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SERVICE DATE – LATE RELEASE MARCH 14, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42125

E.I. DUPONT DE NEMOURS AND COMPANY

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Digest:¹ The Board finds that the complaining shipper does not have a feasible shipping alternative to the defendant railroad for much of the transportation at issue, but that Complainant has failed to demonstrate that the challenged rates are unreasonably high.

Decided: March 14, 2014

ACRONYMS

ATC	Average Total Cost
BNSF	BNSF Railway Company
CMP	Constrained Market Pricing
CTC	Centralized Traffic Control
DCF	Discounted Cash Flow
DRR	The hypothetical "DuPont Stand-Alone Railroad"
DuPont	E.I. DuPont de Nemours & Company
G&A	General and Administrative
IHB	Indiana Harbor Belt Railroad Company
MOW	Maintenance-of-Way
MMM	Maximum Markup Methodology
NS	Norfolk Southern Railway Company
PTC	Positive Train Control
R-1	Annual Report Form R-1
ROW	Right-of-Way
RTC	Rail Traffic Controller
R/VC	Revenue-to-Variable Cost

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

SAC	Stand-Alone Cost
SARR	Stand-Alone Railroad
TCS	Triple Crown Services
TDIS	Thoroughbred Direct Intermodal Services
TIH	Toxic Inhalation Hazard
TRRA	Terminal Railroad Association of St. Louis
T&E	Train and Engine
URCS	Uniform Railroad Costing System
WP	Workpaper

OVERVIEW

On October 7, 2010, E.I. DuPont de Nemours & Company (DuPont) filed a complaint challenging the rates of Norfolk Southern Railway Company (NS) in 138 lanes of movements² that cover 26 discrete commodities.³ The 138 challenged lanes are governed by 100 separate rates, which were established at the expiration of a long-term contract entered into by NS and DuPont in 1997.

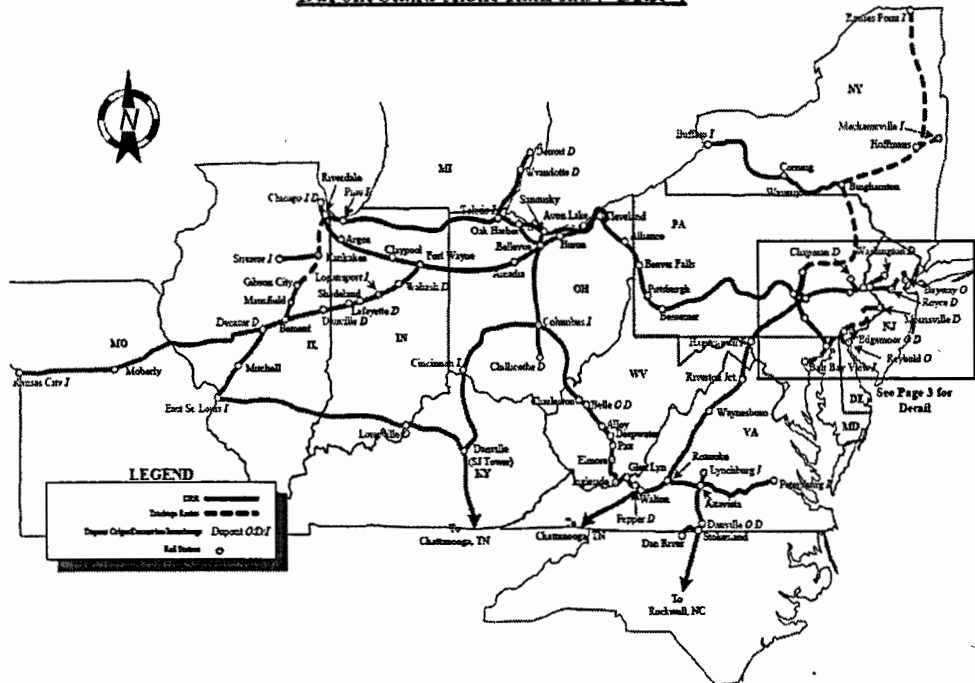
DuPont pursued relief under the agency's stand-alone cost (SAC) test. Under this test, for traffic over which a rail carrier has "market dominance," the parties must hypothesize a stand-alone railroad (SARR) that could serve the traffic at issue if the rail industry were free of entry barriers. Under the SAC test, the challenged rates cannot be higher than what the SARR would need to charge to serve the complaining shipper while fully covering all of its costs and earning a reasonable return on investment. This SAC analysis produces a simulated competitive rate against which the challenged rates are judged. In this analysis, rates are sometimes expressed as the ratio of revenue to variable cost (R/VC).

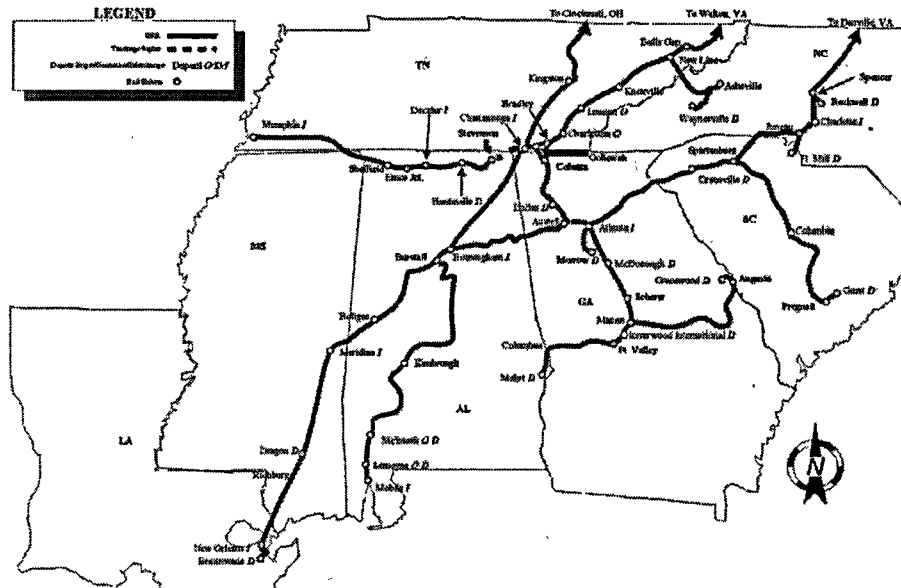
² NS provides transportation in single-line service for 17 of the challenged lanes. For the other 121 lanes, NS operates in joint-line service with one or more other railroads. In this decision, these categories are identified with "A-" (single-line) and "B-" (joint-line) designations. DuPont previously had challenged an additional 29 lanes, but elected to remove them from the case prior to filing its opening evidence.

³ These 26 commodities are: anhydrous methylamines (AHM), aniline oil, aqueous methylamines (AQM), bio-propanediol (PDO), chlorine, difluoroethane (DFE), dimethyl ether (DME), dimethyl formamide (DMF), dimethyl sulfate (DMS), flammable liquid waste (WFL), fuming sulfuric acid, glycolic acid, lime, monomethyl formamide (MMF), muriatic acid, petroleum coke, polyethylene, potassium caustic, sodium caustic, sodium methylate, spent sulfuric acid, sulfur trioxide, sulfuric acid, titanium dioxide, titanium tetrachloride, and zircon sand.

For this case, DuPont created the hypothetical DuPont Stand-Alone Railroad (DRR). The DRR would operate in 20 states with over 7,200 constructed route miles and another 820 miles in trackage rights and joint facilities. The DRR would handle all or some of the line haul for 92% of NS's current traffic base and would claim 74% of NS's overall revenues. The DRR would handle nearly 6.2 million carloads and earn \$6.6 billion in revenue in its first full calendar year of operations. As a railroad carrying a significant amount of carload traffic, the DRR must have an operating plan that accounts for the movement of each carload from its specific origin to its specific destination. This includes moving cars to and from yards, classifying cars into blocks and trains, and picking up and delivering cars to shipper facilities. At the same time, the DRR must move unit trains and time-sensitive intermodal traffic on its system.

DuPont Stand-Alone Railroad ("DRR")





In this case, DuPont has not demonstrated that the challenged rates are unreasonable under the SAC test. Accordingly, the Board will not prescribe rates for DuPont's traffic.⁴

NS MOTION TO DISMISS

On October 24, 2013, NS filed a motion to dismiss the case pursuant to 49 U.S.C. § 11701(c), arguing that, because proceedings in this case have not concluded by the end of the third year after the date on which it began, the instant proceeding should be dismissed. DuPont filed a reply to the motion on November 11, 2013, arguing that § 11701(c) does not require dismissal of the case. As DuPont has failed to show that the rates NS charges on the issue traffic are unreasonable, the motion to dismiss need not be addressed in this decision.

⁴ All appendices will be included in an updated version of the decision to be served shortly.

MARKET DOMINANCE

A. Introduction

The Board's market dominance inquiry seeks to determine whether there is "effective competition from other carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. § 10707(a). This inquiry comprises two components, the first of which is quantitative. The statute establishes a conclusive presumption that a railroad does not have market dominance if the rate charged produces revenues that are less than 180% of its variable costs⁵ of providing the service. 49 U.S.C. § 10707(d)(1)(A).⁶

If this quantitative R/VC ratio threshold is met, the Board moves to the second component, a qualitative analysis. Wis. Power & Light Co. v. Union Pac. R.R., 5 S.T.B. 955, 961 (2001), aff'd sub nom. Union Pac. R.R. v. STB, 62 F. App'x 354 (D.C. Cir. 2003). In this analysis, the Board determines whether there are any feasible transportation alternatives that are sufficient to constrain the railroad's rates to competitive levels, considering both intramodal competition—competition from other railroads—and intermodal competition—competition from other modes of transportation such as trucks, transload arrangements, barges, or pipelines. E.I. du Pont de Nemours & Co. v. CSX Transp., Inc. (2008 DuPont I), NOR 42099, slip op. at 2 (STB served June 30, 2008). Even where feasible transportation alternatives are shown to exist, those alternatives may not provide "effective competition." See Mkt. Dominance Determinations & Consideration of Prod. Competition (Mkt. Dominance II), 365 I.C.C. 118, 129 (1981) ("Effective competition for a firm providing a good or service means that there must be pressures on that firm to perform up to standards and at reasonable prices, or lose desirable business."), aff'd sub nom. W. Coal Traffic League v. United States, 719 F.2d 772 (5th Cir. 1983) (en banc).

⁵ Variable costs are those railroad costs that vary with the level of output. The comparison of revenues to variable costs, reflected as a percentage figure, is known as an R/VC ratio.

⁶ In this case, both parties stipulate in the narrative sections of their filings that NS's R/VC ratios exceed the 180% threshold for all of the challenged rates. See DuPont Opening I-3; NS Reply II-A-1. We conclude, however, that the R/VC ratio generated by the Charlotte-Fort Mill (sulfuric acid) rate—which governs the movements on lanes B-93 and B-118—falls below the statutory jurisdictional threshold after taking into account the mileage that both parties agreed to use for this movement. Using the mileage NS estimated in its reply (NS Reply, Exhibit II-A-3 at 3) and DuPont accepted in its rebuttal (DuPont Rebuttal II-A-4 & Exhibit II-A-13 at 2-3), the resulting R/VC ratio calculated by the Board is 171%.

Market dominance is particularly complicated in this case because of the large number of origin/destination pairs and the number of commodities involved. The movement origins and/or destinations can be served via rail (for the most part) only by NS.⁷ Although most of the various commodities at issue in this case physically can also be transported via truck or rail/truck movements,⁸ to find that market dominance is not present it is not enough simply to establish that truck or truck/rail service compete to some extent with NS rail service. As DuPont correctly observes, at some point even a monopolist could price its services so high that plainly unrealistic transportation alternatives will eventually serve to constrain rates. See, e.g., Ariz. Pub. Serv. Co. v. United States (Ariz. Pub. Serv. 1984), 742 F.2d 644, 651 (D.C. Cir. 1984). Rather, the central issue in determining market dominance in this case is whether truck or truck/rail alternatives function as “effective” constraints on NS’s pricing—i.e., whether they constitute competition sufficient to deter NS from charging monopoly prices for the transportation of DuPont’s products.

Most rate cases over the last two decades were brought by utilities challenging rates for the transportation of large coal volumes with relatively few origins and destinations. Truck or truck/rail alternatives are rarely a feasible alternative to direct rail service in such cases. Thus, the most typical pattern in past rate cases has been either that (1) defendant railroads conceded market dominance, or (2) the questions relating to market dominance were relatively straightforward and easy to resolve. In cases such as the instant one, however, involving a variety of different commodities with multiple origins and destinations, both the qualitative market dominance inquiry and the SAC analysis can be exponentially more complicated.

B. Limit Price

As the Board first explained in a recent rate case, there is a need for a more objective approach in cases where the market dominance analysis is complicated by the large numbers of origin and destination pairs involved. See M&G Polymers USA, LLC v. CSX Transp., Inc. (M&G), NOR 42123, slip op. at 3 (STB served Sept. 27, 2012) (case settled prior to merits

⁷ NS claims that there are direct rail alternatives for several origin and destination pairs. This claim will be addressed in what will be designated the highly confidential market dominance appendix that initially will be released only to the parties’ outside counsel when the updated version of this decision is served. As explained more fully below, a public version of the market dominance appendix will be made available once the parties offer proposed redactions.

⁸ NS concedes that barge transportation is not a competitive alternative for any of the issue movements. See NS Reply II-B-1 n.1.

determination). After concluding that neither party had offered a satisfactory approach to resolving market dominance that would adequately take these complications into account, the Board in M&G applied an approach designed to help it to gauge objectively whether feasible direct rail, direct truck, or truck/rail transload alternatives were effectively constraining the railroad's pricing. See M&G, slip op. at 13-21. It also sought public comments on this approach. See M&G, slip op. at 18. The Board's majority again applied the same methodology for determining market dominance in a subsequent rate case. See Total Petrochems. & Refining USA, Inc. v. CSX Transp., Inc. (TPI I), NOR 42121, slip. op. at 16-29 (STB served May 31, 2013), reconsideration denied (TPI II) (STB served Dec. 19, 2013) (with Vice Chairman Begeman dissenting in both), appeal docketed sub nom. CSX Transp., Inc. v. STB, No. 13-1313 (D.C. Cir. Dec. 26, 2013).⁹

Under the approach used in M&G and TPI I, which was termed the "limit price" approach, as a threshold matter transportation alternatives to the challenged movement that were feasible from a practical (i.e., physical) standpoint were identified.¹⁰ After this initial step, the "limit price," i.e., the highest price the defendant carrier theoretically could charge for the issue traffic without causing a significant amount of that traffic to be diverted to a particular competitive alternative, was calculated. Second, the "limit price R/VC ratio" was calculated by comparing the limit price to the defendant carrier's variable costs of providing the service at issue. Finally, the limit price R/VC ratio was compared to the defendant carrier's most recent Revenue Shortfall Allocation Method (RSAM) figure—the measure of the average markup that the defendant carrier would need to collect from all of its potentially captive traffic to earn a return on investment equal to the cost of capital.¹¹ If the limit price R/VC ratio exceeded the

⁹ CSX filed with the Board a petition seeking a stay, pending judicial review, of the December 19, 2013 decision. The Board, with Vice Chairman Begeman dissenting, denied the petition. Total Petrochems. & Refining USA, Inc. v. CSX Transp., Inc., NOR 42121 (STB served Jan. 2, 2014).

¹⁰ Many prior Board discussions of market dominance have used the term "feasibility" differently, encompassing both a practical/physical analysis as well as an economic one. Under a limit price approach, however, the term is used solely to describe the concept of "practical feasibility"—i.e., whether an alternative is possible from a practical standpoint given real-world constraints. Determining whether or not such an alternative is effectively constraining the rate at issue is a distinct inquiry engaged in after the determination of practical feasibility.

¹¹ The Board has previously indicated that the fact that a particular rate produces an R/VC ratio which falls below the carrier's RSAM number indicates that competitive transportation alternatives likely exist and are exerting downward pressure on the rate governing that traffic. See Simplified Standards for Rail Rate Cases (Simplified Standards 2007), EP 646 (Sub-No. 1), slip op. at 81 (STB served Sept. 5, 2007) (suggesting that a rate that falls below

(continued . . .)

defendant carrier's RSAM figure, there would be a preliminary conclusion that the alternative cannot exert competitive pressure sufficient to effectively constrain the rate at issue. If the limit price R/VC ratio fell below the RSAM figure, the preliminary conclusion would be that the competitive alternative effectively constrains the rate at issue. The preliminary conclusion could be overcome by evidence demonstrating that the alternative upon which the limit price was based—or the challenged rail transportation itself—had certain intangible qualities that bore on the alternative's ability to effectively constrain the rate at issue.

