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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

SUNBELT CHLOR ALKALI PARTNERSHIP

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

and

UNION PACIFIC RAILROAD COMPANY

Defendants.

Docket No. NOR 42130

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Public Record**

**DEFENDANT NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO
SUNBELT'S MOTION FOR CLARIFICATION**

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Defendant Norfolk Southern Railway Company ("NS") respectfully submits this Reply in Opposition to Complainant SunBelt Chlor Alkali Partnership's ("SunBelt's") Motion for Clarification that Complainant is Entitled to Prescription of a Reasonable Joint Rate," filed December 6, 2011 ("Motion for Clarification").

INTRODUCTION AND SUMMARY

SunBelt's "Motion for Clarification" is inaptly named. Sunbelt is *not* asking the Board to "clarify" an uncertain area of the law, it is asking the Board to *create new law* that would nullify rail carriers' statutory right to set and modify any lawful rate as they deem appropriate—a right that is guaranteed by statute and over a century of common law and Supreme Court precedent. In place of the congressionally mandated carrier rate initiative, SunBelt seeks to substitute a new and unprecedented administrative rule that would vest shippers with the power to lock in carriers' rates at the moment a shipper chooses to file a rate complaint (or even before the

complaint is filed), and to use that shipper-frozen rate as the basis for a ten-year rate prescription, even if it is not the rate or form of tariff the carrier is actually charging and collecting.

SunBelt seeks the Board's assistance to leverage a temporary short term joint rate – which expired by its terms at the time this case was initiated – into the basis for a long-term rate prescription binding on both carriers, despite the fact that both carriers have established, charged, and collected separate individual rates since the same week in July 2011 when SunBelt filed the Complaint. Under the approach urged by SunBelt, the Board would consider and adjudicate a challenge to a fictitious joint rate – which does not exist and which SunBelt knew would not exist when it filed its Complaint – based on a combination of a former NS rate that no longer exists and a separate Union Pacific (“UP”) local rate that was not designed or intended to be part of a joint through rate. Such a contorted hypothetical exercise would flout both logic and the law. The unprecedented approach would nullify the carriers' statutorily guaranteed right to establish and amend a tariff and to determine whether the reasonableness of its rate should be evaluated on a through basis or to (or from) the interchange. Instead, it would permit a complainant to seek a rate prescription and reparations based on a non-existent joint tariff that the defendant carriers have neither charged nor collected, remedies that are outside the Board's statutory authority. *See* 49 U.S.C. §§ 10701(c) & 10704(a)–(c).¹

¹ To facilitate contract negotiations, NS and UP published an interim joint rate, and through several extensions, applied that rate from the expiration of the last contract until July 30, 2011. Fully aware of that scheduled expiration and the two carriers' intention to establish separate new rates to replace the joint rate, SunBelt filed its Complaint on July 26, just before the new NS and UP common carrier tariffs replaced the expiring joint rate. *See* NS Reply to UP Motion at 2-3. Thus, for a period of less than four months, the carriers did charge and collect a joint tariff rate, and a separate challenge to that short-term tariff would not violate Section 10704.

A key feature of rail carriers' rate initiative is the right to establish and to change a common carrier rate and terms at any time and for any lawful reason. *See* 49 U.S.C. §§10701(c), 11101(c). This right – which dates back to 19th century common law – is an integral component of a common carrier's obligation to provide service in response to any reasonable request. *See, e.g., I.C.C. v. Chicago Great W. Ry*, 209 U.S. 108, 118-19 (1908); *see also Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 564 (1919) (“Neither the [Commerce Act] nor any amendment thereof has taken from the carriers the power which they originally possessed, to initiate rates, that is the power, in the first instance to fix rates or to increase or to reduce them.”); 49 U.S.C. § 11101(a) – (c). For well over a hundred years, one of the rights rail carriers have been guaranteed in exchange for their common carrier obligation is the right to establish and to modify the form and terms of common carrier tariffs as they deem appropriate, unless and until the Board determines such rates exceed a maximum reasonable level. *See, e.g.,* 49 U.S.C. § 10701(c) (one of the statutory provisions guaranteeing carrier's ratemaking rights).

