional version of MultiRail.”

Second, Complainants cite no evidence whatsoever of any *ex parte* communication between an NS representative and the Board. Even if NS had provided the Board with access to MultiRail, that fact alone would do nothing to establish an *ex parte* communication. Despite quoting at length from regulations concerning prohibited communications between parties and the Board and sanctions for violations of those rules, Complainants neither cite nor specifically allege any such communication. Indeed, Complainants’ argument—that a party’s submission of a computer tool to the agency with full knowledge of Complainants would constitute a prohibited *ex parte* communication—suggests a fundamental misunderstanding of the plain language of the rules.²¹ Complainants can cite no evidence of any proscribed *ex parte* communication in these cases because there has been none.

Third, Complainants’ own Joint Reply exhibits amply demonstrate that they have been fully informed of NS’s intentions and included in NS’s communications with the Board concerning MultiRail. *See* Joint Reply Exhibits A–F. For example, Complainants each received full copies of NS’s Reply Evidence, which simultaneously advised both the Board and Complainants of arrangements for them to obtain access to MultiRail. *See, e.g.*, Joint Reply, Ex. A. Similarly, when NS next communicated with Board staff regarding arrangements for the Board to license and use MultiRail, it copied counsel for Complainants. *See id.*, Ex. D. Likewise, when a representative of the Board responded to NS’s offer to pay for it to use MultiRail for purposes of these cases, she copied counsel for Complainants. *See id.*, Ex. E. There have been no covert or “*ex parte*” communications between NS counsel and the Board

²¹ *See, e.g.*, Joint Reply at 12 (quoting regulation defining an *ex parte* communication as a “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.”) (emphasis added). Complainants allege no communication made without their knowledge or consent.

concerning MultiRail or “the merits of the[se] proceedings.” *See* 49 C.F.R. § 1102.2. To the contrary, the evidence provided by Complainants themselves demonstrates the opposite—representatives of Complainants have been included in relevant communications between NS and the Board, and none of those procedural communications concerned the merits of these rate cases.

B. Complainants’ Due Process Claim is Frivolous.

Complainants’ assertion that they have been denied constitutional due process is frivolous.²² *See* Joint Reply at 11, 14-15. Complainants have not been unfairly “denied” anything. Their real complaint is that if they want to use a “read-write” version of the commercially available MultiRail tool in service of their interests in this litigation, they have to pay for it. Whether NS is required to pay for Complainants to obtain additional MultiRail licenses is, of course, the only question properly at issue in this Petition. But that is not a Due Process question. Constitutional due process does not guarantee civil litigants costless litigation, and litigants do not have the right to compel their opponents to purchase commercially available tools or services they wish to use to aid them in contesting evidence proffered by an opposing party. Even more fundamentally, due process is necessarily a two-way street—it certainly does not create a constitutional right for Party A to force opposing Party B to finance Party A’s litigation against Party B.²³

²² Again as a threshold matter, if the Board does not use MultiRail in connection with these proceedings, Complainants would have access to MultiRail that the Board does not have and the foundational “unfair unequal access” predicate for their claim would evaporate.

²³ In a related claim, Complainants assert that “their right to rebuttal entitles them to an opportunity to examine MultiRail . . .” Joint Reply at 26. Even if this were an accurate summary of the law, Complainants do have an opportunity to use and “examine” a read-write version of MultiRail, they just have to pay for it like NS or any other litigant.

Complainants’ “cross-examination” arguments are similarly inapposite.²⁴ In the first instance, MultiRail is a tool, not evidence. And Complainants have full and unimpaired access to all of NS’s operating evidence, and thus the opportunity to examine and figuratively “interrogate” that evidence in any way they wish. Again, while nothing prevents Complainants from licensing another version of MultiRail from its owner and using it in any manner consistent with the Board’s rules and precedents, they have no right to force NS to purchase that additional license and tool (or any all ancillary services) for them.

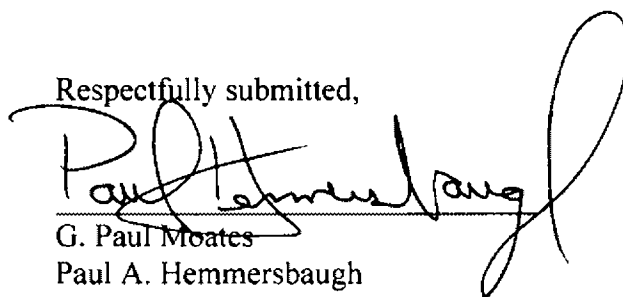
²⁴ Cross-examination is a testimonial process that applies to human witnesses, not to documentary or physical evidence. Contrary to Complainants’ assertions, the principles, process, and law of cross-examination are not readily or directly transferable to non-testimonial documentary evidence. And any connection to an intermediate tool that is not itself evidence is even more tenuous and remote. Thus, although Complainants certainly are entitled to review and respond to NS’s Reply Evidence, the various cases they cite concerning cross-examination of witnesses are not controlling and at most may be instructive regarding general precepts of the adversarial process and ensuring parties have an opportunity to respond to opposing evidence.