In TPI I and TPI II, the Board's majority explained why it believed that the limit price approach was an appropriate way to determine market dominance, why it was economically sound, and why its use in those proceedings was permissible. TPI I, slip op. at 19-27; TPI II, slip op. at 5-14. The majority also stated that the limit price approach was not a binding rule and that, while the majority chose to use a limit price approach in that case, the agency would be open to other ways to address the competitiveness of suggested transportation alternatives. TPI I, slip op. at 22; TPI II, slip op. at 7-8. Here, although NS and (to a lesser extent) DuPont have expressed concerns about the limit price approach—concerns that generally were addressed by the Board in TPI I and TPI II¹²—no better approach has been presented. NS would simply compare the price of the alternative to the challenged rate, and, if the two figures are similar, declare that effective competition exists.¹³ However, as the Board's majority said in TPI, the mere fact that a rail carrier prices its services right at the threshold where, if slightly higher, it might begin to lose traffic to an alternative does not indicate whether that alternative is constraining rates effectively. DuPont would compare the price of the alternative to the

(... continued)

RSAM is "being constrained by . . . market forces"), aff'd sub nom. CSX Transp., Inc. v. STB, 568 F.3d 236 (D.C. Cir. 2009), vacated in part on other grounds, 584 F.3d 1076 (D.C. Cir. 2009).

¹² Compare NS Reply II-B-43 to II-B-45 with TPI I, slip op. at 21-22 & TPI II, slip op. at 5-7 (addressing rail carrier argument that 49 U.S.C. § 10707(d)(2) expressly bars use of the limit price approach when considering qualitative market dominance); compare NS Reply II-B-46 to II-B-49 with TPI I, slip op. at 21-22 & TPI II, slip op. at 7-9 (addressing rail carrier argument that use of the limit price approach requires its adoption via notice-and-comment rulemaking); compare NS Reply II-B-49 to II-B-57 with TPI I, slip op. at 22-26 & TPI II, slip op. at 9-14 (addressing rail carrier arguments that the limit price approach is arbitrary and economically meaningless); compare DuPont Rebuttal II-B-209 to II-B-216 with TPI I, slip op. at 26 & n.78 (addressing shipper argument that the limit price approach should only be used to demonstrate the absence—but not the existence—of effective competition and that the RSAM benchmark should be replaced by the revenue-to-variable-cost-greater-than-180 ratio).

¹³ See, e.g., NS Reply II-B-94 to II-B-98.

challenged rate, and would conclude that competition conclusively does not exist if the alternative is at least 10% more than the challenged rate.¹⁴ Certain transportation alternatives, however, even if more expensive, may constrain rates if they have characteristics that render them more desirable than transportation by rail.

The Board will apply the methodology developed in M&G, and applied in the pending TPI rate case, in order to resolve the question of market dominance here because no better methodology is currently available to the Board to resolve complex cases of market dominance. Thus, to assess whether the rates on the many lanes at issue in this case are being effectively constrained, the transportation alternatives presented by the parties will first be examined to determine if they are feasible from a practical (i.e., physical) standpoint. The limit price will then be calculated for those alternatives that are in fact feasible from a practical standpoint. Because, as noted, just identifying the limit price does not end the inquiry, this limit price will then be compared to the railroad's variable costs of providing the service at issue. If this ratio of the limit price over variable costs (i.e., the "limit price R/VC ratio") exceeds NS's 2011 RSAM figure,¹⁵ it will result in a preliminary conclusion that the alternative cannot exert competitive pressure sufficient to constrain rates effectively. If, in contrast, the limit price R/VC ratio falls below this RSAM figure, it will result in a preliminary conclusion that the competitive alternative effectively constrains the rate at issue. The further the limit price R/VC ratio is above or below the RSAM figure, the stronger the preliminary conclusion that the alternative is either effectively constraining or not effectively constraining the rate governing the issue traffic.¹⁶

¹⁴ See, e.g., DuPont Opening I-14 to I-22. DuPont cites the Board's 2008 DuPont I decision as support for this proposition, asserting that the decision "concluded that a 10% rate disparity after a substantial rail rate increase was sufficient to demonstrate a lack of effective competition." DuPont Opening I-15. DuPont has read this decision too broadly. 2008 DuPont I, slip op. at 7, plainly stated that the Board "considered a number of factors in reaching" the conclusion that trucking did not provide effective competition in that case, only one of which was "the conflicting evidence submitted by the parties regarding the cost difference between rail and truck for shipping" the commodity at issue. Other factors relevant to the Board's market dominance conclusion were the infrequency of truck shipments, the commodity's physical characteristics, customer preferences, and the level of the challenged rate itself. 2008 DuPont I, slip op. at 7-8.

¹⁵ NS's 2011 RSAM figure—covering the 4-year period from 2008-2011—is 275%. See Simplified Standards for Rail Rate Cases—2011 RSAM & R/VC_{>180} Calculations (Simplified Standards 2013), EP 689 (Sub-No. 4), slip op. at 3 (STB served Feb. 11, 2013).

¹⁶ In situations involving multiple proposed alternatives, only the lowest-priced feasible alternative—i.e., the feasible alternative with the lowest limit price and therefore the lowest limit price R/VC ratio—has been utilized in the comparison with the carrier's RSAM figure.

Finally, the question of whether the alternative has any intangible features sufficient to overcome the applicable preliminary conclusion will be considered. For example, if an otherwise uncompetitive alternative provides certain unquantifiable benefits to the shipper, it could be determined that an alternative with a limit price R/VC ratio above the RSAM figure nonetheless effectively exerts market pressure on the railroad sufficient to deter it from charging monopoly prices.¹⁷ Alternatively, if the challenged rail transportation provides certain unquantifiable benefits, it could be determined that an alternative with a limit price R/VC ratio below the RSAM figure nonetheless does not place effective market pressure on the railroad.¹⁸

C. Origin and Destination of Transportation Alternatives

Prior to applying the limit price approach, a preliminary issue must first be addressed regarding what types of transportation alternatives may be considered. For many of the joint-line movements, NS has offered "direct trucking" or transload alternatives involving transportation over the entire length of the movement, rather than just between the origin and destination points on NS's portion, in an effort to demonstrate that it lacks market dominance over the movement. Throughout its pleadings, DuPont contends that such evidence does not constitute evidence of "direct" competition, but rather is evidence of indirect "geographic" competition that is impermissible under Minnesota Power, Inc. v. Duluth, Missabe & Iron Range Railway (DMIR I), 4 S.T.B. 64 (1999), and Minnesota Power, Inc. v. Duluth, Missabe & Iron Range Railway (DMIR II), 4 S.T.B. 288 (1999). As explained in greater detail below, the DMIR decisions hold that in a challenge to a so-called "bottleneck" tariff rate that operates in

¹⁷ See, e.g., M&G, slip op. at 59 (concluding that the proposed direct truck alternative provided advantages over the challenged Apple Grove-Clifton Forge rail transportation because direct trucking generally provides certain customer-related benefits, such as the ability to respond more quickly to customer delivery requests); M&G, slip op. at 37-38 (noting the possibility that direct truck alternatives generally might involve certain intangible benefits vis-à-vis rail transportation, such as increased reliability, better on-time performance, and the provision of certain inventory control benefits to the parties).

¹⁸ See, e.g., M&G, slip op. at 58-59 (concluding that the challenged Apple Grove-Belpre rail transportation provided advantages over the proposed direct truck alternative because the movement's destination was a railcar storage facility and the alternative would have both (a) necessitated significant railcar prepositioning simply for purposes of storage, and (b) foreclosed the possibility of subsequent delivery via truck due to product integrity concerns with more than two transloads); M&G, slip op. at 56 n.254 (noting the possibility that transportation via railcar generally might involve certain intangible benefits vis-à-vis transload alternatives, such as presumed shorter transport times).

combination with a contract rate,¹⁹ evidence of alternative transportation must be between the same precise origin and destination to which the challenged tariff rate applies (i.e., the origin and destination of the bottleneck segment). Otherwise, it is treated as a form of prohibited indirect competition—i.e., geographic competition—which the Board no longer considers in its market dominance inquiry.²⁰

The validity of the DMIR decisions was first called into question in Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., Docket No. NOR 42121, and M&G Polymers USA, LLC v. CSX Transportation, Inc., Docket No. NOR 42123. In those cases, the issue was not addressed for procedural reasons.²¹ In this case, certain evidence presented by both parties conflicts with the DMIR precedent. In contrast to the complainants in M&G and TPI, DuPont on opening properly raised the argument that the Board should disregard transportation alternatives that do not comply with the DMIR decisions.²² Thus, the issue is now squarely before the Board.

¹⁹ In the “bottleneck” line of cases, the Board established the principle that rates governing bottleneck segments (those in which either the origin or destination of the overall movement is served by a single rail carrier) can be independently challenged for reasonableness when the balance of the overall movement is governed by a transportation contract between the shipper and the connecting carrier. See Cent. Power & Light Co. v. S. Pac. Transp. Co., 1 S.T.B. 1059 (1996), clarified, 2 S.T.B. 235 (1997), aff’d sub nom. MidAm. Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999). Again, for 121 of the lanes challenged by DuPont in this case, which are governed by 83 separate rates, NS operates in joint-line service with one or more other railroads. All of these represent rates for bottleneck segments. See DuPont Opening I-2.

²⁰ By way of example, assume a shipper challenges a tariff rate for transportation by one carrier from New York City to Trenton, N.J., where the traffic is then interchanged with a different carrier (which charges a contract rate) for delivery to the shipper’s plant in Washington, D.C. Pursuant to the DMIR decisions, the parties may not submit evidence that the product could be effectively trucked from N.Y.C. to D.C. Although D.C. is the overall movement’s ultimate destination, it is not the destination for purposes of the transportation covered by the challenged tariff rate. Thus, under the DMIR decisions, the parties would need to show the presence (or absence) of effective competition to move the product from N.Y.C. to Trenton.

²¹ See TPI I, slip op. at 10 n.29 (explaining that because the Board’s majority was deciding respondent’s motion to strike on the basis that complainant’s DMIR-related arguments constituted impermissible rebuttal evidence, the majority declined to address “whether DMIR is distinguishable on its facts from the instant case,” whether “DMIR correctly applied [our governing market dominance principles], and, even if it did correctly apply those principles, whether DMIR should be overruled”); M&G, slip op. at 10 n.27 (similar).

²² DuPont Opening I-12 to I-14.

Proper resolution of this issue substantially depends on an analysis of the statutory and regulatory history concerning the distinction between direct and indirect competition, so we begin our inquiry there. We then proceed to a brief review of the DMIR decisions and a presentation of the various arguments put forth by the parties in this case. We then present our analysis.

1. Statutory and Regulatory History of Direct v. Indirect Competition

The Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act) gave the Interstate Commerce Commission (ICC) discretion to establish rules and procedures for determining whether and when a carrier possesses market dominance. See Pub. L. 94-210, § 202(b), 90 Stat. 31 (1976). The ICC's adoption of market dominance rules shortly after passage of the 4R Act limited the market dominance inquiry to evaluating the effects of direct competition on a railroad's ability to set its rates. See Special Procedures for Making Findings of Mkt. Dominance as Required by the R.R Revitalization & Regulatory Reform Act of 1976 (Mkt. Dominance I), 353 I.C.C. 875 (1976), aff'd sub nom. Atchison, Topeka & Santa Fe Ry. v. ICC, 580 F.2d 623 (D.C. Cir. 1978). In Market Dominance I, the ICC concluded that the statute prohibited consideration of anything other than evidence of direct competition, based on the "effective competition . . . for the traffic or movement to which a rate applies" language. 353 I.C.C. at 904 (citing § 202 of the 4R Act). The ICC defined direct competition as transportation alternatives providing "services which directly compete with the service outlined in the tariff under consideration."²³

The Staggers Rail Act of 1980 did not alter the agency's discretionary authority regarding market dominance standards. In another rulemaking following passage of the Staggers Act, the ICC concluded that the statute's definition of market dominance had "a range of possible interpretations which Congress left to the Commission to fix exactly," thereby reversing its position that the agency was precluded by statute from considering anything other than direct competition—i.e., "other carriers transporting the same commodity between the origin and destination to which the challenged rate applies"—in its market dominance inquiry. Mkt. Dominance II, 365 I.C.C. at 128-29. Because indirect competition can sometimes effectively discipline a carrier's tariff rates, Market Dominance II concluded that geographic and product competition should be considered in the market dominance inquiry alongside competition

²³ Mkt. Dominance I, 353 I.C.C. at 904. See also Mkt. Dominance I, 353 I.C.C. at 907 (referring to alternatives offered by other carriers and other modes involving the provision of "transportation services available for moving a particular commodity from . . . the origin area named in the tariff to . . . the named destination area").

involving other “carriers or modes of transportation serving the same origin/destination pair as that for the disputed rate.”²⁴

The ICC Termination Act of 1995 (ICCTA) did not diminish the agency’s discretion regarding its market dominance rules and procedures.²⁵ Thus, in 1998, the Board elected once again to limit the market dominance inquiry to direct competition only.²⁶ While Market Dominance III reached the same result as Market Dominance I, it relied on a different rationale for doing so. In contrast to Market Dominance I, Market Dominance III first concluded that the only form of competition required by statute to be included in the Board’s market dominance inquiry is direct competition.²⁷ That, explained the Board, is because the statute permits, but does not require, the consideration of indirect competition. Mkt. Dominance III, 3 S.T.B. at 946. Employing a balancing test in an effort to meet competing statutory objectives, the Board then concluded that consideration of indirect competition significantly impedes the efficient processing of rate cases. Mkt. Dominance III, 3 S.T.B. at 948. The Board acknowledged that product and geographic competition can be effective competitive constraints on rail pricing, but, in its discretion, chose to balance the interest of exploring every possible form of competition that might constrain a railroad’s rates against the burden, time, and expense of performing such an investigation. Mkt. Dominance III, 3 S.T.B. at 946-48. “On balance,” explained the Board, “there is no question that the scale tips in favor of limiting the market dominance inquiry to the literal statutory requirement.” Mkt. Dominance III, 3 S.T.B. at 949. As a result, the inquiry is

²⁴ Mkt. Dominance II, 365 I.C.C. at 129. See also Mkt. Dominance II, 365 I.C.C. at 132-33 (defining intramodal competition as “competition between two or more railroads transporting the same commodity between the same origin and destination” and intermodal competition as “competition between rail carriers and other modes for the transportation of a particular product between the same origin and destination”).

²⁵ See H.R. Conf. Rep. No. 104-422, at 173 (1995) (stating that while the conference provision would not disturb the existing statutory standard or the current agency regulations concerning the market dominance standard, there was recognition that the agency had broad discretion to revise and supplement its standards and regulations as appropriate).

²⁶ See Mkt. Dominance Determinations—Prod. & Geographic Competition (Mkt. Dominance III), 3 S.T.B. 937, 950 (1998), remanded sub nom. Ass’n of Am. R.R. v. STB, 237 F.3d 676 (D.C. Cir. 2001), reaff’d by Mkt. Dominance Determinations—Prod. & Geographic Competition (Mkt. Dominance IV), 5 S.T.B. 492 (2001), pet. for review denied sub nom. Ass’n of Am. R.R. v. STB, 306 F.3d 1108 (D.C. Cir. 2002).

²⁷ 3 S.T.B. at 946 (citing Mkt. Dominance I and Mkt. Dominance II for the proposition that “the plain language of the statute only requires that we consider alternatives for moving the same product between the same origin and destination points”).

now limited to the consideration of direct competition—i.e., intra- and intermodal alternatives for “transport[ing] the same commodity between the same points.” Mkt. Dominance III, 3 S.T.B. at 937.

2. The DMIR Decisions

The instant controversy involves the Board’s interpretations of “direct” and “geographic” competition announced in a discovery dispute in the DMIR decisions. In that proceeding, Minnesota Power, Inc. (MP) challenged the reasonableness of the rates charged by Duluth, Missabe and Iron Range Railway Company (DMIR) for the transportation of coal from a connection with Burlington Northern and Santa Fe Railway Company (BNSF) at Keenan, Minn., to MP’s Laskin generating facility near Colby, Minn. On May 11, 1999, the Board served a decision that, in part, denied a motion to compel discovery filed by DMIR. DMIR sought documents and information in support of its argument that the principal alternative to DMIR’s service of the issue traffic was existing single-line rail service provided by BNSF from the same Montana and Wyoming mines to MP’s Boswell facility, a BNSF-served power plant, where MP could transload the coal onto trucks for delivery to the Laskin facility. The Board denied the motion on the grounds that the Board had, in Market Dominance III, “limited the market dominance inquiry to an examination of the intra- and intermodal transportation alternatives between the points to which the rate applies.” DMIR I, 4 S.T.B. at 66. Therefore, the Board ruled, any evidence of truck deliveries to Laskin would be relevant only if they originated in Keenan. DMIR I, 4 S.T.B. at 66.

Following a petition for reconsideration filed by DMIR, the Board clarified that the transportation alternative proposed by DMIR constituted improper “geographic” competition, explaining that:

For a separately challengeable bottleneck-segment rate, transportation alternatives between the “same origin and destination points” . . . must necessarily refer to those between the interchange point at which the bottleneck carrier obtains the traffic and the point of delivery.

DMIR II, 4 S.T.B. at 292 n.13. “Because the transportation to which the rate at issue applies is limited to the movement between Keenan and Laskin,” explained the Board, “transportation alternatives involving service to or from other points would constitute geographic competition.” DMIR II, 4 S.T.B. at 292. While DMIR had argued that Market Dominance III envisioned a broader interpretation of the “origin and destination” and that requiring the origin to be a remote

interchange point reached far beyond the Board's rationale in that decision,²⁸ the Board rejected the carrier's argument and reaffirmed its position that the origin and destination for any proposed alternative must directly correlate with the "transportation for which the rate applies," i.e. the origin and destination for the challenged bottleneck segment.