The new rule SunBelt asks the Board to create would effectively eliminate carriers' rate initiative in favor of a heretofore unknown shipper right to freeze the form and type of a carrier's rate at a time of the shipper's choosing. Extended to its logical conclusion, such a radical change would dismantle one of the foundational tenets of transportation law: in exchange for the obligation to accept and move all lawful cargo tendered to it, rail common carriers have the right to establish and change the terms and conditions of their common carrier tariffs. Any change to this fundamental, longstanding principle may be undertaken only by Congress. *See* 49 U.S.C. §§ 10701(c), 10702, 11101(a)–(c), (e).

The only rationale Sunbelt offers for its proposal that the Board create radical exceptions to long-established law and statutory mandates is that NS has engaged in “gamesmanship” that has prejudiced Sunbelt. As NS demonstrates below, SunBelt’s allegations are unfounded, and Sunbelt would suffer no unfair prejudice from the application of long-established rules and law to the facts of this case and the Complaint that Sunbelt alone designed and filed.

From the outset of the case, Sunbelt knew or should have known that its decision to challenge both a former joint rate and two separate individual rates would require it to file three separate sets of evidence. The need for three sets of evidence was a direct result of the scope of Sunbelt’s complaint – a matter solely within Sunbelt’s discretion and control – not from any gamesmanship by the defendant carriers. Having taken the actions requiring the filing of three sets of evidence, Sunbelt should not now be heard to complain that in order to maintain its full challenge, it must do exactly that. With respect to NS’s amendment of its tariff to make clear it is a local, separately challengeable tariff, NS hardly engaged in gamesmanship.² Rather, NS amended the tariff promptly as soon as it determined such an amendment was necessary and appropriate to ensure that its separate tariff would be subject to an individual challenge, not the fictional joint rate challenge that SunBelt proposed in its December 6 Motion.

Nor has Sunbelt’s ability to prepare its challenge to NS’s rates been prejudiced by NS’s amendment of the challenged tariff. While the case has otherwise largely been held in abeyance over the last several months, NS diligently has engaged in discovery, including ongoing production of the data and information necessary for Sunbelt to develop its case. NS amended its tariff long before either it or Sunbelt it had completed discovery production. Moreover, UP

² Sunbelt has sought a local tariff from NS for months, and has even complained to the Board that NS and other carriers would not issue local tariffs for Sunbelt traffic. NS has now established precisely the local tariff Sunbelt advocated.

has yet to even commence discovery production. Under the procedural schedule proposed by SunBelt and adopted by the Board, discovery will continue into February, and opening evidence is not due for five months, plenty of time for Sunbelt to develop that evidence using the discovery materials produced by NS.

Finally, NS has offered to allow SunBelt to challenge an NS local rate from the date of the Complaint as an accommodation to avoid potential inefficiency or perceived unfairness that might result if SunBelt were required to challenge NS's Rule 11 tariff and its amended local tariff separately.³ SunBelt may decide to reject that opportunity in favor of pursuit of some other, more complex – and likely more costly and time-consuming for all concerned – challenge to the rates established by NS. What it may *not* do, however, is eliminate NS's statutorily guaranteed rate initiative in the process. As demonstrated below, there is no serious question that the only NS tariff that SunBelt may challenge from this point forward is the local tariff embodied in the current NSRQ 65912 (Dec. 13, 2011).

BACKGROUND

NS described much of the relevant history in its Reply to UP's Motion for Partial Dismissal filed December 13, 2011 (the "NS Reply to UP Motion"). NS briefly reviews some of the salient facts again here, and notes that despite ample opportunity – including filing a prohibited Surreply to NS's Reply – SunBelt has not contested the facts set forth in NS's Reply to the UP Motion⁴.

³ SunBelt's characterization of NS's proffered accommodation as an attempt to apply a local rate retroactively is erroneous, as NS explains below. *See* Surreply at 3; *cf. infra* at III.A.

⁴ NS incorporates to this Reply by reference the entire introduction and Background sections, as well as other factual discussions of its Reply to Union Pacific's Motion for Partial Dismissal or in the Alternative, Expedited Determination of Jurisdiction over Challenged Rates (Dec. 13, 2011). Here, NS summarizes a few of those facts and discusses additional relevant facts.