CONCLUSION

The Board should reject and refuse to consider Complainants' numerous non-responsive, inaccurate, and improper claims and arguments. If the Board does consider any of those inappropriate claims and requests for relief, the responses NS provides above show that Complainants are entitled to none of the relief they seek. As demonstrated in its Petition, NS has no obligation to purchase any additional MultiRail licenses or services for Complainants' use. Accordingly, the Board should grant NS's Petition for Clarification and confirm that NS is not required to purchase any further MultiRail licenses or services on behalf of Complainants, or to reimburse Complainants for any additional MultiRail-related costs.

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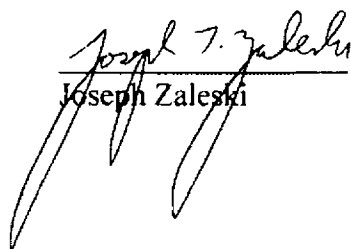
Counsel to Norfolk Southern Railway Company.

Dated: February 22, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February 2013, I caused a copy of the foregoing Norfolk Southern Railway Company's Response to Complainants' Joint Reply to Petition for Clarification to be served by email and U.S. Mail upon:

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



Joseph Zaleski

EXHIBIT 1

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

VERIFIED STATEMENT OF KEVIN M. FOY

I am Kevin M. Foy, a member of the MultiModal Systems Practice within Oliver Wyman’s Surface Transportation Group. I am responsible for customer support for our MultiRail products, which are widely used for improving the operations and general performance of railroads and other transportation companies in North America, Europe, Asia and Africa. I have more than 28 years of experience in the application of information technology to transportation and logistics, and I was a member of the senior management team for MultiModal Applied Systems, which was acquired by Oliver Wyman in 2006.

I have read “Complainants’ Joint Reply to Defendant’s Petition for Clarification” in the above-captioned cases, including the “Joint Verified Statement of Robert Mulholland and

Timothy Crowley.” There are several statements made in the Joint Reply and in the Joint Verified Statement of Messrs. Mulholland and Crowley that are either incorrect or require clarification, as explained below:

1. Complainants claim that the fact that NS purchased a license for MultiRail in order to prepare NS’s Reply Evidence “suggests that NS does not use MultiRail in the ordinary course of its business.” (Joint Reply at 3). That suggestion is not accurate. In fact, NS has had a license for MultiRail since January 1994, and it has used MultiRail for a variety of purposes over the course of the past 19 years. NS did pay for a maintenance update, which included a specific version of MultiRail that it used in preparing its Reply Evidence in these cases.

2. Messrs. Mulholland and Crowley are incorrect in their assertion that “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.” (Joint Verified Statement at 6). The ability to create a scenario does exist in the read-only version, and with telephone guidance from Oliver Wyman, L.E. Peabody could have loaded the application and data to their PCs. It is therefore not accurate to claim that Complainants had to “pay the Base Fee just to view NS’s MultiRail evidence.” (Joint Reply at 8).

3. Complainants are incorrect in their assertion that “NS is simply wrong to claim that Complainants could upload the case data files into the read-only version of MultiRail on their own.” (Joint Reply at 30). This is a fundamental point about which Messrs. Mulholland and Crowley appear to have a misunderstanding. The reason that NS did not supply scenario files with the data supporting its operating plan evidence is that scenario files are PC-specific. The scenario files must be created on the PC that is used for the MultiRail application. This could be done by creating the scenarios on the leased laptop PCs (which is what Oliver Wyman

did for Complainants) or by creating the scenarios on a local L.E. Peabody PC. To be absolutely clear: The read-only version of MultiRail can be used to create a scenario file.

4. Scenario files specify the name and location of the data files used by the application, and a user may create as many scenario files as it wishes, with the caveat that only one may be active (open) at a time. Scenario files are typically stored with their associated MultiRail data files. The MultiRail Freight Edition scenario file name suffix is .sc3. Using a scenario file, a user can specify various data files on his PC or network server. This allows the user to “mix and match” databases. A MultiRail scenario file contains pathnames to the component databases and support files, along with information describing the applicable database drivers. A user may create, copy, replace, and delete these files using Windows Explorer.