3. Positions of the Parties

NS puts forward a number of arguments in an effort to support its contention that the Board should not follow the DMIR decisions. First, NS argues that prohibiting evidence of so-called "whole-route" competition is illogical because (1) DuPont itself actually avails itself of such alternatives in the real world, and (2) to ignore such competition would be economically irrational. Second, NS argues that the DMIR decisions are inconsistent with Congressional intent because (1) the statute requires consideration of intermodal alternatives while the DMIR decisions prohibit the consideration of whole-route intermodal alternatives, and (2) they ignore the overall Congressional policy that railroad rates should be governed by competitive forces to the maximum extent possible. Third, NS argues that the DMIR decisions represent a misapplication of the agency's market dominance guidelines and do not accord with the definition of geographic competition reflected in past rate cases. Fourth, NS argues that the DMIR decisions are distinguishable from the case at hand. Fifth, NS argues that the DMIR decisions are inherently flawed, and—insofar as their discussions regarding market dominance are concerned—constitute non-binding dicta in any event.²⁹

In response, DuPont first argues that the statute's plain meaning dictates that only alternatives using the same origin and destination as the challenged bottleneck segment may be considered in the Board's market dominance inquiry, and that NS has selectively quoted the statute and its legislative history to bolster its contrary argument. Second, DuPont argues that overturning the DMIR decisions would lead to divergence in treatment of the challenged movement not only in the context of (1) rate reasonableness vs. market dominance, but also in the context of (2) quantitative market dominance vs. qualitative market dominance. Third, DuPont argues that NS's position that whole-route alternatives function to effectively discipline its bottleneck segment rates is premised on an outdated understanding of economics and is contrary to more recent judicial precedent. Fourth, DuPont argues that NS's proposal would be unwieldy and impractical. Fifth, DuPont contends that agency precedent (rulemakings and

²⁸ DMIR argued that under Market Dominance III, alternatives originating at the same mines constituted permissible intermodal, as opposed to impermissible geographic, competition.

²⁹ See generally NS Reply II-B-58 to II-B-91.

cases) does not support NS's position. Sixth, DuPont argues that the DMIR decisions are not distinguishable from the case at hand.³⁰

4. Board Analysis

The DMIR decisions correctly held that whole-route alternatives fall outside the agency's traditional definition of direct competition as set forth in various prior Board decisions. Market Dominance III clearly and unambiguously concluded that the Board's market dominance inquiry is now limited to considering alternatives that directly compete with the "transportation to which [the challenged] rate applies." Since 1976, the agency has consistently defined direct competition as alternatives offered by other carriers or modes involving the provision of "transportation services available for moving a particular commodity from . . . the origin area named in the tariff to . . . the named destination area." Mkt. Dominance I, 353 I.C.C. at 907.³¹ Because whole-route alternatives fall outside the definition of direct competition (adopted in prior Board decisions), and because the Board's market dominance inquiry is now limited to direct competition only, the DMIR decisions correctly applied our current market dominance guidelines to exclude the consideration of such alternatives from our qualitative market dominance analysis.

The exclusion of whole-route alternatives from the market dominance inquiry is consistent with the "legislative directive to process rate complaints more expeditiously and the long-standing Congressional intent that market dominance be a practical determination made without delay." Mkt. Dominance III, 3 S.T.B. at 938. Limiting the inquiry to alternative transportation covering the origin and destination of the bottleneck segment will significantly decrease the burden, time, and expense of performing the market dominance inquiry, consistent with the exclusion of indirect competition under Market Dominance III. Exclusion of whole-route alternatives also serves to harmonize the qualitative market dominance analysis with the quantitative market dominance analysis and the Board's rate reasonableness review, all of which are premised on similar statutory language (i.e., "the transportation to which the rate applies" language).³²

³⁰ See generally DuPont Rebuttal I-48 to I-71.

³¹ See also Mkt. Dominance II, 365 I.C.C. at 129 (describing direct competition as involving "carriers or modes of transportation serving the same origin/destination pair as that for the disputed rate"); Mkt. Dominance III, 3 S.T.B. at 937 (describing direct competition as involving intra- and intermodal alternatives for "transport[ing] the same commodity between the same points").

³² See 49 U.S.C. §§ 10701(d)(1), 10707(a)-(b), 10707(d)(1)(a). In cases involving bottleneck segments (such as the instant one), the Board's quantitative market dominance

(continued . . .)

For the above reasons, consideration of whole-route alternatives will be excluded from the market dominance analysis. NS's various arguments do not demonstrate that such a course is inappropriate or unjustified. First, the reasons set forth in the DMIR decisions and the policy considerations described above outweigh the concerns expressed by NS regarding the practical consequences of excluding whole-route alternatives from our qualitative market dominance analysis. The fact that DuPont avails itself of such alternatives for certain of the challenged movements says nothing about whether these alternatives constitute forms of direct competition—which may be considered under our current market dominance guidelines—or forms of indirect competition—which may not be considered under the current guidelines.

Second, the prohibition on whole-route alternatives initially set forth in the DMIR decisions is consistent with the Board's various (and often conflicting) statutory directives. In Market Dominance III and Market Dominance IV the Board balanced the rail transportation policy directives and, notwithstanding the guidance of 49 U.S.C. § 10101(1) and the directives of 49 U.S.C. § 10707(a), decided to prohibit consideration of indirect forms of competition. Mkt. Dominance III, 3 S.T.B. at 948.³³ This same concern supports the conclusion reached by the Board in the DMIR decisions that whole-route alternatives do not constitute a form of direct competition for bottleneck segments and therefore should be excluded from the qualitative market dominance inquiry.

Third, as the above discussion makes clear, whole-route alternatives fall outside the agency's traditional definition of direct competition as consistently set forth in the agency's various market dominance decisions dating back almost 40 years. NS seeks to undermine this fact by arguing that two prior ICC and Board decisions included consideration of whole-route alternatives in their analysis of direct competition rather than their analysis of indirect competition.³⁴ Both cases cited by NS were decided under market dominance regimes that

(... continued)

analysis and rate reasonableness review are limited to the challenged bottleneck segments at issue. Allowing evidence of whole-route alternatives would render the qualitative market dominance analysis inconsistent with the other components of the Board's review, given that the "transportation to which the rate applies" language for purposes of the former would necessarily have to be read more broadly to include the entire through route.

³³ Indeed, Market Dominance IV, 5 S.T.B. at 497-99, specifically considered all of the relevant goals of the Rail Transportation Policy set forth in 49 U.S.C. § 10101 and concluded that the exclusion of indirect competition represented an appropriate balance of competing statutory directives.

³⁴ See NS Reply II-B-78 to II-B-80.

included consideration of both forms of competition.³⁵ Despite NS's assertion to the contrary, neither case ever "held that . . . whole-route competitive alternatives analogous to the whole-route truck competition at issue here"³⁶ constituted direct competition. Proper characterization of those alternatives was neither a contested issue in those cases nor necessary to the rationale upon which those decisions were based.³⁷

D. Application to This Case

In the qualitative market dominance inquiry, the complainant bears the burden of establishing the absence of effective competition from other rail carriers or modes of transportation for the traffic to which the challenged rate applies.³⁸ DuPont demonstrates in its

³⁵ The first case cited by NS, Dayton Power & Light Co. v. Louisville & Nashville Railroad, 1 I.C.C. 2d 375 (1985), was decided at a time—between Market Dominance II in 1981 and Market Dominance III in 1998—when the agency considered both direct and indirect competition in rail rate cases. While the second case cited by NS, CF Industries, Inc. v. Koch Pipeline Co., 4 S.T.B. 637 (2000), was decided after Market Dominance III, it was decided under the Board's pipeline rate jurisdiction. In pipeline cases, while the Board is "guided generally" by its rail market dominance guidelines, it concluded in CF Industries that the concerns which led it to prohibit consideration of indirect competition in rail rate cases were not present with respect to pipeline rate cases. CF Industries, 4 S.T.B. at 641-42. Thus, the Board considered both direct and indirect competition in CF Industries just as it had in Dayton Power.

³⁶ NS Reply II-B-78 (emphasis added).

³⁷ As a result, it is immaterial that the Board did not discuss Dayton Power in the DMIR decisions.

Furthermore, NS's argument that the DMIR decisions are distinguishable from the case at hand is unpersuasive. The fact that the proffered alternative at issue in those decisions (rail from the mines to an interchange point at Boswell where the coal would be transloaded onto truck) was of the same "type" as what the Board would have permitted (rail from the mines to an interchange point at Keenan where the coal would be transloaded onto truck) was irrelevant to the reasoning of the DMIR decisions. The logic of those decisions would have equally prohibited alternatives involving the direct trucking of coal from the mines to Laskin (given that the scope of potential alternatives was limited to those involving service from and to the points of the challenged bottleneck segment only).

³⁸ See 49 U.S.C. § 10707. See also CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc., 3 S.T.B. 196, 266 (1998); Gov't of the Territory of Guam v. Sea-Land Serv., Inc., WCC 101, slip op. at 5-6 (STB served Feb. 2, 2007) ("In rail cases,

(continued . . .)

opening evidence, and NS concedes on reply, that no effective intermodal or intramodal competition exists for 25 rates governing 39 of the challenged movements.³⁹ The parties disagree on whether effective intermodal competition exists for 75 rates governing the other 99 movements challenged by DuPont. The parties contest whether effective intramodal competition exists for two of the challenged rates.⁴⁰

The majority of the evidence submitted by the parties in this case—relating primarily to the presence or absence of effective competitive alternatives for the challenged rates—was filed under seal and is competitively sensitive. Pursuant to our protective order, this information has been shared only with outside counsel and experts; the marketing employees of neither DuPont nor NS have been allowed to access this information for any purpose. In light of the prevalence of competitively sensitive information in this case, our analysis of the record in the highly confidential market dominance appendix will initially be provided only to the parties' outside counsel. Given the importance of guiding party conduct in future cases and educating the public, however, we will release a public version of the market dominance appendix after DuPont and

(... continued)

because a finding of market dominance is a threshold jurisdictional requirement, we place the burden of proof on the shipper to show that there is not effective competition.”).

³⁹ See DuPont Opening II-B-1 to II-B-172; NS Reply, Exhibit II-B-1 (indicating that “NS does not contest market dominance” for 39 of the challenged lanes). The following 25 separate rates govern solely uncontested movements: Belle-Chicago (AHM), Belle-Chicago (AQM), Belle-Chicago (DMF), Belle-East St. Louis (DMS), Belle-East St. Louis (glycolic acid), Belle-East St. Louis (MMF), Belle-Streator (AHM), Belle-Streator (DMF), Birmingham-McIntosh (sulfuric acid), Buffalo-Edgemoor (chlorine), Charleston-Edgemoor (chlorine), East St. Louis-Royce (DFE), Edgemoor-Riverwood (titanium dioxide), Edgemoor-Rouses Point (titanium dioxide), Edgemoor-East St. Louis (titanium tetrachloride), Edgemoor-Streator (titanium dioxide), Edgemoor-Wabash (titanium dioxide), Lemoyne-Giant (WFL), Loudon-Brathwaite (PDO), Loudon-Chattanooga (PDO), McIntosh-Lemoyne (sodium caustic), McIntosh-Mobile (chlorine), New Orleans-Dragon (DFE), New Orleans-Gracewood (sulfur trioxide), and Reybold-Fort Mill (sulfuric acid). The following six rates govern both contested and uncontested movements: Belle-Chicago (DME), Belle-Chicago (DMS), Belle-East St. Louis (DMF), Charlotte-Fort Mill (sulfuric acid), Edgemoor-Chicago (titanium dioxide), and New Orleans-Greenville (polyethylene).

⁴⁰ See NS Reply II-B-8 to II-B-9; DuPont Rebuttal II-B-3 to II-B-6.

NS have been given the opportunity to propose redactions of any confidential and highly confidential information contained therein.⁴¹

Based upon the approach described above, this decision concludes that NS lacks market dominance over the following four rates: Chicago-Edgemoor (petroleum coke, NS cars); East St. Louis-Edgemoor (petroleum coke, NS cars); East St. Louis-Edgemoor (petroleum coke, private cars); and Louisville-Lafayette (muriatic acid).⁴² These rates all have limit price R/VC ratios that fall below NS's RSAM figure, and there are no intangible features that might otherwise suggest market dominance. In contrast, this decision concludes that NS has market dominance over the remaining rates, many of which have limit price R/VC ratios above NS's RSAM figure, and for which no other factors demonstrate that the alternatives, even if feasible, are placing competitive pressure on NS adequate to constrain rates effectively.

RATE REASONABLENESS STANDARDS

A. Constrained Market Pricing

The Board's general standards for judging the reasonableness of rail freight rates are set forth in Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d 520 (1985), aff'd sub nom. Consol. Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987), as modified in Major Issues in Rail Rate Cases (Major Issues), EP 657 (Sub-No. 1) (STB served Oct. 30, 2006), aff'd sub nom. BNSF Ry. v. STB, 526 F.3d 770 (D.C. Cir. 2008), and Rate Regulation Reforms (Adopted Rate Regulation Reforms), EP 715 (STB served July 18, 2013), appeal docketed sub nom. CSX Transp., Inc. v. STB, No. 13-1230 (D.C. Cir. July 29, 2013). These guidelines adopt a set of pricing principles known as "constrained market pricing" (CMP). The objectives of CMP can be simply stated. A captive shipper should not be required to pay more than is necessary for the carrier involved to earn adequate revenues. Nor should it pay more than is necessary for efficient service. And a captive shipper should not bear the cost of any facilities or services from which it derives no benefit. Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d at 523.

CMP contains three main constraints on the extent to which a railroad may charge differentially higher rates on captive traffic. The revenue adequacy constraint ensures that a

⁴¹ No later than 30 days from the effective date of the updated version of this decision, DuPont and NS each shall prepare and submit a version of the highly confidential market dominance appendix that specifically identifies proposed redactions of any confidential and highly confidential information contained therein.

⁴² NS also lacks market dominance over the Charlotte-Fort Mill (sulfuric acid) rate because the rate's R/VC ratio falls below the jurisdictional threshold. See supra n.6.

captive shipper will "not be required to continue to pay differentially higher rates than other shippers when some or all of that differential is no longer necessary to ensure a financially sound carrier capable of meeting its current and future service needs." Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d at 535-36. The management efficiency constraint protects captive shippers from paying for avoidable inefficiencies (whether short-run or long-run) that are shown to increase a railroad's revenue need to a point where the shipper's rate is affected. Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d at 537-42. The SAC constraint protects a captive shipper from bearing costs of inefficiencies or from cross-subsidizing other traffic by paying more than the revenue needed to replicate rail service to a select subset of the carrier's traffic base. Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d at 542-46. As stated, DuPont seeks relief under the SAC constraint.

B. SAC Test

A SAC analysis seeks to determine whether a complainant is bearing the cost of any inefficiencies or the cost of any facilities or services from which it derives no benefit; it does this by simulating the competitive rate that would exist in a "contestable market," i.e., a market that is free from barriers to entry. The economic theory of contestable markets does not depend on a large number of competing firms in the marketplace to ensure a competitive outcome. Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d at 528. In a contestable market, even a monopolist must offer competitive rates or lose its customers to a new entrant. Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d at 528. In other words, contestable markets have competitive characteristics that preclude monopoly pricing.

To simulate the competitive price that would result if the market for rail service were contestable, the costs and other limitations associated with entry barriers must be omitted from the SAC analysis. Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d at 529. This removes any advantages the existing railroad would have over a new entrant that create the existing railroad's monopoly power. A SARR that could serve the traffic at issue if the rail industry were free of entry barriers is therefore hypothesized. Under the SAC constraint, the rate at issue cannot be higher than what the SARR would need to charge to serve the complaining shipper while fully covering all of its costs and earning a reasonable return on investment. This analysis produces a simulated competitive rate against which we judge the challenged rate. Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d at 542.

To make a SAC presentation, a shipper designs a SARR specifically tailored to serve an identified traffic group. Using information on the types and amounts of traffic moving over the defendant's rail system, the complainant selects a subset of that traffic (including its own traffic to which the challenged rate applies) that the SARR would serve.

Based on the traffic group to be served, the level of services to be provided, and the terrain to be traversed, a detailed operating plan must be developed for the SARR. Once an operating plan is developed that would accommodate the traffic group selected by the complainant, the system-wide investment requirements and operating expense requirements (including such expenses as locomotive and car leasing, personnel, material and supplies, and administrative and overhead costs) must be estimated. The parties must provide appropriate documentation to support their estimates.

It is assumed that investments normally would be made prior to the start of service, that the SARR would continue to operate into the indefinite future, and that recovery of the investment costs would occur over the economic life of the assets. The Board's SAC analyses, however, are limited to a finite period of time and examine the revenue requirements for the SARR based on the operating expenses that would be incurred over that period and the portion of capital costs that would need to be recovered during that period. A computerized discounted cash flow (DCF) model simulates how the SARR would likely recover its capital investments, taking into account inflation, Federal and state tax liabilities, and a reasonable rate of return. The annual revenues required to recover the SARR's capital costs (and taxes) are combined with the annual operating costs to calculate the SARR's total annual revenue requirements.