Following the expiration of a long term joint transportation contract between NS, UP, and SunBelt, the carriers issued a series of short-term joint tariff rates and extensions to cover transportation of SunBelt's McIntosh-New Orleans-LaPorte traffic while the parties conducted negotiations for a new transportation contract. *See* NS Reply to UP Motion at 4. Those interim joint tariffs were effective from April 1 through July 29, 2011. The parties were unable to reach agreement, and before SunBelt filed the Complaint initiating this case, UP published a local rate for its movement of SunBelt traffic from New Orleans to LaPorte on the UP system. That UP local tariff replaced its portion of the temporary joint tariffs under which the SunBelt interline traffic moved during contract negotiations (through July 29). On July 26, 2011, aware that UP had established a new local rate (which replaced the expiring joint rate and rendered it ineffective), SunBelt filed a Complaint challenging the reasonableness of both "the joint tariff rate in NSRQ 70319" (in place during contract negotiations from April through July) and "any subsequent . . . tariff rates that NS and UP shall publish for" that movement. Complaint ¶ 13. Shortly thereafter, in response to SunBelt's request, NS published a Rule 11 tariff covering SunBelt traffic from McIntosh to New Orleans on the NS system, which Sunbelt combined with the UP local rate to move that traffic from New Orleans to SunBelt's customer in LaPorte, Texas.⁵

Thus, from the very outset of the case, SunBelt has known that the period covered by its Complaint embraced two different forms of interline rate arrangements: (i) a joint rate from April

⁵ Paragraph 13 initially refers to subsequent "proportional" rates established by the carriers, but the Complaint later makes clear that it applies to "any and all adjustments to the challenged rates . . . and any new rates established by NS and/or UP for the services described" in the Complaint, not just proportional rates. *Id.* ¶ 20. Thus at the time it filed the Complaint, SunBelt knew that both NS and UP had withdrawn from the expiring joint rate tariff, that UP had established a new rate governing only its segment, that NS would soon do the same, and that the carriers had the right to change their tariffs during the pendency of SunBelt's challenge.

through July; and, subsequently, (ii) two separate individual carrier rates established by UP and NS that SunBelt could combine to construct an interline route and rate. From the start, it was clear that challenges to these two different rate structures would likely require at least two – and likely three – different sets of evidentiary presentations. SunBelt’s claim to have been surprised by this fact is not credible (nor is it legally relevant in any event).

UP filed its Motion for Partial Dismissal on September 26, 2011, and the parties participated in mediation sessions on September 28-29, 2011. Because the parties made some progress in those mediation sessions, the Board granted the parties’ joint motion to extend the mediation period and to hold UP’s Motion in abeyance until December 13, 2011. *See* Decision, *SunBelt Chlor Alkali P’ship v. Norfolk So. Ry. Co. & Union Pacific R.R. Co.* (“*SunBelt v. NS & UP*”), STB Docket No. 42130 (served Oct. 5, 2011). SunBelt and NS served discovery requests on one another in September, and NS began a rolling production of responsive information and data on October 11, 2011. While SunBelt also served discovery requests on UP, UP and SunBelt subsequently agreed to suspend discovery between them pending further meditation and settlement discussions. The Board issued a scheduling order on November 21, 2011 that acknowledged the SunBelt-UP suspension of discovery and the fact that a revised schedule might be necessary in the event that SunBelt and UP did not reach settlement by January 2012. *See SunBelt v. NS & UP*, Decision at 2 (served Nov. 21, 2011).

In late November and early December, two events caused NS to amend and clarify the tariff covering its portion of the interline issue movement. *First*, on November 22 the Board issued a rate case decision in *AEPCO v. BNSF Railway Co. and Union Pacific RR Co.*, STB Dkt. No. 42113 (served Nov. 22, 2011), which, *inter alia*, confirmed that “separately challengeable” rates must be challenged separately. *Id.*, slip op at 13. *Second*, on December 6 SunBelt filed a

Reply to UP's Motion, and a separate "Motion for Clarification." Surprisingly, Sunbelt's new Motion asserted that the Board should constructively deem UP's local rate and NS's Rule 11 rate a joint through rate, which could potentially render NS liable for the reasonableness of the entire interline rate without NS's consent to do so. Moreover, SunBelt erroneously asserted that NS had filed its Rule 11 rate because NS intended to "file its own motion to dismiss" a challenge to that rate in the event that UP was dismissed for lack of market dominance. NS filed its Reply to UP's Motion to Dismiss on December 13, the date it was due. *See* NS Reply to UP Motion for Partial Dismissal (Dec. 13, 2011). Also on December 13 – partly in response to the Board's recent *AEPCO* decision, and partly in response to SunBelt's surprising Motion – NS amended its common carrier tariff to clarify that NS intended its tariff to be separately challengeable. The revised tariff makes clear that it is a separately challengeable local tariff that may be used for solely local movements from McIntosh to New Orleans or may be combined with another carrier's tariff for movement on the second carrier's system beyond New Orleans. *See* NSRQ 65912 (Dec. 13, 2011) (*see* NS Reply to UP Motion for Partial Dismissal, Exhibit A). Shortly thereafter, the Board granted the parties' joint motion to continue to hold UP's Motion to Dismiss in abeyance until January 6, 2012 and to extend the due date for replies to the same date. *SunBelt v. NS & UP*, STB Docket No. 42130 (served Dec. 16, 2011).