5. The “limitations” attributed to the read-only version of MultiRail that Complainants list in Attachment A to the Joint Statement appear to be versions of the same basic complaint: that while the read-only version allows Complainants to review NS’s MultiRail analyses and results, it does not allow Complainants to run MultiRail with inputs, assumptions, and parameters different from those used in NS’s evidence. That is true; the read-only version does not permit the user to change inputs—be they to the network, to the selected traffic, car blocks, train schedules or operating assumptions—or modification of outputs such as blocking plans. However, these “limitations” in no way restrict Complainants’ ability to review and evaluate the MultiRail analysis used in NS’s Reply Evidence. If Complainants wish to have the ability to modify MultiRail inputs and use MultiRail to generate blocking plans different from those used by NS, they can obtain such functionality by licensing a full MultiRail software package.

6. Oliver Wyman and I take issue with Complainants' characterization of MultiRail as "black-box software." (Reply at 31). MultiRail uses readily understood algorithms and employs iterative passes by the user to develop an operating plan. MultiRail has been used by all of the Class I railroads at some point over the course of the past 20 years, and it is currently used by four of them, as well as by railroads in such nations as Switzerland, Sweden, South Africa and Kazakhstan. The MultiRail platform has in fact become the market's de-facto standard for network operations design.



Kevin M. Foy
Oliver Wyman, Inc.
February 20, 2013

Kevin M. Foy is the Head of Marketing for the Surface Transportation and Corporate Finance Practices of Oliver Wyman. Based in Princeton, New Jersey, Mr. Foy directs the development and implementation of the group's global marketing plan. He also manages the product strategy for the MultiRail Freight and Passenger Editions, as well as the new MultiRail PAX integrated passenger rail planning system.

Mr. Foy was formerly a member of the senior management team for MultiModal Applied Systems, which was acquired by Oliver Wyman in early 2006. In the past 5 years, he has headed MultiRail Freight project teams at Ferromex, Pacific National (Australia), Vale (Brazil), and Norfolk Southern, and has managed the MultiRail Passenger projects at GO Transit (Toronto), Metra (Chicago), Tri-Rail (Miami), and Metrolink (Los Angeles). He is currently the Project Manager for the MultiRail PAX system implementations at SEPTA (Philadelphia) and AMT in Montreal.

Mr Foy received a B.A. in Business Administration from Rutgers University and lives with his family in Princeton Junction, New Jersey.



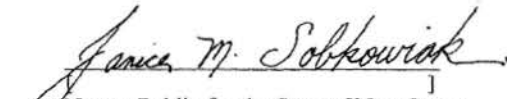
VERIFICATION

STATE OF NEW JERSEY)
)
COUNTY OF MERCER)

I, KEVIN M. FOY, verify under penalty of perjury that I have read the foregoing
Verified Statement, 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.


Kevin M. Foy

Sworn to and subscribed


] Notary Public for the State of New Jersey

My Commission Expires: [Janice M Sobkowiak]
Notary Public
New Jersey
My Commission Expires 6-7-15
No. 2329915

EXHIBIT 2

January 17, 2013

By Email and Hand Delivery

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

Re: E.I. du Pont de Nemours & Co. v. Norfolk Southern Ry. Co., STB Docket No. 42125

Dear Jeff:

Below are responses to a number of E.I. du Pont de Nemours & Company's ("DuPont's") remaining requests regarding Norfolk Southern Railway Company's ("NS's") Reply Evidence in the above-referenced proceeding. The responses in this letter are labeled and numbered to correspond to DuPont's requests, which NS replicates in bold text.

NS is producing a replacement workpaper and several supplemental files in response to DuPont's workpaper requests. The replacement file "NS_DUPONT_REPLY_2.bak" is being produced on an encrypted external hard drive that is being produced with the hand-delivered copy of this letter. The hard drive can be decrypted using the same password used to decrypt NS's previous workpaper hard drives; the replacement file is designated as Sensitive Security Information and should be treated accordingly.¹ The remaining supplemental files referenced in

¹ The enclosed hard drive contains Sensitive Security Information ("SSI") that is controlled under 49 C.F.R. Parts 15 and 1520. No part of the records contained in the enclosed hard drive may be disclosed to persons without a "need to know" as defined in 49 C.F.R. Parts 15 and 1520, except with the written permission of the Administrator of the Transportation Security Administration or the Secretary of Transportation. Unauthorized release or disclosure of SSI may result in civil penalty or other action. For U.S. government agencies, public disclosure is governed by 5 U.S.C. § 552 and 49 C.F.R. Parts 15 and 1520.