The revenue requirements of the SARR are then compared to the revenues that the defendant railroad is expected to earn from the traffic group, presuming that the revenue contributions from non-issue traffic are based on the revenues produced by the current rates. Traffic and rate level trends for that traffic group are forecast into the future to determine the future revenue contributions from that traffic.

The Board then compares the revenue requirements of the SARR against the total revenues to be generated by the traffic group over the SAC analysis period. A present value analysis is used that takes into account the time value of money, netting annual over-recovery and under-recovery as of a common point in time. If the present value of the revenues that would be generated by the traffic group is less than the present value of the SARR's revenue requirements, then the complainant has failed to demonstrate that the challenged rate levels violate the SAC constraint. If the present value of the revenues from the traffic group exceeds the present value of the revenue requirements of the SARR, then the Board must decide what relief to provide to the complainant by allocating the revenue requirements of the SARR among the traffic group and over time.

NS MOTION TO STRIKE

On July 18, 2013, DuPont submitted an errata to its rebuttal evidence.⁴³ On July 25, 2013, NS filed a motion to strike the errata as an unauthorized new evidentiary filing in violation of the Board's rules and procedures. DuPont replied to the motion to strike on August 1, 2013. The motion will be granted.

In its motion to strike, NS argues that the errata constitutes prejudicial new evidence that should not have been filed without prior Board authorization. NS notes that DuPont filed the errata more than three months after filing its rebuttal, and more than a month after DuPont filed its final brief.⁴⁴ DuPont responds that the errata simply fixes errors and identifies the downstream impact of those corrections on the SAC analysis. Thus, according to DuPont, the pleading is correctly classified as an errata, does not constitute impermissible new evidence, and is not prejudicial to NS.⁴⁵

As an initial matter, the Board routinely allows the correction of minor technical errors in SAC rate cases.⁴⁶ Given the size and complexity of such cases—in which thousands of data points are submitted—a standard that allows parties to correct minor errors is both appropriate and necessary. However, the flexibility to correct minor errors does not mean that major changes to an operating plan post-rebuttal are proper. See Intermountain Power Agency v. Union Pac. R.R., NOR 42127, slip op. at 3 (STB served Apr. 4, 2012) (holding that “a technical error, brought on by the complainant’s own mistake, is [not] grounds for it to modify a core part of its evidence”).

Taken as a whole, DuPont’s errata falls into this latter category. Acceptance of the filing would result in major and significant changes to the evidence presented by DuPont both on opening and rebuttal. While DuPont characterizes the proposed changes to its operating plan as merely technical, it concedes that the proposed changes in the errata would reduce the estimated

⁴³ This filing was DuPont’s second errata to its rebuttal evidence. DuPont previously filed an errata on June 10, 2013, which has been accepted into the record.

⁴⁴ NS Motion to Strike 2.

⁴⁵ DuPont Reply to Motion to Strike 1-2.

⁴⁶ See, e.g., AEP Tex. N. Co. v. BNSF Ry. (AEP), NOR 41191 (Sub-No. 1), slip op. at 76 n.88 (STB served Sept. 10, 2007) (noting Board acceptance of minor change in yard acreage submitted in errata filing), reconsideration denied (STB served May 15, 2009), vacated on other grounds and remanded sub nom. AEP Tex. N. Co. v. STB, 609 F.3d 432 (D.C. Cir. 2010).

excess revenue of its model by \$447.8 million.⁴⁷ Given the cumulative significance of the changes proposed in the errata, to allow DuPont's filing at this point would be improper.

The bulk of the changes proposed in the errata stem from DuPont's miscalculation regarding car classification counts.⁴⁸ On opening, DuPont inexplicably omitted car classification services for overhead traffic and provided no hump yards.⁴⁹ On rebuttal, in response to NS's reply pointing out this oversight, DuPont provided car classification counts and provided for certain facilities based on those numbers, none of which were hump yards. The errata acknowledges that DuPont miscalculated the car classification counts (by 77% for main yards and 54% for all yards), and essentially now asks for a third chance to include the proper facilities necessitated by its newly proposed car classification figures. In the errata, DuPont proposes for the first time to include hump yards in its operating plan, going from zero hump yards in its rebuttal evidence to seven hump yards in the errata.⁵⁰ DuPont argues that the addition of these seven hump yards is consistent with the reasoning set forth in its rebuttal that a hump yard would not be required until a threshold of 900 cars per day were crossed.⁵¹ DuPont concedes that it incorrectly concluded on rebuttal, based on its erroneous car classification numbers, that no hump yards would be needed. Based on the new car classification numbers set forth in the errata, DuPont now asserts that seven hump yards are required because the 900-cars-per-day threshold has been met at those locations.⁵²

⁴⁷ DuPont Errata to Rebuttal Evidence 4.

⁴⁸ Car classification counts may be used to determine the necessary amount of facilities and car classification services (e.g., yard crews, departure tracks, and switch locomotives).

The changes to DuPont's operating plan proposed in the errata that are necessitated by the new car classification counts include the addition of hump yards and classification tracks, as well as the modification of various cycle times, operating statistics, operating expenses, road property investment, DCF model results, and MMM model results.

⁴⁹ Hump yards are major freight classification facilities on rail networks that have an important impact on how the network operates. At hump yards, rail carriers switch and block trains; that is, they pull cars out of arriving trains and then reorganize the cars into new departing trains to facilitate shipments reaching their final destination.

⁵⁰ DuPont Errata to Rebuttal Evidence 2.

⁵¹ DuPont Reply to Motion to Strike 3.

⁵² DuPont Reply to Motion to Strike 3. It appears that DuPont did not apply this reasoning in its rebuttal. While the rebuttal does state that a hump yard would be required when the 900-cars-per-day threshold is surpassed, NS notes (and DuPont concedes) that there is one instance in the rebuttal where that threshold was met based on the car classification count

(continued . . .)

This new evidence, which would fundamentally change DuPont's basic case, comes too late to be considered, for its acceptance at this point would unduly prejudice NS. DuPont's claim that the changes proposed in the errata are not unduly prejudicial to NS presumes that in its final brief, NS could have identified DuPont's technical error on its own, modified the entire SAC analysis accordingly, and responded to the argument it theorized DuPont would have made based on the results of that analysis. This is an unrealistic burden to impose.

DuPont further argues that, as part of its authority to fix technical errors, the Board itself could have made the same changes to the SARR that the errata provides, and DuPont claims that its filing is simply assisting the Board in that endeavor in this complex SAC analysis. The Board's authority to make its own adjustments to parties' operating plans is well-established.⁵³ However, the magnitude and scope of the corrections proposed by the errata are, when taken together, far more significant and wide-reaching than those made by the Board in prior cases.⁵⁴

For the reasons stated above, NS's motion to strike DuPont's errata filing will be granted.

(... continued)

numbers set forth therein, yet DuPont nonetheless elected not to include that hump yard. NS Motion to Strike 7; DuPont Reply to Motion to Strike 3.

⁵³ See BNSF Ry. v. STB (BNSF 2006), 453 F.3d 473, 485 (D.C. Cir. 2006) (affirming Board's decision to add certain capital improvements to shipper's operating plan); Balt. & Ohio R.R. v. United States, 386 U.S. 372, 430 (1967) (agency "is not the prisoner of the parties' submissions" and must "weigh alternatives and make its choice according to its judgment how best to achieve and advance the goals of the National Transportation Policy") (Brennan, J., concurring).

⁵⁴ As noted above, the bulk of the changes proposed in the errata stem directly from DuPont's miscalculation regarding car classification counts. DuPont also proposes certain changes that are unrelated to this miscalculation, including the addition of a small number of trains and the modification of certain maximum train speeds, cable lengths for lighting, loss and damage calculations, and yard acreage. While these may be the type of changes that the Board might accept in errata in appropriate circumstances, we need not reach this issue here given the cumulative significance of the other changes proposed in the errata (i.e., those directly related to DuPont's miscalculation regarding car classification counts).

STAND-ALONE COST ANALYSIS

Set forth below is the Board's analysis of the SAC evidence presented in this case. The evidence demonstrates that the challenged rates do not exceed the level permitted by the SAC test. The more significant issues are discussed in this decision, with more technical issues described in the appendices.

A. Operating Expenses

1. Operating Plan

How a SARR would operate influences both its configuration and annual operating expenses. AEPCO, slip op. at 16. Although the operating plan must be able to meet the transportation needs of the traffic to be served, it need not match the existing practices of the defendant railroad, as the objective of the SAC test is to determine what it would cost to provide the service with optimal efficiency. The assumptions used in the SAC analysis, including the operating plan, nonetheless must be realistic, i.e., consistent with the underlying realities of real-world transportation. Ariz. Elec. Power Coop. v. BNSF Ry. (AEPCO), NOR 42113, slip op. at 16 (STB served Nov. 22, 2011), appeal docketed sub nom. Ariz. Elec. Power Coop. v. STB, No. 12-1246 (D.C. Cir. June 8, 2012).

In this case, DuPont and NS submitted competing operating plans that detail how the SARR would handle the traffic group. Both use the RTC model to determine the feasibility of the DRR's operating plan and develop key operating characteristics of the SARR.

The Board will adopt the NS operating plan because DuPont's operating plan is not workable. The primary deficiency in DuPont's operating plan is the absence of a significant number of trains needed to carry the selected traffic group—including a large percentage of DuPont's own issue traffic. While this fundamental shortcoming is sufficient to undermine the overall workability of the DuPont operating plan, it is not the only issue. DuPont's plan does not provide complete service for the trains that it does carry, including a lack of facilities for serving and interchanging local traffic, and for the blocking of trains to ensure that carload shipments are delivered to their final destination. These two problems, the missing trains and the service issues, are more significant than any of the other issues associated with either party's operating plan.⁵⁵ Due to these specific deficiencies in DuPont's evidence, we accept NS's operating plan.

⁵⁵ The NS operating plan is not without its own flaws. For example, DuPont alleges that the NS plan involves certain instances of routing the DRR's traffic in a circuitous manner, and at

(continued . . .)

Accordingly, we need not determine how the other shortcomings in DuPont's evidence would affect the Board's analysis of the DuPont operating plan.

a. Missing Trains

DuPont's operating plan is based on a train selection process that sought to identify trains in NS's train event file that traveled over the DRR during the Base Year.⁵⁶ According to NS, in conducting this process, DuPont failed to capture 35,699 Base Year trains that "both transported DuPont's selected traffic and moved between multiple points (or traveled entirely) on the DRR."⁵⁷ NS contends these trains are needed to provide uninterrupted on-SARR service for 725,661 carloads of the DRR's selected traffic, which includes 76% of DuPont's issue traffic.⁵⁸ On rebuttal, DuPont argues that its original operating plan did, in fact, account for all of the trains necessary to handle the DRR's traffic,⁵⁹ but DuPont nonetheless adds approximately 7,500

(... continued)

least one instance of a reroute external to the SARR. The NS operating plan, however, does provide the facilities and trains necessary to serve the issue traffic.

Two additional issues discussed specifically in DuPont's Brief regard NS's use of an average week as opposed to a peak week in its RTC model, and an overstatement of foreign train crossings that is based on evidence purportedly not suitable for litigation. DuPont Brief 47-48. We note that the peak week issue is much less problematic here than in previous cases due to the number of commodities moved by the DRR. For instance, in cases involving a large percentage of coal in the traffic group, there are certain times of the year when coal demand is higher, and traffic levels correspondingly increase. The diversity of commodities here dampens the effect of seasonal volume changes in individual commodity groups. We also note that the use of an average week by NS, as opposed to a peak week, actually results in lower costs (associated with an average volume as opposed to a peak week volume), and therefore lower allowable revenues. We agree that there are problems with NS's foreign train crossing evidence, in that priority is given to foreign trains over all DRR traffic. That is, every time a foreign train and a DRR train cross routes, the DRR train must wait until the foreign train is through. As a result, NS's operating plan unnecessarily slows down operations on the DRR, thus increasing expenses. But the magnitude of this problem does not rise to the level of those discussed above with respect to DuPont's operating plan.

⁵⁶ NS Reply III-C-9 to III-C-12.

⁵⁷ NS Reply III-C-13 to III-C-14.

⁵⁸ NS Reply III-C-14, III-C-20.

⁵⁹ DuPont Rebuttal III-C-7 to III-C-22.

trains to the DRR's train list.⁶⁰ DuPont states that these new trains are added mainly as a result of a coding error in its opening evidence, but several are local trains servicing issue traffic that NS identified on reply.⁶¹ NS contends that, on rebuttal, DuPont made no effort to account for all of the missing trains that were identified in the workpapers NS provided to both DuPont and the Board.⁶²

Neither party does a particularly good job explaining the process that it followed in compiling the DRR's train list. Despite DuPont's implicit concession on rebuttal that its train list should be revised, however, DuPont nonetheless failed to do so on a consistent basis, ultimately rendering its list unreliable. The trains DuPont added on rebuttal are limited to the three specific examples of missing trains that NS discussed in its reply narrative, but DuPont neither includes any trains from NS's workpapers beyond those cited examples nor explains why it does not need to do so. DuPont adopts the examples of the missing trains, implicitly acknowledging the error in its original methodology, but does not add the much larger subset of trains that those examples represent. And as NS points out, a list of those specific trains was provided in its reply evidence.⁶³ As a result, even accepting the trains added on rebuttal, DuPont's operating plan does not provide complete service for approximately 33% of the issue traffic, as well as a large portion of the remainder of the traffic group.

The trains that DuPont failed to add are largely local trains, which are important to an effective rail network. Local trains move shipments between yards and those shipments' origins, destinations, or both. Without local trains, a railroad could not pick up or deliver shippers' goods. DuPont failed to submit an operating plan for the DRR that would provide for full service from each specific origin, through the network, and to each specific destination for the selected traffic group. Due to the fact that even after the addition of an estimated 7,500 missing trains in DuPont's rebuttal, DuPont's operating plan still does not provide complete on-SARR service for approximately 33% of the issue traffic, as well as a large portion of the remainder of the traffic group, the evidence that follows from that plan is also defective. This includes the RTC analysis as well as the operating statistics that flow from that analysis.

⁶⁰ DuPont Rebuttal III-C-25 to III-C-26.

⁶¹ DuPont Rebuttal III-C-25 to III-C-26. DuPont's rebuttal indicates 699 trains were added to serve the issue traffic, while the workpapers show that only 622 were added.

⁶² NS Brief 21 (citing NS Reply, WP "DRR_TRAIN_ANALYSIS.xlsx").

⁶³ NS Brief 21 (citing NS Reply WP "DRR_TRAIN_ANALYSIS.xlsx").

DuPont argues that any shortcomings in its train counts are due to flaws and deficiencies in the traffic data supplied by NS in discovery.⁶⁴ NS disputes this claim, arguing that the flaws are attributable to errors in the methodology DuPont used to develop its train selection and car classification.⁶⁵ We believe that the primary cause of DuPont's deficient train counts is errors in its selection methodology. Unlike prior SAC cases that have focused on unit-train coal service, the DRR has a high percentage of carload traffic. DuPont's plan does not account sufficiently for the fundamentals of carload transportation and the need to move individual shipments to their specific locations. While DuPont argues that it was following Board precedent by not straying too far from the incumbent's train operations,⁶⁶ NS has demonstrated that DuPont's methodology overlooks the inclusion of many vital local trains.

Furthermore, DuPont was aware of the alleged deficiencies in NS's production but never sought to obtain what it now claims was the proper data through a motion to compel.⁶⁷ Nor did DuPont confirm that the DRR was capable of delivering its own issue traffic from the stated origin to the stated destination—a threshold task of any SAC presentation. On rebuttal, DuPont implicitly acknowledges this shortcoming by adding some, but not all, of the missing trains necessary to serve the issue traffic.

b. Service Issues

DuPont's operating plan also contains many service issues. NS asserts that the operating plan presented by DuPont on opening did not fully account for the time and physical facilities necessary to provide local train service in connection with the DRR's merchandise traffic,⁶⁸ and contained no car classification or blocking plan for the DRR's three million carloads of freight traffic.⁶⁹ On rebuttal, DuPont has agreed to adopt NS's proposed additional lead tracks to service local traffic,⁷⁰ and acknowledges that it "did not provide fully for required yard switching

⁶⁴ DuPont Rebuttal III-C-14 to III-C-16.

⁶⁵ NS Brief 34-36.

⁶⁶ DuPont Rebuttal III-C-4.

⁶⁷ DuPont Rebuttal III-C-14.

⁶⁸ NS Reply III-C-65 to III-C-66.

⁶⁹ NS Brief 16.

⁷⁰ DuPont Rebuttal III-B-3; DuPont Rebuttal, Electronic WPs "DUPONT RR Route Miles Rebuttal Grading.xlsx" & "DRR Rebuttal Sticks."

activity” necessary to serve the DRR’s carload traffic.⁷¹ But even with these changes to address its understatement of classification tracks, yard crews, and yard locomotives, DuPont’s plan is still deficient because it failed to conduct a proper car classification count.