On December 19, SunBelt filed a "reply to a reply," responding to NS's Reply to UP's Motion to Dismiss and a request for leave to file such a surreply. Neither SunBelt's Reply to UP's Motion nor its Surreply to NS's Reply offered *any* evidence or argument to contest UP's *prima facie* showing that it lacks market dominance over the transportation subject to its local tariff. Thus, if UP is correct that market dominance must be evaluated and determined with respect to its local rate from July 30, 2011 forward – and NS agrees this is the proper analysis –

then SunBelt has utterly failed to present evidence or argument to meet its burden of showing UP possesses market dominance, and UP's Motion for Partial Dismissal should be granted. As SunBelt has acknowledged, the nature and parameters of this case will be substantially different depending on whether UP is or is not a defendant in some or all of this case. In all events, however, from the effective date of NS's local rate forward, the scope of SunBelt's challenge to NS's rates (and any prescription or reparations it may seek), is limited to NS's local rate.

ARGUMENT

I. SUNBELT'S REQUEST TO CHALLENGE A JOINT RATE THAT DOES NOT EXIST IS FORBIDDEN BY THE INTERSTATE COMMERCE ACT, AND SEEKS TO NULLIFY DEFENDANT CARRIERS' RATE INITIATIVE.

SunBelt's "clarification" request, if granted, would deny UP and NS their statutorily guaranteed rate initiative and effectively force a 9½ year extension of a temporary joint rate that ceased to exist at or about the time SunBelt filed its Complaint. The imposition of a hypothetical joint rate as the basis for evaluating the reasonableness of existing local rates is: (i) outside the Board's rate reasonableness authority, which is limited to consideration of rates "charged or collected," and (ii) contrary to carriers' foundational rate initiative right, which has existed continuously for over a century and is guaranteed by federal law. *See* 49 U.S.C. §§ 10701(c), 10704(a). SunBelt offers no authority or argument that could justify the flouting of those statutory rights and limits. The Board should reject SunBelt's attempted end run around foundational common carrier law and policy.

A. For the Overwhelming Majority of this Case, Extending From the Effective Date of NS's Local Rate Forward, the Only NS Rate that Sunbelt May Challenged is the Local Rate Established on December 13, 2011.

Under the undisputed facts, the question raised by Sunbelt's Motion concerning the current local rate established by NS – which covers the overwhelming majority of the case – is straightforward and easily resolved. On December 13, 2011, NS exercised its statutorily

guaranteed rate initiative and amended its tariff to make clear it is a “local” tariff. Such tariffs, even when used in combination with another local tariff in an interline movement, are properly challenged separately and not in combination with another local rate. Therefore, at least from the effective date of NS’s local tariff forward, SunBelt may only challenge that tariff separately, and not as part of a fictitious through rate. SunBelt offers no meaningful argument to the contrary, and essentially concedes that unless the Board creates an exception to the carriers’ statutory rate initiative, its challenge to NS’s rate from here forward must be confined to that local rate. Stated plainly, the Board, an executive branch agency, does not have authority to create exceptions to the clear commands, requirements, and limitations of the statutes at issue (including 49 U.S.C. §§ 10701(c), 10702, 10704, 11101) that would be necessary to allow SunBelt prospectively to challenge a non-existent “joint” through tariff rate from McIntosh, LA to LaPorte, TX.