Jeffrey Moreno
January 17, 2013
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this letter are being transmitted by email. These files are designated as Highly Confidential under the Protective Order, except for "Exhibit II-B-5 errata and backup.xlsx," which is designated Confidential.

December 27, 2012 Requests

- 1. With regard to the attached e-mail correspondence, NS still has not responded to my Dec. 6th request for the work papers underlying Exhibit II-B-5.**

Response: As stated in my January 11, 2013 letter, Exhibit II-B-5 was based on carload volume data for DuPont shipments that was provided by NS's marketing department in substantially the same format presented in the Exhibit. That data was generated by querying NS marketing applications (primarily NS Workbench Traffic History) for DuPont shipments over the issue lanes. Additional detail is appended in the enclosed "Exhibit II-B-5 errata and backup.xlsx" file. When responding to DuPont's request, NS discovered that its initial pull of data for Exhibit II-B-5 did not include shipments for the first quarter of 2007 (and thus did not incorporate all DuPont shipments for 2007). To correct this error NS is producing a corrected Exhibit II-B-5 that deletes the incomplete 2007 data; this corrected Exhibit is the first tab in "Exhibit II-B-5 errata and backup.xlsx." NS will be submitting the corrected exhibit to the Board in a forthcoming errata filing.

- 3. Please provide all work papers and documentation supporting the statement that between 1997 and 2009 DuPont's contract rates increased "...at a far slower pace than other rates in the chemical transportation market." NS Reply, II-B-93.**

Response: All workpapers and documentation for NS's Reply Evidence were included in NS's Reply Evidence. The quoted statement is supported by the verified testimony of NS Group Vice President – Chemicals Alan Shaw, whose testimony was based on his experience in the chemical transportation market and the detailed evidence and workpapers showing that DuPont's contract rates increased at {only 70% of RCAF between 1997 and 2009.} NS is also producing a spreadsheet analysis demonstrating the significant difference between the escalation provisions of DuPont's contract and other measures of inflation over the course of DuPont's contract ("DuPont Contract Escalator vs. Market Indices.xls"). This analysis was prepared in connection with the mediation of this matter, and it helped to inform Mr. Shaw's conclusion that DuPont's contract rates lagged behind other rates in the chemical transportation market.

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4. Please provide all work papers and documentation supporting the statement that by the time DuPont's contract expired, the escalation provision caused "...DuPont's rates to be well below the rates paid by other NS chemical customers." NS Reply, II-B-93.

Response: See response to December 27 workpaper request #3.

January 2, 2013 Requests

A. Specific documents referenced in NS' Reply Text or Workpapers that are not included in NS' Reply Workpapers

1. **Part III-C**
b. **"Terminal Clock Reports", referenced at III-C-165-100, Footnote 256**

Response: NS included detailed information identifying the arrival and departure times of trains (and blocks) at individual yards and terminals in the "III-C\Yard Sizing Analyses" workpaper folder. For further detail see the responses below to January 2 workpaper requests B.1.a. and B.1.b.

- c. **"Yard Connections With Blocks By Outbound Train", referenced at III-C-176, footnote 270**

Response: NS included detailed information identifying the daily arrivals, departures, and volumes at individual yards in the "III-C\Yard Sizing Analyses" workpaper folder. For further detail see the responses below to January 2 workpaper requests B.1.a. and B.1.b.

- d. **"NS_Dupont.dbo.DRR_Operating_Plan_Dataset_WB_053012," referenced in NS workpaper "DRR TIH Shipments.xlsx"**

Response: The referenced workpaper is in the traffic database workpaper "NS_DUPONT_REPLY_2.bak," which NS included on its workpaper hard drive and is re-producing with this response.

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2. **Part III-D**

- c. **“NS_DUPONT_REPLY.dbo.Locations_RFP171”, referenced in NS workpaper “RTC Unit Train Additions for NS Reply.xlsx”, tab “Train_Sheet”**

Response: The requested information was included in the traffic database workpaper “NS_DUPONT_REPLY_2.bak,” which NS included on its workpaper hard drive and is re-producing with this response.