In an effort to correct these admitted understatements, DuPont for the first time on rebuttal developed its own car classification counts from the car event data provided by NS in discovery.⁷² NS argues that the rebuttal miscalculates these counts and therefore undersizes the necessary facilities.⁷³ We have reviewed NS’s critique of the DuPont rebuttal car classification counts and agree that DuPont’s calculations are substantially understated. Furthermore, while DuPont has alleged that NS’s own car classification counts are unsupported and unrealistic,⁷⁴ we have reviewed the NS calculations and conclude that its car counts are reasonable. One indicator of the reasonableness of NS’s count is that both the total number of cars and the ratio of empty to loaded cars appear to be fairly close to the numbers found on the ATC traffic files.

Moreover, NS has demonstrated that certain activities and facilities that are essential to the functioning of a railroad the size of the DRR providing carload service—eight hump yards, most notably—are not present in DuPont’s operating plan. DuPont argues that it is adopting NS’s historical blocking plan, but fails to provide the same facilities NS uses to block and interchange traffic. Moreover, the DRR, later in the analysis period, will carry much more traffic than the current day NS. DuPont’s version of the DRR would eventually handle almost 50% more traffic volume than that of NS in 2010.⁷⁵ But DuPont has not adequately explained how it would effectively move this increased volume of traffic with fewer facilities than the current NS system serving a reduced level of traffic. And, although DuPont claims that it provides adequate dwell times for servicing local traffic,⁷⁶ our analysis of DuPont’s RTC model does not show trains stopping at the necessary interchanges. DuPont’s service plan on opening was insufficient, and though some changes were made on rebuttal—such as an effort to develop a new car classification count and the addition of some classification tracks, yard crews, and yard locations—DuPont’s plan still fails to provide adequate service to DRR’s customers.

⁷¹ DuPont Rebuttal III-C-121.

⁷² DuPont Rebuttal III-C-126.

⁷³ NS Brief 24.

⁷⁴ DuPont Rebuttal III-C-122.

⁷⁵ NS Brief 3-4.

⁷⁶ DuPont Rebuttal III-C-11. Dwell times represent the amount of time a train must remain at any given location to perform whatever function is required of it at that location (e.g., dropping off or picking up individual cars).

c. MultiRail

MultiRail computer software is a modeling tool that generates car classification and blocking service plans for a selected traffic group, based upon the characteristics of the traffic, the railroad's network configuration, and customer service requirements.⁷⁷ Operating experts are capable of developing the costs for such blocking train service plans without the assistance of software, but the use of software like MultiRail can be used to facilitate this process. MultiRail is used to help develop a comprehensive blocking and train service plan, which then establishes the requirements for the network of yards and other facilities necessary to serve the selected traffic. But it does not replace the Board's traditional RTC simulation that must still be run to confirm the feasibility of the operating plan developed, in part, using the MultiRail software. The Board has allowed the use of MultiRail to create blocking plans in other types of proceedings,⁷⁸ and we conclude that its use here is permissible.

Much of DuPont's complaint about NS's operating plan relates to NS's use of MultiRail. DuPont argues that the use of MultiRail is unsupported, infeasible, unrealistic, unnecessary, and violates fundamental SAC principles.⁷⁹ Furthermore, DuPont contends that it is inappropriate for NS to propose an entirely new operating plan on reply.⁸⁰ DuPont is correct that, in most circumstances, the Board would require the defendant in a SAC case to make any necessary corrections to the complainant's opening evidence rather than submitting something entirely new on reply, to avoid having operating plans so different as to impede comparison. See, e.g., Gen. Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases, 5 S.T.B. 441, 446 (2001)

⁷⁷ See NS Reply WP "MultiRail Freight Edition." On January 25, 2013, NS filed a petition asking the Board to clarify that NS was not obligated to bear the cost of providing DuPont with certain licenses or training for the MultiRail software that NS used in developing its reply evidence. NS stated that it used MultiRail to develop carload blocking and train service plans for the DRR. According to NS, it had arranged for DuPont to have cost-free access to a read-only version of MultiRail, but NS was unwilling to underwrite the cost of a full read-write version of MultiRail for DuPont's use. The Board denied the petition as moot when DuPont no longer sought a license for the MultiRail program. E.I. DuPont de Nemours & Co. v. Norfolk S. Ry. (MultiRail Decision), NOR 42125 et al. (STB served Mar. 27, 2013), slip op. at 2 (noting that the Board need not reach the question of whether NS was "required to bear the cost of providing Complainants with licensing and training for a full read-write version of MultiRail").

⁷⁸ See NS Reply III-C-158 n.245.

⁷⁹ DuPont Brief 33-47.

⁸⁰ DuPont Rebuttal III-C-65.

(explaining that "a railroad's SAC evidence should be limited to addressing deficiencies in the complaining shipper's evidence"). Here, however, DuPont's operating plan on opening included no blocking and classification at intermediate yards.⁸¹ Thus, on this issue, there was nothing for NS to correct on reply. To provide this essential part of the operating plan for a predominantly carload system, NS needed to supply its own analysis.

DuPont also claims that MultiRail is disconnected from reality and violates SAC principles because it utilizes train consists that are different from those provided by NS in the real world.⁸² However, the mix of traffic will not remain the same as in NS's real world consists because the diverse commodity groups carried by the SARR are projected to have different volume growth rates as the number of shipments increases throughout the analysis period. In prior cases involving predominantly trainload traffic and fewer commodity types, developing trains for higher traffic volumes was a far simpler task. Here, with a sizeable volume of carload service, trains must be built, conducted to interim locations (sometimes in multiple instances) to be broken apart and reconfigured, and individual cars must be picked up at their origins and delivered to their final destination. Compared with unit-train coal service and the prior use of merchandise traffic delivered on a through basis (which does not require as extensive car classification facilities and services), the DRR's intended service is much more involved. Thus, the complexity associated with the volume of carload traffic on the DRR suggests that use of a blocking and train services model such as MultiRail can be appropriate. This is not to suggest that a program such as MultiRail must be used to develop a SAC presentation involving carload traffic, only that it can be utilized in SAC proceedings such as the one at hand.

DuPont also argues that the evidence developed by MultiRail is unsupported and unverifiable because NS has not submitted the MultiRail software as part of its evidence.⁸³ However, as explained in MultiRail Decision, slip op. at 3:

[T]he Board relies on each party to make its own case and critique the other party's case. Should the Board decide to rely on a certain type of evidence . . . the fact that the Board does not have a particular software program does not mean we would be unable to evaluate that evidence.

⁸¹ DuPont Rebuttal III-C-121; NS Brief 23.

⁸² DuPont Rebuttal III-C-67 to III-C-71. A train consist is the make-up and order of the engines and cars within the train.

⁸³ DuPont Brief 40-44.

While the Board does not have the MultiRail software, we are able to analyze its inputs and outputs just as we would if the blocking and train service plans were developed by operating experts without the use of software. As NS notes,⁸⁴ DuPont's rebuttal cites many instances where DuPont believes NS erred in utilizing MultiRail, undercutting the argument that the evidence cannot be analyzed. Furthermore, NS, like litigants in prior cases, must run its operating plan through the RTC software to develop its operating statistics. The output from MultiRail is used as the input for the RTC, a program that the Board can and does review.

DuPont further argues that NS itself no longer uses MultiRail to develop its real-world operating plan, having shifted to an internal, next-generation system.⁸⁵ But NS presented evidence showing that MultiRail is a tool commonly used by railroads to plan their day-to-day operations.⁸⁶ Thus, MultiRail is one acceptable system to use for car blocking and classification.

DuPont makes several further arguments as to why the Board should not accept the use of MultiRail. For example, it contends that there are problems with proper blocking of cars and movements of those blocks, efficiency concerns, distinction of car types, effects on the residual NS, and missing cars and trains.⁸⁷ NS responds to these arguments and addresses the concerns raised by DuPont.⁸⁸ For instance, while DuPont claims that 1.7% of the carloads MultiRail models do not reach their final destination, NS has illustrated that 90% of these carloads cited by DuPont actually reach their destination, albeit through alternative routes.⁸⁹

While DuPont's complaints regarding the shortcomings of NS's use of the MultiRail system are not trivial, these asserted shortcomings are far less significant than the more fundamental problems with DuPont's operating plan. After reviewing NS's MultiRail evidence, and DuPont's critiques thereof, we conclude that NS's operating plan is acceptable.

⁸⁴ NS Brief 44.

⁸⁵ DuPont Rebuttal III-C-84 to III-C-85.

⁸⁶ NS Brief 41-42.

⁸⁷ DuPont Rebuttal III-C-85 to III-C-108.

⁸⁸ NS Brief 44-48.

⁸⁹ NS Brief 46-47. Thus, while NS implicitly concedes that at least some number (less than 0.2%) of the carloads modeled by MultiRail in fact do not reach their final destination, we conclude that this number is de minimis. Standing alone, this fact does not justify a prohibition on the use of MultiRail in this case.

2. Leapfrog Traffic

In recent SAC cases, complainants have relied extensively on the use of cross-over traffic to simplify their SAC presentations. Cross-over traffic refers to those movements included in the traffic group that would be routed over the SARR for only a portion of their trip from origin to destination. In such circumstances, the SARR would not replicate all of the defendant railroad's service, but would instead interchange the traffic with the residual portion of that railroad's system. This modeling device, which was first accepted by the agency in 1994 in Bituminous Coal—Hiawatha, Utah, to Moapa, Nevada, 10 I.C.C. 2d 259, 265-68 (1994), is now a well-established practice in SAC cases.⁹⁰ DuPont, in this case, utilizes cross-over traffic in a previously unused manner. DuPont's evidence posits that some of its cross-over traffic would exit and reenter the DRR. DuPont occasionally refers to this type of traffic as internal cross-over traffic, but both parties refer to it as "leapfrog" traffic.

Leapfrog traffic would allow a SARR to create infrastructure gaps in its system. That is, cross-over traffic was originally designed to allow a SARR to expand the scope of its traffic group without having to extend its geographic scope.⁹¹ Here, DuPont is using cross-over traffic in a novel way to connect points within its system without building facilities to connect those points directly. This concept is not a prima facie violation of the Board's regulations. In fact, as DuPont points out, existing, real-life railroad operations contain leapfrog traffic configurations.⁹² NS opposes the use of leapfrog traffic, arguing that it permits a SARR to capture large amounts of traffic/revenues without constructing the expensive portions of the network required to carry that traffic.⁹³ The Board need not decide whether leapfrog traffic as utilized by DuPont in this case is appropriate. As previously discussed, we find that the missing train and service issues associated with DuPont's operating plan are so significant that we will accept NS's operating plan.

With regard to a remaining procedural matter, we note that while NS states that it has removed leapfrog traffic from the SARR, both DuPont and NS acknowledge that NS did not

⁹⁰ See, e.g., Otter Tail Power Co. v. BNSF Ry., NOR 42071, slip op. at 11-13 (STB served Jan. 27, 2006), aff'd sub nom. Otter Tail Power Co. v. STB, 484 F.3d 959 (8th Cir. 2007); Duke Energy Corp. v. CSX Transp., Inc., 7 S.T.B. 402, 422-24 (2004); Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry. (TMPA), 6 S.T.B. 573, 605 (2003).

⁹¹ The use of cross-over traffic is a simplifying device that is not designed to allow for the avoidance of otherwise legitimate costs.

⁹² DuPont Brief 49.

⁹³ NS Brief 100.

conduct an entirely separate additional SAC analysis to exclude that traffic.⁹⁴ DuPont argues that NS's failure to do so renders this argument moot, while NS requests that the Board allow the parties to resubmit analyses without the leapfrog traffic included.⁹⁵ We reject NS's request for an additional round of evidentiary submissions, as it is a railroad's duty to present evidence to support its criticisms, and to allow further evidentiary submissions would unnecessarily extend the procedural schedule. Any leapfrog traffic included in NS's operating plan will remain in the final analysis, as it represents the best evidence of record.

3. NS Operating Plan Issues

Again, although the Board accepts NS's operating plan, it is not without its flaws. DuPont claims that NS's DRR often moves traffic in a circuitous, inefficient manner,⁹⁶ and further notes that in at least one instance NS has created an external reroute, a practice the Board has deemed inappropriate in the past.⁹⁷ DuPont argues that this issue is, in part, a result of NS rerouting to avoid DuPont's leapfrog configuration.⁹⁸ NS responds that DuPont's choices regarding which NS lines the DRR replicated resulted in new interchange points, thus necessitating departures from NS's actual routings.⁹⁹ DuPont has identified an issue that, in another context, could be determinative in our evaluation of which operating plan to accept. However, in this instance, these routing concerns are not nearly as significant an issue as the traffic missing from DuPont's plan. NS's operating plan is the best evidence of record.

DuPont characterizes the external rerouting issue as a systemic problem with NS's operating plan. However, DuPont points to only one specific example of such rerouting. DuPont has identified no additional examples in NS's plan, and has not identified information in its workpapers that would support a claim that external rerouting is indeed a systemic problem. With just one example provided, we cannot conclude that the external rerouting issue identified by DuPont is systemic. With regard to circuitous rerouting, DuPont has likewise failed to demonstrate that the issue is of sufficient magnitude to warrant rejection or modification of NS's operating plan. Just as with the issue of external rerouting, DuPont characterizes the circuitous

⁹⁴ DuPont Brief 51; NS Brief 101.

⁹⁵ DuPont Brief 51; NS Reply III-A-55 n.50.

⁹⁶ DuPont Brief 48; DuPont Rebuttal III-C-44 to III-C-47.

⁹⁷ DuPont Rebuttal III-C-44 to III-C-47 (citing TMPA, 6 S.T.B. at 595, and Duke Energy Corp. v. Norfolk S. Ry., 7 S.T.B. 89, 115-16 (2003)).

⁹⁸ DuPont Rebuttal III-C-44 to III-C-47.

⁹⁹ NS Brief 46.

rerouting issue as a systemic problem with NS's operating plan. Given that DuPont points to only a handful of examples in support of its argument, we cannot conclude that the circuitous rerouting issue is systemic.

Furthermore, even assuming *arguendo* that modification of NS's operating plan to address the rerouting concerns raised by DuPont is appropriate in this case,¹⁰⁰ we would be unable to do so given the evidence of record. DuPont provided no evidence on rebuttal that would enable us to identify each specific instance of a reroute and replace it with a specific leapfrog segment.

4. Configuration

Having accepted NS's operating plan as better supported than DuPont's, we also accept NS's configuration as the best evidence of record because the system configuration forms the basis for an operating plan.

Tables 1 & 2 summarize our conclusions on the route miles and constructed track miles of the DRR.

¹⁰⁰ Again, the Board's authority to make its own adjustments to parties' operating plans is well-established. See BNSF 2006, 453 F.3d at 485 (affirming Board's decision to add certain capital improvements to shipper's operating plan); Balt. & Ohio R.R., 386 U.S. at 430 (agency "is not the prisoner of the parties' submissions" and must "weigh alternatives and make its choice according to its judgment how best to achieve and advance the goals of the National Transportation Policy") (Brennan, J., concurring).

TABLE 1

DRR Route Miles			
	DuPont	NS	STB
Main Lines			
Partially Owned Lines	0	49.77	49.77
Chicago, IL Extension	2.82	2.82	2.82
Additional Lead Track	14.02	14.02	14.02
Other Main Lines	6,479.79	6,479.79	6,479.79
Branch Lines	797.15	797.15	797.15
Total Route Miles	7,293.78	7,343.55	7,343.55

TABLE 2

DRR Constructed Track Miles			
	DuPont	NS	STB
Main Line Track			
Single Main Line (incl. branch lines)	7,293.78	7,343.55	7,343.55
Other Main (incl. sidings)	3,448.19	3,379.04	3,379.04
Other			
Helper Pocket and Setout Track	76.58	203.84	203.84
Customer Access Sidings	0	191.21	191.21
Yard and Interchange Track	1,197.01	1,787.28	1,787.28
Total Track Miles (excl. Yards)	12,015.56	12,905	12,905

5. Operating Expenses

As discussed above, we use NS's operating plan as the best evidence of record. All other evidentiary disputes will be discussed in Appendix A.

B. Road Property Investment

In the Road Property Investment (RPI) section of the SAC analysis, the Board determines the investment that would be required to build the SARR's physical facilities. With the exception of the partially owned joint facilities issue discussed below, the numerous issues involved in determining what it would cost to build the DRR will be addressed in Appendix B.