SunBelt seeks the Board’s intervention to allow it to use a single SAC analysis of a “joint rate structure” that *does not exist*, thereby overriding the carriers’ decisions to replace a temporary interim joint tariff with the currently applicable local tariffs. This is simply irreconcilable with the Interstate Commerce Act’s vesting of the ratemaking initiative with rail carriers. Railroads have the authority in the first instance to set both the level of their rates and to determine what types of rates to offer. *See, e.g., BNSF Ry. Co. v. STB*, 403 F.3d 771, 773 (D.C. Cir. 2005); 49 U.S.C. § 10701(c) (“a rail carrier providing transportation subject to the jurisdiction of the Board under this part may establish any rate for transportation or other service

provided by the rail carrier.”)(emphasis added).⁶ As the Board has recognized, Section 10701(c) means that “a rail carrier is free to establish any common carrier rate it chooses and has the rate freedom to increase its rates without precondition.” *AEP Texas North Co. v. BNSF Ry. Co.*, STB Docket No. 41191 (Sub-No. 1) (Mar. 19, 2004). Rail carriers also have the right to amend the form, level, or other terms of a rate or tariff at any time. *See, e.g.*, 49 U.S.C. § 11101(c).

Railroads’ right to set any lawful rate, and to modify the type, level, and parameters of a common carrier rate or tariff at any time has long been an integral part of commerce law and the Interstate Commerce Act. As the Supreme Court summarized early last century, “[a] carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate-making as to it seems wise.” *U.S. v. Illinois Cent. R.R. Co.*, 263 U.S. 515, 522 (1924). The Railroad Revitalization and Regulatory Reform Act of 1976 and the Staggers Rail Act of 1980 reaffirmed and strengthened the “great flexibility in rate making matters” that “Congress gave the railroads.” *Potomac Elec. Power Co. v. Consol. Rail Corp.*, 367 I.C.C. 532, 536 (1983).⁷ The Board has repeatedly reaffirmed rail carriers’ bedrock right to set rates. *See, e.g.*, *Seminole Elec. Coop. v. CSX Transp., Inc.*, STB Docket No. 42110, at 3 (Dec. 22, 2008); *Arizona Pub. Serv. Co. v. BNSF Ry. Co.*, STB Docket No. 42077, at 6 (Oct. 14, 2003); *Bottleneck I*, 1 S.T.B. at 1064; *Metropolitan Edison*, 5 I.C.C. 2d at 409. Similarly, federal statutes have long mandated a balance of carrier rights and regulatory oversight: Railroads have the right and discretion to

⁶ *See also* *MidAmerican Energy Co. v. STB*, 169 F.3d 1099, 1106 (8th Cir. 1999); *Central Power & Light Co. v. Southern Pac. Transp. Co.*, 1 S.T.B. 1059, 1064 (1996) (“*Bottleneck F*”); *Metropolitan Edison Co. v. Conrail*, 5 I.C.C. 2d 385, 409 (1989).

⁷ *See* *Edison Electric Institute v. ICC*, 969 F.2d 1221, 1222 (D.C. Cir. 1992) (“The Staggers Act allows a railroad to set or change a rate without advance approval from the Interstate Commerce Commission.”); *Harborlite Corp. v. South. Pac. Transp. Co.*, 364 I.C.C. 585, 587 (1981) (“Railroad reform legislation enacted in 1976 . . . enunciate[d] a fundamental policy in favor of greater railroad pricing freedom.”).

choose the level and the form of their rates, and in appropriate circumstances the Board may evaluate the reasonableness of those rates.⁸

Importantly, railroads' rate initiative includes the right to establish not only the level of those rates and tariff terms and conditions, but also the type of rates. *Bottleneck I*, 1 S.T.B. at 1064; *Metropolitan Edison*, 5 I.C.C. 2d at 409. Carriers have discretion to choose to provide service via joint rates, proportional rates, or local rates. The Board and the ICC have consistently rejected attempts to subvert this principle through rate reasonableness challenges that did not correspond to the rates a rail carrier has established. For example, in *Metropolitan Edison* the complainant's challenge to a joint through rate was predicated not on evidence that the joint through rate was unreasonable as a whole, but rather on evidence that Conrail's division for its segment of the joint through movement was excessive. *Metropolitan Edison*, 5 I.C.C. 2d at 401. Rather than develop stand-alone cost evidence for the entire joint through movement, complainant Metropolitan Edison presented stand-alone cost evidence solely for the Conrail portion, as though Conrail had established a local rate for its segment of the movement. The ICC rejected this approach, holding that "if Met Ed's position were to prevail, it would, in effect, be given the authority to supplant the carrier's choice of the type of rate, *i.e.*, local rate, proportional rate, or joint rate." *Id.* at 409. Similarly, in *Bottleneck I*, complainants argued that railroads should be forced to offer separately challengeable local rates at the complainants' request. Like the ICC in *Metropolitan Edison*, the Board rejected the complainants' argument and reaffirmed