B. Analyses referenced in NS’ Reply Text or Workpapers that are not included in NS’ Reply Workpapers

1. **Part III-C**

- a. **Information generated by MultiRail regarding the time at which trains arrived at, or departed from , intermediate terminals, and the blocks (and the block sizes) arriving and departing on each train referenced at III-C-167**

Response: The requested information can be found in the “\III-C\Yard Sizing Analyses\” workpaper folder. For each classification yard, NS provided a Capacity Analysis workpaper (e.g., “Knoxville_TN_Capacity_Analysis.xlsx,” in the “DRR Large Flat Yards” subfolder) that includes in the “MDSR” and “MDSU” worksheets the arrival and departure times and blocks and block sizes used to determine the classification volume and yard inventory each hour for a week. The column headings starting with “A” refer to the Arrival day and time, and those starting with “D” identify Departure information. Column heading “CC” identifies “Car Counts,” and the Connection Types are 1 for Origin, 2 for Classification, and 3 for Block Swap.

- b. **A “list of DRR intermodal trains; their length, trailing tons and locomotive consist; the intermodal containers and/or trailers moving on each train; and any work events performed by each train en route” referenced at page III-C-169**

Response: Requested information can be found in NS Reply workpapers in “MultiRail Files for Modeling.zip” in the “\III-C\RTC\” folder, except for locomotive consist information, which can be found in the “\III-C\MultiRail\Loco Tonnage Rating Requirements\” workpaper folder. The individual files in “MultiRail Files for Modeling.zip” are described in the “Modeling Operating Plan in MultiRail for the DuPont Rate Case.docx” workpaper in the “\III-C\MultiRail\Documentation &

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Related Files\" folder. Specifically, NS Reply workpapers "sptnrtv.csv" and "Trn_Link_Info.csv" contain information responsive to DuPont's request.

- c. **The information provided by MultiRail related to "all road and local train services, intermediate classification and switching of individual cars, 'swapping' of blocks between trains, and pick ups and set offs at customer facilities and interchange points...the time required to perform those activities" referenced at III-C-170**

Response: Requested information can be found in the NS Reply workpapers described in NS's response to January 2 workpaper request B.1.b. NS is also providing DuPont with an additional workpaper "MultiRail Train Handlings_DRR.xls," which identifies the trains, handlings, and locations for DRR shipments.

D. Source for hard coded entries in NS Reply Workpapers

1. **Part III-C**
 - b. **Please provide the source(s) and all data and calculations supporting the connecting link between columns D (NS Cross Reference), and E (Foreign Cross Reference) of NS Reply workpaper titled "At-Grade Foreign Crossing Train Data.xlsx"**

Response: NS Reply WP "At-Grade Foreign Grade Crossing Train Data.xlsx" identifies the FRA website <http://safetydata.fra.dot.gov/OfficeofSafety> as the source of the information. The "connecting link" was the result of a manual process performed by NS for each individual crossing. On the "Crossing" tab of the website ("5.02 - Generate Crossing Inventory"), NS input the NS Crossing ID (column D), and used the website's "Generate Map" feature. On the map, NS then located a nearby road crossing on the foreign railroad, which provided the Foreign Crossing ID (column E) and was used to "Generate Report" of daily train volumes on the website.

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D. Source for hard coded entries in NS Reply Workpapers

1. Part III-C

- a. Please provide the source(s) and all data and calculations supporting the numbers shown in columns G, H, J, and K of NS Reply workpaper titled "Reply NS Yard-Operations.xlsx"**

Response: The enclosed spreadsheet "Yard_Volumes_DRR.xlsx" provides detailed support for the referenced numbers in NS Reply WP "Reply NS Yard-Operations.xlsx."

- c. Please provide the source(s) for all data and calculations supporting the numbers shown in columns B, C and D in NS Reply workpaper titled "DRR Reply Car Inspectors.xls"**

Response: The enclosed spreadsheet "Yard_Clock_DRR.xlsx" provides detailed support for the referenced numbers in NS Reply WP "DRR Reply Car Inspectors.xlsx."

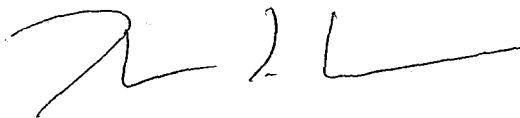
E. Workpapers that were provided but cannot be read

1. Part III-C

- a. Database "NS_DUPONT_REPLY_2.bak", this file cannot be read as it appears to be corrupted.**

Response: NS provides with this response a hard drive containing a replacement version of "NS_DUPONT_REPLY_2.bak."

Sincerely,



Matthew J. Warren

Attachments