1. Partially Owned Joint Facilities

On reply, NS states that DuPont proposes to “use trackage rights to operate over facilities partially-owned by [NS], without accounting for [NS’s] ownership interest.”¹⁰¹ NS states that DuPont claims to operate over the following partially owned facilities:

1. Conrail Shared Asset Areas (SAA) – Norfolk Southern Corporation (NSC) holds a 58% ownership interest
2. Indiana Harbor Belt Railway (IHB) – NSC holds a 29.58% ownership interest
3. Belt Railway of Chicago (BRC) – NS holds a 25% ownership interest
4. Terminal Railroad Association of St. Louis (TRRA) – NS holds a 14.29% ownership interest¹⁰²

NS argues that DuPont is not stepping into its shoes because DuPont is not accounting for NS’s ownership interests in these partially owned facilities.¹⁰³ Rather, NS asserts, DuPont is claiming far more favorable terms for the DRR than NS currently enjoys.¹⁰⁴ NS argues that the trackage rights payments proposed by DuPont for operating rights over these partially owned facilities do not cover the costs of NS’s ownership.¹⁰⁵ NS asserts that DuPont must account for the replacement costs of these facilities proportional to NS’s ownership interests.¹⁰⁶ To account for these costs, NS states that it “calculated the full land acquisition and construction costs for the partially owned facilities used by the DRR and then assigned the DRR a portion of those costs equivalent to the NS ownership percentage for that line.”¹⁰⁷

On rebuttal, DuPont argues that NS’s position is wrong because the partially owned facilities are third party entities and are not co-defendants.¹⁰⁸ Furthermore, DuPont asserts, in the cases of SAA and IHB, the ownership interest is held by a different third party, NSC, and not

¹⁰¹ NS Reply III-F-298.

¹⁰² NS Reply III-F-298.

¹⁰³ NS Reply III-F-299.

¹⁰⁴ NS Reply III-F-299.

¹⁰⁵ NS Reply III-F-299 to III-F-300.

¹⁰⁶ NS Reply III-F-300, III-F-315.

¹⁰⁷ NS Reply III-F-316.

¹⁰⁸ DuPont Rebuttal III-F-148 to III-F-149.

NS.¹⁰⁹ DuPont argues that NS's R-1 data, a report given to the Board by the railroads annually, does not list SAA or IHB as lines owned by NS.¹¹⁰ However, DuPont acknowledges that the same R-1 data does list BRC and TRRA as lines owned by NS.¹¹¹ DuPont states that even if the Board were to agree with NS's argument, the correct method for determining the DRR's ownership costs would not be replacement costs but rather acquisition costs.¹¹² Furthermore, DuPont states that it must be able to collect the revenue shares that NSR earns from these partially owned facilities.¹¹³

DuPont did not account for the construction costs proportional to NS's ownership interests in the BRC and the TRRA, even though these partially owned facilities are owned by the railroad. The DRR must replicate and account for those costs.¹¹⁴ DuPont's argument that the costs should be based on the cost of acquisition as opposed to replacement costs is inconsistent with Board SAC precedent. In SAC cases, RPI costs are developed by replacement costs, and not the cost the incumbent railroad paid for the line when it was acquired. Where appropriate, as discussed above, costs for these partially owned facilities have been incorporated into the various DRR construction segments.

At the same time, the Board will not require DuPont to account for the construction costs of the SAA and the IHB because these partially owned facilities are subsidiaries of NSC and not of NS. In this instance, the Board notes that NSC elected to set up its ownership interests in SAA and IHB as separate legal entities from its railroad subsidiary, and NS has failed to present a valid argument for ignoring this structure. Here, we are not dealing with discovery issues where access to data and documents may still be relevant, but rather whether the data used in the SAC analysis accurately reflects the underlying corporate structure. In this case, as DuPont notes, the SAA and IHB are not listed in NS's R-1 data. As a result, the Board will accept DuPont's use of trackage rights and associated payments to account for its use of these lines. The Board realizes that partially owned facilities are a common corporate entity structure that

¹⁰⁹ DuPont Rebuttal III-F-148.

¹¹⁰ DuPont Rebuttal III-F-150 to III-F-151.

¹¹¹ DuPont Rebuttal III-F-153.

¹¹² DuPont Rebuttal III-F-148.

¹¹³ DuPont Rebuttal III-F-148.

¹¹⁴ DuPont is also entitled to include offsetting revenues from those partially owned facilities the DRR is required to construct. Here, however, the evidence on record demonstrates that the BRC and the TRRA did not realize any revenue during the relevant reporting period and, therefore, no offsetting revenue has been included.

allows multiple railroads to own and operate joint facilities. However, the burden is on the railroad to demonstrate the relationship of the joint facility entity and the costs and revenue realized by the railroad as a result of that relationship. With respect to the SAA and IHB, NS failed to meet this burden.

C. Traffic Group and Revenues

A complainant creates a traffic group by using information on the types and amounts of traffic moving over the defendant's rail system, and selecting a subset of that traffic (including its own traffic to which the challenged rate applies) that the SARR would serve. AEPCO, slip op. at 16. The selected traffic group is representative of that which would move on the SARR in the future. AEPCO, slip op. at 16. The composition of the traffic group, as with all assumptions used in the SAC analysis, must be realistic, i.e., consistent with the underlying realities of real-world railroading. AEPCO, slip op. at 16.

The parties generally agree on the DRR's traffic group for purposes of determining the SARR traffic volumes and revenues. However, the parties disagree on the appropriate Average Total Cost (ATC) methodology to determine cross-over traffic revenues, use of certain forecasts or methodologies to determine tonnage volumes for DRR traffic, whether the Board should allow the concept of shifting tonnage from capped plants, the proper methodology to be used to calculate fuel surcharge revenues, and whether income from certain companies within NS's corporate family should be included in the DRR's forecasted revenues. We examine the appropriate ATC methodology and income from corporate subsidiaries below, and the remaining traffic and revenue disputes will be discussed in Appendix C.

1. Average Total Cost Methodology

A recent issue in SAC cases has been how to allocate the total revenues the railroad earns from cross-over traffic between the facilities replicated by the SARR and the residual network of the railroad needed to serve that traffic. That is, what percentage of the revenues from the cross-over traffic can the SARR claim as its own.

In Major Issues, slip op. at 31, the Board adopted the ATC approach to allocate revenues from cross-over traffic between the facilities replicated by the SARR and those of the incumbent carrier (Original ATC). Under Original ATC, parties would first use the variable and fixed costs for the carrier developed under URCS, and the density and miles of each segment, to calculate the railroad's average total cost for each segment of a move. The revenues from each portion of the movement would then be allocated in proportion to the average total cost of the movement on- and off-SARR. See Major Issues in Rail Rate Cases, EP 657 (Sub-No. 1), slip op. at 19 (STB served Feb. 27, 2006).

Since then, to deal with low-rated cross-over traffic, in a few cases the Board has applied what it has called “modified ATC.” See W. Fuels Ass’n v. BNSF Ry., NOR 42088 (STB served Sept. 10, 2007), remanded sub nom. BNSF Ry. v. STB, 604 F.3d 602, 613 (D.C. Cir. 2010), on remand W. Fuels Ass’n v. BNSF Ry. (W. Fuels Remand), NOR 42088 (STB served June 15, 2012) (with Vice Chairman Begeman dissenting), remanded sub nom. BNSF Ry. v. STB, 741 F.3d 163 (D.C. Cir. 2014). More recently, after considering comments from interested parties in a rulemaking proceeding, the Board adopted what it called “Alternative ATC” to deal in a more targeted way with low-rated cross-over traffic. See Adopted Rate Regulation Reforms, slip op. at 30-34.

In this proceeding, DuPont argues that the Board should continue to utilize modified ATC, while NS argues that the Board should use Original ATC.¹¹⁵ NS further states that, even if the Board does not agree that Original ATC is the proper methodology, Alternative ATC is far superior to modified ATC.¹¹⁶ NS argues that Original ATC is more consistent with SAC principles and rules, is more fair and logical than modified ATC, and was adopted through a proper notice and comment rulemaking in which all interested parties had an opportunity to participate.¹¹⁷ NS states that, as a legal matter, because modified ATC sought to amend, in an individual adjudication, a legislative rule adopted in a notice and comment rulemaking, this amended rule violates the APA and is invalid and unenforceable.¹¹⁸ DuPont argues that it would be arbitrary and capricious for the Board to apply the discredited Original ATC methodology, that modified ATC is superior to Original and Alternative ATC, and that both Original and Alternative ATC have flaws.

We will use Alternative ATC, which was developed through notice and comment rulemaking, because we believe it to be a superior methodology to both Original ATC and modified ATC. Furthermore, the arguments both parties make here about the superiority of their chosen method—Original ATC for NS and modified ATC for DuPont—were addressed by the Board in Adopted Rate Regulation Reforms and Western Fuels Remand, and we incorporate by reference our discussion of those arguments here.

¹¹⁵ DuPont Brief 52-54; NS Brief 81-84.

¹¹⁶ NS Brief 83-84 n.137.

¹¹⁷ NS Brief 81-84.

¹¹⁸ NS Brief 81-84.

Although Alternative ATC had not been adopted prior to the start of this case, the parties were on notice fairly early on that the Board's ATC methodology was potentially subject to modification. DuPont filed its opening evidence in April 2012, Western Fuels Remand was served in June 2012, and the Board proposed Alternative ATC in July 2012 in Rate Regulation Reforms, EP 715 (STB served July 25, 2012). While NS sought to hold this case in abeyance while the Board considered changes to its revenue allocation methodology, DuPont argued that the case should continue to move forward. The Board denied the motion for abeyance. E.I. DuPont de Nemours & Co. v. Norfolk S. Ry., NOR 42125 et al. (STB served Nov. 29, 2012) (with Vice Chairman Begeman dissenting).

2. Triple Crown Service/Thoroughbred Direct Intermodal Service Revenue Adjustments

The parties dispute how to account for revenues the DRR receives from Triple Crown Service (TCS) and Thoroughbred Direct Intermodal Service (TDIS) movements.¹¹⁹ According to NS, because TCS and TDIS are essentially subsidiaries of NS, they function as customers of NS that purchase rail transportation services.¹²⁰ Thus, NS asserts that the revenue the DRR would obtain by "stepping into NS's shoes" would be the rail line haul revenue NS collects for the rail segment of those intermodal movements.¹²¹ NS, however, argues that rather than treating TCS and TDIS as customers of NS, and accepting the revenues that TCS and TDIS pay to NS, DuPont has replaced the revenue NS collects from these customers with the total revenue collected by TCS and TDIS for the various services they provide to third parties (i.e., trucking services from origin to the intermodal facility; revenues for rail line haul services provided by NS, as well as that from other carriers; intermodal lifts; and trucking services from intermodal facilities to the final destination).¹²² With the exception of drayage costs,¹²³ NS states that DuPont's SAC evidence has not taken into account the costs of facilities, equipment, personnel, materials, or other expenses necessary to provide the services required to earn the revenues accrued by TCS and TDIS.¹²⁴ Further, NS states that DuPont has failed to include large operating costs that TCS and TDIS incur each year to provide non-rail line haul services and

¹¹⁹ TCS and TDIS are providers of intermodal and logistics services.

¹²⁰ NS Reply III-A-61.

¹²¹ NS Reply III-A-61.

¹²² NS Reply III-A-61 to III-A-62.

¹²³ Drayage costs account for local movements of freight as part of the larger overall movement.

¹²⁴ NS Reply III-A-61 to III-A-62.

capital investment costs paid by TCS to allow it to conduct its business and support its operations.¹²⁵ According to NS, ignoring these costs, while incorporating TCS's and TDIS's total revenues, violates fundamental SAC principles, Board precedent, and basic economic principles.¹²⁶ Thus, NS states that DuPont's failure to account for costs associated with TCS and TDIS services compels the exclusion of revenues for those services.¹²⁷ Moreover, NS asserts that, because over-the-road truck hauling, rail movements on systems other than the DRR, and other non-rail services provided by TCS and TDIS use facilities that are not shared by the issue traffic here, attributing revenues from those services to the DRR would constitute an impermissible cross-subsidy of the issue traffic.¹²⁸ Citing PPL Montana, LLC v. Burlington Northern & Santa Fe Railway (PPL Montana), 6 S.T.B. 286, 293-95 (2002), NS asserts that, just as issue traffic may not be forced to cross-subsidize non-issue traffic by paying for facilities that it does not use, it is also impermissible for non-issue traffic to cross-subsidize issue traffic by paying for facilities that non-issue traffic does not use.¹²⁹

On rebuttal, DuPont argues that the NS revenue waybill data did not include all rail-related revenues associated with the movement of intermodal traffic for TCS and TDIS subsidiaries.¹³⁰ Thus, DuPont asserts that it was left to develop accurate movement revenues for these shipments from other materials and data provided by NS in response to DuPont's discovery requests.¹³¹ According to DuPont, based upon the information provided by NS during discovery, it calculated what it reasonably assumed to be net rail revenue for TCS and TDIS shipments, excluding revenue associated with activities it reasonably assumed were trucking services from origin to intermodal facilities, lifts, and trucking services from intermodal facilities to final destination.¹³² DuPont states that it then replaced, rather than supplemented, the partial rail-related revenues included in the NS waybill data records with the restated rail revenues NS actually earned on its TCS and TDIS traffic.¹³³ According to DuPont, NS on reply rejects DuPont's revenue adjustment for TCS and TDIS movements and includes only the line haul and

¹²⁵ NS Reply III-A-62.

¹²⁶ NS Reply III-A-63.

¹²⁷ NS Reply III-A-63.

¹²⁸ NS Reply III-A-64.

¹²⁹ NS Reply III-A-64 to III-A-65.

¹³⁰ DuPont Rebuttal III-A-56.

¹³¹ DuPont Rebuttal III-A-56.

¹³² DuPont Rebuttal III-A-56.

¹³³ DuPont Rebuttal III-A-56.

train starts revenue TCS and TDIS transfer directly to NS to cover the NS operating costs associated with moving the individual shipments.¹³⁴ DuPont asserts that this methodology completely disregards the lion's share of the TCS- and TDIS-generated revenues that NS reports in its records each year.¹³⁵ Further, DuPont argues that it did not simply replace the NS line haul revenues collected on movements with the total revenue collected by TCS and TDIS for the various services they provide to third parties.¹³⁶ Instead, DuPont states that it clearly explained the procedures it used to reduce the TCS and TDIS total revenues to net out all costs associated with 10 separately identified drayage activities indicated in NS's workpapers.¹³⁷

DuPont therefore states that it reduced TCS/TDIS revenues by 29% before applying them to the NS movements. Further, DuPont argues that it did not simply replace the revenue NS collected from these customers with the total revenue collected by TCS and TDIS, but removed categories of revenue to account for the activities that NS claimed should be excluded.¹³⁸ DuPont argues that, given the lack of clarity from NS on what activities were included in the drayage activities, its revenue adjustment is appropriate.¹³⁹

DuPont also asserts that NS is critical of DuPont's intermodal revenue adjustment, which is based on the intermodal revenues included in NS's quarterly reports. According to DuPont, NS specifically claims that, in developing its revenue forecast, DuPont relied on "a different and incorrect data source for 2010 NS rail revenues . . . gross intermodal revenue data reported in a NS Quarterly Financial Review which was prepared for different purposes and reports different data."¹⁴⁰ According to DuPont, NS apparently contends that DuPont should only be allowed access to revenue reported in the line haul revenue field of its traffic database, and not to the entire revenue stream associated with the traffic.¹⁴¹ DuPont argues that NS is attempting to use an accounting device to restrict DuPont's access to NS revenues. According to DuPont, NS's financial reports to the SEC, the STB, and to NS shareholders clearly include revenues identified

¹³⁴ DuPont Rebuttal III-A-56.

¹³⁵ DuPont Rebuttal III-A-56.

¹³⁶ DuPont Rebuttal III-A-57.

¹³⁷ DuPont Rebuttal III-A-57.

¹³⁸ DuPont Rebuttal III-A-57 to III-A-58.

¹³⁹ DuPont Rebuttal III-A-57 to III-A-58.

¹⁴⁰ DuPont Rebuttal III-A-57 to III-A-58 (citing NS Reply III-A-67 to III-A-68).

¹⁴¹ DuPont Rebuttal III-A-58.

as NS Railway Operating Revenues, which are generated by its TCS and TDIS subsidiaries.¹⁴² DuPont, however, states that when it is time for the DRR to “step into the shoes” of NS, for purposes of developing SAC evidence, NS argues that the DRR should not be allowed access to the same TCS/TDIS revenues.¹⁴³ Nonetheless, DuPont asserts that, in light of the additional information provided by NS on reply, DuPont has adjusted its TCS and TDIS net revenues. Specifically, DuPont states that, in addition to the \$107.9 million in drayage costs DuPont initially netted out of the TCS/TDIS total revenues in its opening, it further adjusts the TCS/TDIS revenues down by another \$83.6 million to account for other cost items identified by NS.¹⁴⁴ Thus, DuPont states that its opening evidence inadvertently overstated TCS/TDIS intermodal revenues by 20% due to NS’s failure to provide adequate support for its data.¹⁴⁵ By contrast, DuPont states that NS’s reply evidence intentionally understated TCS/TDIS intermodal revenue by 134% as a way to limit the DRR’s access to the revenues identified as “NS Intermodal Railway Operating Revenues,” and reported in certain NS accounting documents.¹⁴⁶

We accept NS’s argument that the SARR should only be allowed to claim rail line haul revenues, and therefore adopt its evidence. TCS and TDIS, while subsidiaries of NS, participate in non-rail activities, such as trucking. Revenues generated by non-rail activity cannot be included in a SARR’s traffic revenue base. Further, as NS asserts, DuPont overstated SARR revenues in its opening by including revenues earned by TCS/TDIS without providing adequate evidence that the necessary infrastructure, operations, or corresponding expenses have been accounted for to provide such services. On rebuttal, DuPont still fails to include the necessary facilities, operations, capital investments, and expenses necessary to generate the TCS/TDIS revenue it seeks to include, and merely subtracts some TCS/TDIS operations costs from the intermodal revenues. DuPont has failed to show that the DRR is entitled to more than the rail line haul revenues. Therefore, we will accept NS’s evidence on the rail line haul revenues from TCS and TDIS, as those are the only revenues to which the DRR is entitled.