⁸ 49 U.S.C. §§ 10701(c), 10704; *see ICC v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 92 (1913) ("Under the [ICA] the carrier retains the primary right to make rates"); *ICC v. Chicago Great W. Ry. Co.*, 209 U.S. 108, 119 (1908) ("Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate . . . the act to regulate commerce leaves common carriers as they were at common law, free to make special rates looking for the increase of their business, to classify their traffic, [and] to adjust and apportion their rates so as to meet the necessities of commerce") (internal quotations omitted).

that under the statute “a rail carrier ‘may establish any rate for transportation or other service’ that it provides, and pursuant to that initiative, may choose to establish local, joint, or proportional rates.” *Bottleneck I* at 1064 (quoting 49 U.S.C. § 10701(c)). In the present case, Sunbelt seeks precisely the power rejected in *Metropolitan Edison* and the *Bottleneck* cases: the power to “supplant the carrier’s choice of the type of rate.” SunBelt’s gambit is equally unlawful today.

B. SunBelt Cannot Justify An Exception to Carriers’ Statutory Rate Initiative or to the Statutory Requirement Limiting Rate Challenges to Rates Charged or Collected by the Carrier.

SunBelt acknowledges the overwhelming body of precedent holding that it is a railroad’s prerogative to choose the form of rates it will offer, as well as the statutory guarantee of that right. *See, e.g.*, Clarification Motion at 5. In support of its extraordinary suggestion that the Board engage in agency legislation by creating an exception to the statutory rule, SunBelt offers only the weak and indefinite claim that carriers’ rate initiative right “is not unfettered.” *Id.* As far as it goes, this vague, unspecific assertion is accurate: carriers may not establish unlawful rates, for example. However, that uncontroversial assertion has no bearing on the specific question presented by SunBelt’s Motion: whether a rail carrier’s rate initiative may be nullified by a complainant who would prefer to challenge a different rate type or structure than that established by the carrier(s). And, the few cases SunBelt relies upon do not support its position that a carrier’s rate initiative can be so constrained by a shipper. Instead, they narrowly hold that a railroad’s rate initiative may be constrained in instances in which *it would conflict with or defeat another carrier’s exercise of its rate initiative*. Thus, when one carrier has entered a transportation contract with a shipper for a portion of an interline movement, the connecting carrier may not refuse to issue a separate rate for its portion, because allowing the connecting

carrier to insist on a joint rate would overrule the contracting carrier's rate initiative. *See Cen. Power & Light v. S. Pac.*, 2 S.T.B. 235 (1997) ("*Bottleneck II*").

SunBelt uses a materially incomplete quotation from *Bottleneck II* to assert that "the bottleneck carrier's discretion to determine the kind of rates it will offer is not absolute." Clarification Motion at 5. As the full quotation makes clear, the Board simply held that two connecting railroads' rate initiatives sometimes must be balanced against one another, and a carrier may not exercise its rate initiative in a manner that denies the rate initiative of a connecting carrier. The full relevant quote, including the essential clause that SunBelt failed to include, makes the Board's limited holding clear: "[T]he bottleneck carrier's discretion to determine the kind of rates it will offer is not absolute, *but must necessarily be accommodated with that equally held and exercised by the origin carrier.*" *Bottleneck II*, 2 S.T.B. at 245 (emphasis added to illustrate portion of quotation SunBelt excluded); *cf.* Motion for Clarification at 5.

The *FMC Wyoming* decision relied on by SunBelt stands for the same general proposition – it held that one carrier's rate initiative does not allow it to "effectively negate" contracts entered by other carriers by refusing to quote rates that could be used in connection with those contracts. *FMC Wyo. Corp. v. Union Pac. R.R. Co.*, 2 S.T.B. 766, 771-72 (1997) ("UP is not permitted to effectively negate a transportation contract negotiated with a connecting carrier, but rather is obliged to provide proportional rates that could be used by FMC in conjunction with the CSXT rail transportation contracts"). Again, the only limitation imposed on a carrier's rate initiative was that it may not frustrate another railroad's rate initiative. In short, SunBelt cites no case in which the Board or the ICC denied a carrier the right to establish the form of rate it

chooses, simply because it had previously published a different form of rate that a shipper would prefer to challenge.