D. DCF Analysis

A DCF analysis is used to distribute the total capital costs (in current year dollars) of the DRR over the SAC analysis period (10 years). Operating expenses are calculated for a base year

¹⁴² DuPont Rebuttal III-A-59.

¹⁴³ DuPont Rebuttal III-A-59 to III-A-60.

¹⁴⁴ DuPont Rebuttal III-A-60 to III-A-61.

¹⁴⁵ DuPont Rebuttal III-A-61.

¹⁴⁶ DuPont Rebuttal III-A-61.

and forecasted into other years by indexing for inflation and forecasted changes in tonnage. The DRR's total revenue requirements (capital and operating expenses) are then compared against the stream of revenues NS is expected to earn from the revised traffic group, discounted to the starting year (2008). Operating expenses will be discussed in Appendix A.

To adjust the base-year operating expenses for inflation over the analysis period, the parties use projections of the Rail Cost Adjustment Factor (RCAF), which is an index of railroad costs that we publish quarterly. There are two versions of the RCAF that are relevant to SAC proceedings: one that does not take into account changes in the rail industry's productivity (the unadjusted RCAF, or RCAF-U) and a second that does (the adjusted RCAF, or RCAF-A). See 49 U.S.C. § 10708 (requiring publication by the Board of both versions). In Major Issues, slip op. at 42-44, the Board decided to phase in the productivity gains projected in RCAF-A incrementally over the analysis period. That approach is applied here.

The parties dispute aspects of the DCF analysis. Our resolution of these disputes will be set forth in detail in Appendix D, which will demonstrate that DuPont has not shown the challenged rates to be unreasonable.

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. NS's October 24, 2013 motion to dismiss the proceeding is denied as moot.
2. NS's July 19, 2013 motion to strike is granted.
3. The rates NS charges for the issue traffic have not been shown to be unreasonable.
4. This decision is effective on the date of service.

By the Board, Chairman Elliott and Vice Chairman Begeman. Chairman Elliott concurred with a separate expression and Vice Chairman Begeman concurred with a separate expression.

CHAIRMAN ELLIOTT, concurring:

I write separately to address two issues. First, in today's decision, the Board applies the Alternative ATC methodology developed in a recent rulemaking proceeding. See Adopted Rate Regulation Reforms, slip op. at 30-34. This conclusion takes into account the arguments presented by the parties in this case, consistent with the Board's decision that revenue allocation methodologies would be litigated in the pending individual dockets, regardless of the outcome in Adopted Rate Regulation Reforms. See E.I. DuPont de Nemours & Co. v. Norfolk S. Ry., NOR 42125 et al., slip op. at 5 (STB served Nov. 29, 2012) (denying NS's motion for abeyance). However, to the extent that DuPont wishes to argue that it would have changed its SAC case had it known that Alternative ATC would be adopted, I believe it can do so in a motion to reconsider or reopen.

Second, I will address the issue of market dominance, to express, in more detail, my view as to why the limit price approach offers a sufficiently reliable indicator of whether a particular feasible alternative presents competition adequate to constrain the carrier's rates effectively.

Let me note at the outset that limit price, which is not binding on the agency even though we have applied it in certain cases in the absence of a better approach, gives the Board some objective guidance to gauge, in a flexible way, whether or not a particular feasible alternative effectively constrains the carrier's pricing. For example, if a feasible alternative prevents the railroad from charging rates above 190% of variable costs, it would appear that the marketplace is capable of disciplining the carrier's behavior. In contrast, if that same alternative serves only to prevent the railroad from charging rates above, for example, 500% of variable costs, then it may well be that the marketplace is not placing sufficient discipline on the carrier's behavior and that Congress would have intended for the Board to investigate the reasonableness of those rates. I believe that employing an objective methodology based on a measure such as RSAM ensures that our market dominance analysis balances the revenue needs of the carrier with the need to protect captive shippers from the abuse of market power. While prior decisions addressing the issue of market dominance have considered whether feasible alternatives were effectively constraining carrier pricing, see, e.g., McCarty Farms v. Burlington Northern, Inc., 3 I.C.C. 2d 822, 827-32 (1987), I believe that a more objective methodology such as limit price can help to better guide our inquiries in this respect.

"At the core of the 'effective competition' standard is the idea that there are competitive, market pressures on the railroads deterring them from charging monopoly prices for transporting goods." Ariz. Pub. Serv. 1984, 742 F.2d at 650-51. The limit price approach can help to resolve the central market dominance inquiry—i.e., whether a feasible alternative is providing "effective

competition” to the transportation at issue. After applying the limit price approach here, I believe that this decision properly concludes that NS possesses market dominance over 70 of the 75 rates for which NS contests market dominance.¹

I believe that the overall approach to evaluating potential transportation alternatives in this case—i.e., a threshold feasibility analysis, a comparison of the limit price to the defendant’s variable costs of providing the service at issue, and a consideration of intangible features—encompasses the same factors described by the market dominance guidelines set forth in Market Dominance II, 365 I.C.C. at 132-33, and cited by the parties.² Again, while prior decisions addressing the issue of market dominance have considered whether feasible alternatives effectively constrained carrier pricing, see, e.g., McCarty Farms, 3 I.C.C. 2d at 827-32, development of a more objective methodology can better guide our inquiries in this respect.³

Moreover, I believe this comparative approach offers a sufficiently reliable indicator of whether effective competition exists for several reasons. First, a carrier’s RSAM figure is a measure of the average markup that the carrier would need to collect from all of its potentially captive traffic (i.e., all traffic priced at or above the 180% R/VC level) in order to earn adequate revenues as measured by the Board under 49 U.S.C. § 10704(a)(2) (i.e., earn a return on investment equal to the cost of capital). 2010 Tax Info. for Use in the Revenue Shortfall Allocation Method, EP 682 (Sub-No. 2), slip op. at 1 (STB served July 8, 2011). It “takes into account the key economic and equity principles embodied in the Interstate Commerce Act[, and] provides for differential pricing and a railroad’s need to earn adequate revenues by directly linking its ‘revenue need shortfall’ to a benchmark markup for captive traffic.” Rate Guidelines—Non-Coal Proceedings, EP 347 (Sub-No. 2), slip op. at 4 (ICC served Nov. 16, 1992) (footnote omitted).

¹ NS does not contest market dominance for 25 of the challenged rates. See NS Reply, Exhibit II-B-1. NS lacks market dominance over one of the challenged rates because the rate’s R/VC ratio falls below the jurisdictional threshold. See supra Majority Decision n.6.

² See DuPont Opening I-7; NS Reply II-B-11.

³ DuPont argues that the rate increases it has experienced, without NS losing DuPont’s traffic, conclusively demonstrate NS’s market dominance. See, e.g., DuPont Opening I-22 to I-29. NS notes that the rate increases experienced by DuPont are unsurprising given that they followed the expiration of a long-term contract with a below-market escalator. NS Reply II-B-92 to II-B-94. In my view, it is difficult to treat contract rates and tariff rates as apples-to-apples comparisons because contract rates are often lower for a variety of reasons, including volume commitments.

While the RSAM number standing alone simply represents the system-wide average markup required to achieve revenue adequacy, the Board has explained that “[h]ow a particular carrier’s revenue requirements can and should be allocated within its traffic base—i.e., the proper markup to be applied to individual traffic components—is affected by such factors as the mix of competitive and captive traffic handled by that carrier[and] the degree of competition that it faces on its competitive traffic.” Rate Guidelines—Non-Coal Proceedings, 1 S.T.B. 1004, 1033-34 (1996). “[B]ecause the average derived by the RSAM is the average for captive shippers only[,] the ratios for some captive shippers must be above and some below that figure.” BNSF 2006, 453 F.3d at 481. Applying the carrier’s RSAM to the limit price R/VC ratio generated by the rate charged by the “competing” carrier does not have to be a perfect measure of real competition. But as a carrier’s RSAM number represents the average level at which the carrier would achieve system-wide revenue adequacy, the fact that a rate involving certain potentially captive traffic produces an R/VC ratio that falls below the carrier’s RSAM number is sufficiently indicative that competitive transportation alternatives likely exist and are exerting downward pressure on the rate governing that traffic.⁴ Likewise, the fact that a rate involving other potentially captive traffic produces an R/VC ratio that falls above the carrier’s RSAM number is a useful indicator that competitive transportation alternatives—whether intermodal or intramodal—are less likely to exist and effectively constrain the rate charged by the carrier for that traffic.

Thus, comparing the limit price R/VC ratio for a given movement to the carrier’s RSAM number can be an indication of either the presence or absence of effective competition for that movement. The limit price R/VC ratio expresses the limit price figure as a percentage of the movement’s variable costs.⁵ And because no party has presented a better way of measuring competitiveness, in my view a finding that effective competition likely exists if the highest price the carrier theoretically could charge to move that potentially captive traffic falls below the average point at which the carrier could achieve revenue adequacy—but that effective competition is unlikely where the highest price the carrier theoretically could charge to move the potentially captive traffic falls above the average point at which the carrier could achieve revenue adequacy—is reasonable. See Simplified Standards 2007, slip op. at 81.

I believe use of this metric to gauge the effectiveness of potential competitive alternatives is appropriate given that the “rates that would be charged by a competing mode [of

⁴ See Simplified Standards 2007, slip op. at 81 (suggesting that a rate which falls below RSAM is “being constrained by . . . market forces”).

⁵ In other words, the limit price R/VC ratio differs from the typical R/VC ratio in that the former utilizes the postulated limit price in the numerator while the latter utilizes the actual revenue generated by a particular tariff rate in the numerator.

transportation] are relevant to an evaluation of whether that mode provides effective intermodal competition” to the movement at issue. Ariz. Pub. Serv. Co. v. Atchison, Topeka & Santa Fe Ry. (Ariz. Pub. Serv. 1997), 2 S.T.B. 367, 375 n.15 (1997).⁶ Furthermore, while the Board’s qualitative market dominance guidelines “contemplate the use of” considerations such as the capacity, reliability, speed, and safety of potential transportation alternatives, “they do not exclude the application of quantitative analysis as well.” CF Indus., Inc. v. STB, 255 F.3d 816, 822 (D.C. Cir. 2001) (citing Mkt. Dominance II, 365 I.C.C. at 119 n.5).

In its filings, NS argues that we cannot and should not use the limit price approach for purposes of evaluating qualitative market dominance in this case.⁷ DuPont, on the other hand, argues that the approach is defensible but should be modified in certain respects.⁸ I disagree with these criticisms.

1. 49 U.S.C. § 10707

NS first argues that 49 U.S.C. § 10707(d)(2) expressly bars us from utilizing the limit price approach when considering qualitative market dominance.⁹ But that provision only precludes the Board from establishing market dominance and rate reasonableness presumptions based on the fact that the R/VC ratio “for the transportation to which the rate applies” is equal to or greater than 180%.¹⁰ The limit price approach establishes no such presumption, but rather reflects a set order of considerations relevant to the issue of qualitative market dominance that are to be examined in turn—1) a threshold practical feasibility analysis; 2) calculation of the

⁶ See also Salt River Project Agric. Improvement & Power Dist. v. United States, 762 F.2d 1053, 1060 (D.C. Cir. 1985); Ariz. Pub. Serv. 1984, 742 F.2d at 650 (“The [ICC’s] guidelines state that evidence of effective competition may include ‘the transportation costs of the rail and motor carrier alternatives.’” (quoting Mkt. Dominance II, 365 I.C.C. at 133)).

⁷ NS Reply II-B-40 to II-B-57; NS Brief 13.

⁸ DuPont Rebuttal I-71 to I-78 & II-B-206 to II-B-216; DuPont Brief 9-13. DuPont did not address the limit price approach on opening because it submitted its opening on April 30, 2012—five months before issuance of the decision in M&G, which first introduced the limit price approach.

⁹ NS Reply II-B-43 to II-B-45.

¹⁰ Section 10707(d)(2) states that “[a] finding by the Board that a rate charged by a rail carrier results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than 180 percent does not establish a presumption that—(A) such rail carrier has or does not have market dominance over such transportation; or (B) the proposed rate exceeds or does not exceed a reasonable maximum.”

limit price ratio and its comparison to the defendant railroad's RSAM figure; and 3) a consideration of intangible features.

Moreover, even if the limit price approach did utilize some form of presumption (which it does not), the plain language of the statute only prevents the Board from creating a presumption of market dominance based on the fact that the challenged rate produces a markup at or above 180% of variable cost. The statute is silent as to whether a presumption could be drawn from a higher markup above variable costs (e.g., 500% or 1000%) or based on a markup above RSAM. While NS seems to contend that § 10707(d)(2) prevents our use of R/VC ratios for any qualitative market dominance purpose, a permissible and more reasonable interpretation is that the plain language of the statute only prohibits us from establishing 180% as a presumption demarcation point.¹¹ Had Congress wished to prevent the establishment of all potential R/VC-based presumptions—as opposed to the very specific 180% figure—it could have done so. But it did not.¹²

Most importantly, the limit price approach does not utilize the rail rate generated by the challenged movement in its calculation of the limit price R/VC ratio. Section 10707(d)(2) is very specific, referring only to a 180% R/VC ratio presumption with respect to the “rate charged by a rail carrier.” The limit price R/VC ratio, in contrast, is based on the price of a proffered alternative to that particular rail movement, and reflects not the rate at issue but rather the highest price the rail carrier theoretically could charge the shipper without causing a significant amount of the issue traffic to be diverted to the proffered alternative. Therefore, assuming *arguendo* that the limit price approach includes some form of a presumption and that the statute prevents any presumptions based on the R/VC ratio of the challenged rate (no matter how high), limit price still would not run afoul of § 10707(d)(2) because it does not utilize the challenged rail rate in its calculation of the limit price R/VC ratio. NS contends that there is no practical distinction between a limit price R/VC ratio and the R/VC ratio associated with the challenged rail rate, due to the fact that the transportation alternatives on lanes contested by NS have rates that are

¹¹ Cf. Mr. Sprout, Inc. v. United States, 8 F.3d 118, 124 (2d Cir. 1993) (recognizing that the ICC, federal courts, and Congress have all employed actual R/VC ratios “as a valid and reliable measure of market power in the rail industry” and concluding that the ICC’s use of such ratios in its “threshold inquiry” on the issue of market power was not an abuse of discretion).

¹² Thus, NS’s reliance on “[t]he legislative context in which § 10707(d)(2) was enacted” in an effort to demonstrate “Congress’s unmistakable opposition to the use of R/VC presumptions in the market dominance analysis,” NS Reply II-B-44 to II-B-45, is misplaced. Neither the statute nor the legislative history cited by NS, NS Reply II-B-45 nn.61 & 62, suggests that Congress intended to bar the use of all potential R/VC-based presumptions.

“reasonably comparable” to the challenged NS rates.¹³ But the price of the challenged rail movement and the price of the alternative—charged by an unaffiliated entity—undeniably are two separate figures and do not necessarily have a direct causal relationship with one another. Simply because the statute speaks to Board use of a 180% R/VC ratio presumption associated with the challenged rail rate does not mean that it similarly does so with respect to the alternative transportation rate. In sum, I find none of NS’s statutory arguments persuasive and would not read further restrictions into the statute beyond those specifically set forth by Congress.

2. Administrative Procedure Act

NS next argues that use of the limit price approach requires its adoption via notice-and-comment rulemaking, due to the fact that the prevailing market dominance guidelines set forth in Market Dominance II were adopted in this manner.¹⁴ Such a proposition would be true only if (1) the current market dominance rules were binding legislative rules rather than flexible evidentiary guidelines, and (2) the limit price approach represented a departure from those rules. The guidelines described in Market Dominance II, however, do not constitute a legislative rule, but rather represent an interpretive statement of agency policy regarding the procedures to be followed in connection with the submission of market dominance evidence and the types of evidence that the agency will consider in that inquiry.¹⁵ Despite NS’s contrary assertion, the limit price approach is not a legislative rule because the approach neither has binding effect nor limits our discretion. See, e.g., McLouth Steel Prods. v. Thomas, 838 F.2d 1317, 1320 (D.C. Cir. 1988); Am. Hosp. Ass’n v. Bowen, 834 F.2d 1037, 1045-48 (D.C. Cir. 1987). As the Board explained in TPI I, slip op. at 26, parties in future cases remain free to “advocate alternative

¹³ NS Reply II-B-44.

¹⁴ NS Reply II-B-46 to II-B-49.

¹⁵ See, e.g., Notice of Proposed Policy, 35 Fed. Reg. 83342, 83345 (Dec. 18, 1980) (Clapp, Comm’r, concurring) (stating in connection with the 1981 market dominance proceeding that “[o]ne must also question whether it is wise to propose issuance of a mere policy statement, which theoretically is subject to change without notice, when adoption of specific rules would avoid this uncertainty”); Mkt. Dominance II, 365 I.C.C. at 118 (explaining that the decision was “removing the existing market dominance rules” and “replac[ing] them with evidentiary guidelines”); W. Coal Traffic League v. United States, 719 F.2d 772, 780 (5th Cir. 1983) (en banc) (affirming Mkt. Dominance II, noting that the ICC’s guidelines were not intended “to establish hard and fast rules for every situation,” and asserting that courts “must remain cognizant of the Supreme Court’s direction that the formulation of procedures is basically to be left within the discretion of the agencies to which Congress has confided the responsibility of substantive judgments” (internal quotation and alteration marks omitted)); TPI II, slip op. at 7.

benchmarks or methods for determining whether a particular feasible transportation alternative provides effective competition.”

Even if the guidelines set forth in Market Dominance II were deemed to be legislative in nature, the limit price approach would not constitute a departure from those rules. The overall framework for evaluating potential transportation alternatives reflected in the limit price approach—including consideration of issues related to practical feasibility, economic feasibility, and the existence of any intangible features related either to the proffered alternative or the challenged rail transportation—encompasses the same factors described by the prevailing guidelines. As a result, the limit price approach excludes no factor the Board has previously stated it will consider in its qualitative market dominance analysis.

Moreover, even if the refined approach incorporates additional elements to consider within the Board’s qualitative market dominance analysis, the Market Dominance II decision set forth “flexible guidelines” for the submission of qualitative market dominance evidence—specifically stating that: (1) such evidence “may include price-cost ratios;”¹⁶ (2) the evidence is to focus on the central question of whether “[e]ffective competition” exists; and (3) “types of evidence [regarding] the feasibility or nonfeasibility of” proposed alternatives other than those specifically enumerated would be considered. 365 I.C.C. at 119, 122, 133. NS attempts to sidestep this conclusion by arguing that the limit price approach conflicts with Market Dominance II because that decision eliminated use of various presumptions, including one (the “cost test” presumption) that utilized R/VC ratios associated with the actual movement.¹⁷ But unlike the “cost test” presumption eliminated in Market Dominance II, the limit price approach establishes a multi-factor framework for evaluating potential transportation alternatives while using neither presumptions nor the actual R/VC ratios of the issue movements. Moreover, while the Market Dominance II decision eliminated several other presumptions in addition to the “cost test” presumption, the decision does not state that the agency would never again use any rebuttable presumption in the market dominance analysis. Thus, even assuming *arguendo* that the limit price approach does involve the use of some form of presumption (which, again, it does

¹⁶ This statement makes it clear that rather than constituting a flat prohibition on the use of R/VC ratios in the qualitative market dominance context, the Market Dominance II decision specifically contemplated such use.

¹⁷ Under the “cost test” presumption, a rebuttable presumption of market dominance arose when the rate at issue exceeded the variable cost of providing the service at issue by 60% or more (i.e., when the challenged movement generated an R/VC ratio greater than or equal to 160%). NS seems to suggest that the “cost test” presumption is similar to the limit price approach and thus, in using it, the agency reverted to an already-discarded market dominance methodology.

not), the approach would not run afoul of the Market Dominance II decision because that decision did not prohibit the agency from subsequently adopting new and different market dominance presumptions.

3. Economic Foundation

Finally, NS argues that the limit price approach is an arbitrary and economically meaningless method for assessing the effectiveness of competition in a particular market.¹⁸ NS offers a broad array of related arguments that: (1) the limit price approach ignores relevant market information such as the relationship between the rail rate and the price of the alternative;¹⁹ (2) RSAM is a flawed benchmark for measuring the effectiveness of competition in a particular market; (3) high R/VC ratios are a weak indicator of market power abuse; and (4) the limit price approach is inadequately justified and does nothing to simplify market dominance determinations. I disagree.

First, while NS correctly points out that the limit price approach does not involve a comparison of the price of the alternative to that of the challenged rail rate, I consider this a useful feature rather than a critical shortcoming. Again, the mere fact that a rail carrier has priced its services right at the threshold where, if slightly higher, it might begin to lose traffic to an alternative does not indicate that the alternative is constraining the rate effectively. TPI I, slip op. at 17. In other words, equivalence in price between the challenged rail transportation and a given alternative does not conclusively demonstrate that the latter is effectively constraining the former.

Second, contrary to NS's position, use of RSAM as a component of the limit price approach is appropriate. Each rail carrier's RSAM is pegged to its revenue needs, and employing an objective methodology relying in part on RSAM indicates whether a carrier is pricing below the level necessary to achieve revenue adequacy; if so, that indicates the presence of effective competition. TPI I, slip op. at 5, 25-27. Comparing a market-specific figure (the limit price R/VC ratio) to a carrier-specific figure (RSAM) provides an estimate of whether the

¹⁸ NS Reply II-B-49 to II-B-57.

¹⁹ Among the "relevant market information" that NS asserts the limit price approach "fails to consider" is "the impact of product and geographic competition." NS Reply II-B-43. However, the Board has not considered product or geographic competition in the market dominance inquiry in quite some time. See Mkt. Dominance III; PPL Montana, 6 S.T.B. at 289 n.4.

alternative is low enough to generate competitive pressure,²⁰ as there is no reason to believe that a carrier with market power would charge its potentially captive traffic a rate below that needed to earn adequate revenues as measured under 49 U.S.C. § 10704(a)(2). Moreover, because RSAM is not a constant value, but one that will both vary from carrier to carrier and change over time to reflect gradual changes in the degree of differential pricing a particular carrier needs,²¹ I believe it provides a reasonable measure of effective competition specific to the case at hand.²² And while I recognize that no benchmark can be a perfect indicator of market power, I believe that RSAM is sufficiently accurate for our purposes here. See BNSF 2006, 453 F.3d at 482; Pennsylvania v. ICC, 535 F.2d 91, 96 (D.C. Cir. 1976). While it criticizes the RSAM benchmark, NS has presented no workable alternative solution to the underlying problem we have identified—the compelling need to develop a more objective approach for resolving the issue of effective competition, given the rapidly escalating complexity of the market dominance inquiry in a number of our rate cases. Again, “the mere existence of some alternative does not in itself constrain the railroads from charging rates far in excess of the just and reasonable rates that Congress thought the existence of competitive pressures would ensure.” Ariz. Pub. Serv. 1984, 742 F.2d at 651. At the core of the limit price analysis is an effort to determine whether there are any transportation alternatives sufficient to deter the railroad from charging monopoly prices for the transportation of goods.

Regarding NS’s third point, as the Board has explained in prior cases, high R/VC ratio levels can be used to support ultimate conclusions regarding the competitive effectiveness of transportation alternatives when such conclusions are supported by other evidence.²³ Calculation

²⁰ The Board has previously indicated that an R/VC ratio that falls below the carrier’s RSAM number indicates that the rate at issue is “being constrained by . . . market forces.” Simplified Standards 2007, slip op. at 81.

²¹ NS also takes issue with the system-average nature of the RSAM benchmark. This characteristic of RSAM exists (at least in part) because of the underlying system-average nature of URCS (the Board’s general purpose costing system), rendering system averages an inescapable part of the Board’s market dominance inquiry regardless of whether or not the RSAM benchmark is used.

²² As the agency explained in TPI I, slip op. at 26, parties in future cases may advocate alternative ways for determining whether a particular feasible transportation alternative provides effective competition. In this case, NS did not do so.

²³ See 2008 DuPont I, slip op. at 8; McCarty Farms, 3 I.C.C. 2d at 832. But cf. Potomac Elec. Power Co. v. CSX Transp., Inc., 2 S.T.B. 290, 294 (1997) (“Apart from the 180% jurisdictional threshold, which has been set by law, we do not use rate-cost relationships as a basis for qualitative market dominance determinations.”); Mkt. Dominance II, 365 I.C.C. at 122 (questioning whether actual R/VC ratios “reliably indicate the presence or absence of market

(continued . . .)

of the limit price R/VC ratio is but a single component of the refined approach, which is specifically structured to consider a variety of other factors relevant to the qualitative market dominance inquiry separate and apart from the limit price R/VC ratio. Furthermore, even if by statute market dominance could not be found based solely on R/VC ratios above 180%, in the limit price context that does not matter given that the limit price R/VC ratio is based on a different number than the actual R/VC ratio generated by the rail rate, i.e., the price of a proffered alternative. TPI I, slip op. at 24.²⁴

(... continued)

dominance” because there “are any number of reasons why a high price/cost ratio may not be indicative of true market power on the part of the railroad”); Laurits R. Christensen Associates, Inc., A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals That Might Enhance Competition—Revised Final Report (Christensen Study) at ES-12 to ES-20 (Nov. 2009) (noting relative weakness of R/VC ratio as indicator of market power abuse in Board-commissioned independent study), available at <http://www.stb.dot.gov/stb/elibrary/CompetitionStudy.html>. Because conclusions regarding qualitative market dominance under the refined approach are premised on more than simple reliance on high ratios, our approach does not implicate the Board’s previously expressed concerns on this score.

²⁴ Citing the Christensen Study, NS argues that this distinction is immaterial for purposes of its criticism because the basic problem with using R/VC ratios as an indicator of market dominance is the inability of the URCS-based variable cost measure in the denominator to accurately measure shipment-level variable costs. Again, however, I believe that the prevailing market dominance guidelines specifically contemplate consideration of the costs associated with the challenged rail movement. See Mkt. Dominance II, 365 I.C.C. at 122, 133; Ariz. Pub. Serv. 1997, 2 S.T.B. at 375 n.15 (asserting that the “rates that would be charged by a competing mode [of transportation] are relevant to an evaluation of whether that mode provides effective intermodal competition” to the movement at issue); Salt River Project, 762 F.2d at 1060 (identifying the ICC’s consideration of cost evidence in the course of its market dominance inquiry); Ariz. Pub. Serv. 1984, 742 F.2d at 650 (explaining that the prevailing “guidelines state that evidence of effective competition may include ‘the transportation costs of the rail and motor carrier alternatives’”). Thus, even though the Christensen Study expressed skepticism about using R/VC ratios as an accurate measure of market power abuse, the costs of providing the transportation at issue are undeniably relevant to the qualitative market dominance inquiry in accordance with the prevailing guidelines. Furthermore, because URCS is the Board’s general purpose costing system adopted for all regulatory costing purposes (including those used in market dominance determinations), URCS-based variable costs are always part of the Board’s market dominance inquiry.

NS also argues that our justification for using the limit price approach is misguided. But market dominance is a particularly complicated issue in cases like this one because, while the movement origins and/or destinations can be served via rail (for the most part) only by the defendant carrier, the products at issue (for the most part) can be transported via either rail or truck. But again, the fact that some competition exists, or that the price of the alternative happens to be similar to the challenged rate, does not in itself demonstrate that such competition is effectively constraining a carrier's pricing—i.e., that the competitive alternative is sufficient to deter the carrier from charging monopoly prices for the transportation at issue.²⁵ The limit price approach represents an objective method for drawing a line between those feasible transportation alternatives that effectively constrain carrier pricing and those that do not. TPI I, slip op. at 27. By providing a set order of considerations that enables prospective complainants to better assess the merits of their position before deciding to file a case, and that will facilitate the submission of evidence from both parties in the event a case is filed, the limit price approach brings greater structure to the qualitative market dominance inquiry.

4. Revisions Proposed by DuPont

DuPont agrees that use of limit price is within the Board's statutory authority and reasonable discretion, but asserts that the approach should be modified in two ways: (1) it should only be used to demonstrate the absence—but not the existence—of effective competition, and (2) the RSAM benchmark should be replaced by the revenue-to-variable cost greater than 180 ($R/VC_{>180}$) ratio—the measure of the average markup over variable cost earned by a railroad on its potentially captive traffic, Simplified Standards 2013, slip op. at 1.²⁶ I do not agree.

As an initial matter, I do not believe there is any reason why the limit price approach should be used only for a limited purpose—i.e., to demonstrate the absence of competition—but not where the limit price falls below RSAM. Such an approach would offer only a partial solution to the underlying problem the Board has identified—the compelling need to develop a more objective approach for resolving the issue of effective competition, given the rapidly

²⁵ TPI I, slip op. at 17; see also Ariz. Pub. Serv. 1984, 742 F.2d at 651 (conjuring images of competition by horse and buggy or people carrying buckets, and explaining that “the mere existence of some alternative does not in itself constrain the railroads from charging rates far in excess of the just and reasonable rates that Congress thought the existence of competitive pressures would ensure”).

²⁶ DuPont Rebuttal I-71 to I-78 & II-B-206 to II-B-216; DuPont Brief 9-13.

escalating complexity of the market dominance inquiry in a number of our rate cases—and as such would not represent a better general approach to the central issues in this case.¹

Furthermore, I do not believe the $R/VC_{>180}$ ratio represents an improvement over RSAM. As the Board has stated previously, in rate cases we look to see if there are any alternatives sufficiently competitive (whether singly or in combination) to bring market discipline to the carrier's pricing—i.e., whether there is effective competition adequate to constrain rates at or below a maximum reasonable level. McCarty Farms, 3 I.C.C.2d at 825, 831. RSAM provides a better benchmark to help judge whether a particular alternative is effectively constraining rates within a reasonable range because it takes into account the revenue need of the defendant railroad, a central inquiry in the reasonableness of rail rates. In contrast, $R/VC_{>180}$ merely shows the average markup the defendant railroad is charging potentially captive traffic. If the defendant railroad were grossly revenue adequate (or vice versa), the fact that a feasible competitive alternative was constraining the defendant railroad from charging more than the $R/VC_{>180}$ figure would not provide much help in deciding whether that particular competitive alternative was adequate to constrain the defendant railroad's rates at or below a reasonable level.

VICE CHAIRMAN BEGEMAN, concurring:

This rate case was first brought to the Board in 2010, well before I arrived here. Considerable time, effort, and resources have been expended on it by the shipper, the carrier, and this agency. By statute, the Board is directed to complete cases like this within 9 months after the close of the administrative record. That directive is a firm and important requirement, giving the outer time limit for the Board to decide a case, while ideally the Board would act sooner, given the considerable time and expense of such cases.

The time has come for the Board to provide a resolution. For that reason, I am concurring with this decision, despite my reservations about the Board's approach to resolving

¹ Given that the limit price R/VC ratio—and its subsequent comparison to the RSAM figure—is based on the price of the lowest-cost alternative rather than the challenged rail rate, DuPont's argument that it would be unlawful to use the limit price approach to find the existence of competition based on a limit price R/VC ratio below RSAM because it "effectively would replace the quantitative market dominance jurisdictional threshold of 180% R/VC with the RSAM ratio," DuPont Rebuttal II-B-214, is incorrect.

the question of market dominance, which I have voiced repeatedly in a prior case. I am concurring here because the alternative would result in an unacceptable outcome for this member: the Board would be at an impasse, the case would be unresolved, and the significant time (years) and expense (millions) dedicated to this proceeding would be wasted.

As I explained in my dissents on the market dominance portion of the TPI rate proceeding, which is currently pending in the D.C. Circuit, I have serious questions about the Board's limit price approach first proposed in M&G. Importantly, there the Board also provided an opportunity for public comment on the methodology. With my support, the Board requested that "[i]f there is a better general approach to this issue, if there is a superior benchmark that can be used to guide this inquiry, or if the application of the refined approach to the facts of this case is somehow flawed, parties are strongly encouraged to use this comment period to bring such concerns to our attention." The comments received were overwhelmingly critical from shippers, carriers, and economists. M&G settled the case before the Board issued a final decision on the matter.

A then-majority of the Board applied the limit price approach in the next case, TPI, over my objections, without making adjustments to rectify any of the methodology's shortcomings identified by the comments filed in both M&G and TPI. I believe that was a mistake on the Board's part. It is now in the court's hands to determine whether the limit price, as established, will stand. It is my hope that the court will provide needed finality to the question soon.

Today's decision explains why the market dominance determination in cases like this is very difficult to resolve due to the large number of origins and destinations and different commodities. I believe the Board should initiate a formal rulemaking and invite public comment in order to develop—and then consistently apply—the most economically sound and objective approach to resolve the question of market dominance in a rate proceeding.

In the meantime, no other approach is currently available to me to resolve the question of market dominance in this case. I would not be fulfilling my responsibilities as a Board Member if I allowed my strong opinion about a particular Board methodology, and the manner in which the Board established it, to result in Board inaction and a case going unresolved given the time and resources the parties have expended.

While today's decision finds that much of the traffic at issue is market dominant, the Board cannot find that the contested rates are unreasonable because the complainant did not prove its case. The decision details at length the problems with the evidence, including not only missing trains and essential facilities, but incomplete service for over one-third of the shipments. While a stand-alone railroad (SARR) is by definition hypothetical, the complainant's SARR was unprecedented in "creative" design, which may have contributed ultimately to the unworkable operating plan.

Finally, the extent to which "leapfrog" traffic is presented in this case also raises concerns, and I would have preferred for the Board to rule more firmly on this issue. There is a line at which such traffic becomes implausible in a SARR. A presentation of leapfrog traffic in future cases would need to be considered very carefully by the Board to ensure its use does not render the SAC process meaningless.