The instant case presents no need to balance NS's rate initiative against UP's rate initiative. To the contrary, each carrier has exercised its own ratemaking initiative to offer a separate local rate that can be applied to a portion of SunBelt's interline movement. There is no need to harmonize the carriers' exercise of their respective rate initiatives, because the forms of rates they have chosen are compatible and neither carrier's tariff infringes on the other's rate initiative.

The short term joint rate in place from April through July 2011 no longer exists, and SunBelt may not challenge that non-existent rate for a period and movements to which it does not apply. SunBelt's new proposed exception to rail carriers' statutory rate initiative is wholly without support in the agency's precedents and would violate multiple provisions of the Interstate Commerce Act. Granting the proposed exception embodied in SunBelt's Clarification Motion would be contrary to law, arbitrary and capricious.

C. SunBelt's Attempt to Lock in a Type and Structure of a Common Carrier Tariff that No Longer Exists Would Exceed the Board's Authority to Consider Challenges to Tariff Rates That Have Been Charged or Collected.

SunBelt seeks to extend a temporary stop-gap joint rate structure that terminated on July 29, 2011 to a 10-year rate analysis and prescription period ending in 2021. Sunbelt would thus have the Board create a fictional joint rate for the purposes of its rate challenge, forcing the carriers to defend and be held liable for that non-existent rate for 10 years, despite the fact that each carrier established a separate rate at essentially the time SunBelt filed its Complaint, in July 2011. The statute granting the Board authority to determine rate reasonableness and to prescribe maximum reasonable rates applies only to a rate "*charged or collected* by a rail carrier for transportation subject to the jurisdiction of the Board." 49 U.S.C. 10704(a)(1) (emphasis added).

From the effective date of NS's local tariff forward, the only tariff rate and terms charged or collected by NS for Sunbelt's traffic are those set forth in its present local tariff as published December 13, 2011.⁹ Thus, under the clear terms of governing statutory provisions, if SunBelt wishes to challenge an NS tariff applying to the prospective movement of SunBelt's chlorine traffic from McIntosh to New Orleans, it may only challenge the NS local rate presently in effect.

II. SUNBELT'S REQUEST FOR AN EXCEPTION TO CLEAR STATUTORY REQUIREMENTS CANNOT BE JUSTIFIED BY ITS DISSATISFACTION WITH THE OBJECTIVE APPLICATION OF EXISTING RULES; OR BY ITS MERITLESS ACCUSATIONS OF "GAMESMANSHIP" AND UNFAIR PREJUDICE.

SunBelt does not contest the law, analysis, and conclusions set forth above. *See, e.g.*, SunBelt Surreply at 5 ("SunBelt agrees with NS that, by changing its rate from a proportional to a local rate, NS has created a combination of two local rates that can be separately challenged."). Instead, it argues that the Board should create exceptions to clear statutory rights, rules, and limits because unusual circumstances may make aspects of SunBelt's desired rate challenge more complex and less convenient. But the statute nowhere provides that a rate complainant is entitled to the least complicated and most convenient rate challenge it can envision. Nor has SunBelt cited any Board or ICC precedents to support overriding statutory rights and requirements in order to make a complainant's rate case easier or to maximize the route or rates a complainant can challenge using a single evidentiary presentation. And the Board can hardly be

⁹ SunBelt initially expressed concern that either NS or UP might change the form of its rate at some future time during the pendency of the case. *See* SunBelt Surreply at 4, n. 4. NS has no intention of changing the SunBelt tariff to a joint rate or proportional rate or any form of rate during this case, and it has expressly represented this to the Board and to SunBelt in public filings. Thus, SunBelt's concern about NS changes to the form of the rate during the remainder of this case is unfounded.

in the business of changing its rules and processes – let alone statutory mandates – to accommodate parties who complain that, under a neutral application of existing rules and law in a particular adjudication, the facts of a case make it difficult or complex.¹⁰

Sunbelt also claims that NS has engaged in “gamesmanship” by amending its tariff to clarify that its Rule 11 rate is a local rate, subject to individual challenge. NS did no such thing.

NS did not unreasonably delay issuing its tariff amendment, but rather acted promptly as soon as it became clear such an amendment was appropriate. Two events in late November and early December led to NS’s amendment of its tariff in mid-December, well before the completion of discovery between NS and SunBelt and six months before the current deadline for filing of opening evidence. *See* Decision, *SunBelt v. NS & UP*, STB Docket No. 42130 (Nov. 21, 2011) (setting June 1, 2012 as due date for opening evidence). First, the Board issued a final decision in *AEPCO v. BNSF & UP*, STB Docket No. 42113 (served Nov. 22, 2011) (“*AEPCO*”).

¹⁰ As SunBelt’s parent Olin Corporation knows, the Board conducted a lengthy, comprehensive review and revisions of its rules and procedures for both large rate cases and medium and smaller rate cases in the last few years. Following multiple rounds of comments by numerous interested parties and two separate extensive public hearings, the Board adopted new rate case approaches for medium and smaller rate cases, to complement its CMP methodology for larger cases. *See Simplified Standards for Rail Rate Cases*, STB Ex Parte 646 (served Sept. 5, 2007), *aff’d in part and vacated and remanded in part*, *CSX Transp., Inc. v. STB*, 584 F.3d 1076 (D.C. Cir. 2009). Olin actively participated in the rulemaking, both individually, and as a member of an industry association that submitted extensive comments and testimony. *See, e.g.* Rebuttal Comments and Recommendations Submitted on Behalf of Olin Chemical, STB Ex Parte No. 646 (Sub-No. 1) (filed Jan. 11, 2007); Joint Comments Submitted by Amer. Chem. Council *et al.*, STB Ex Parte 646 (Sub-No. 2) (filed Aug. 1, 2008); Joint Opening Comments of Amer. Chem. Council *et al.*, STB Ex Parte 646 (Sub-No. 3) (filed May 3, 2010); Supplemental Joint Reply Comments of Amer. Chem. Council *et al.*, STB Ex Parte 646 (Sub-No. 3) (filed Dec. 27, 2010). The Board also recently conducted a rulemaking proceeding to address major issues in SAC rail rate cases, *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657. The Board took three rounds of comments from interested parties addressing significant issues in SAC cases, and at the end of the proceeding issued revised major case rules and procedures. *See Major Issues in Rail Rate Cases* (Oct. 30, 2006), *aff’d BNSF Ry. Co. v. STB*, 526 F.3d 660 (D.C. Cir. 2008). This individual rate case is neither the time nor the forum to attempt to revisit the Board’s recently overhauled rate case rules and procedures.

In resolving one of two critical “overarching issues” in that long-running case involving interline movements, the Board distinguished between joint through rates and “separately challengeable rates to the chosen point of interchange,” holding that separately challengeable rates are not subject to a joint rate challenge. *See id.* at 13. This determination solidified and affirmed the principle that carriers may insist that separately challengeable tariff rates be challenged separately (even when a shipper has combined those separate tariffs into an interline movement). *See id.* (“[D]efendant [carriers] could have insulated themselves from a joint rate challenge by issuing separately challengeable rates to the chosen point of interchange instead of a single joint rate.”).

Second, on December 6, SunBelt filed its present Motion for “clarification,” raising the claim that its challenges to NS’s Rule 11 rate and to UP’s local rate must be treated as a single joint through rate.¹¹ Contemporaneously, SunBelt also claimed that NS had established its Rule 11 rate because if UP were dismissed for lack of market dominance “NS undoubtedly would file its own motion to dismiss” on the theory that a proportional rate cannot be challenged separately. SunBelt Reply to UP Motion at 4-5. Further, SunBelt’s rationale and arguments suggested to NS that if UP were dismissed from the case, SunBelt might take the position that NS’s Rule 11 rate rendered it liable for the entire interline rate (not just the rate that applies to transportation on the NS system), including any rate prescription or reparations the Board might order with respect to

¹¹ SunBelt also argued that the fictional joint rate required market dominance to be determined with respect to the entire combination interline route constructed by SunBelt, not with respect to the transportation covered by UP’s local tariff. *See* Clarification Motion at 2-4; *cf.* 49 U.S.C. § 10701(c). NS has refuted the argument that market dominance for UP’s local rate should be determined with reference to the entire interline route covered by the combination of the UP tariff and the NS tariff, and will not address that point further in this Reply. *See, e.g.*, NS Reply to UP Motion for Partial Dismissal at 3, 8-18 (Dec. 13, 2011).

the fictitious “joint” rate. *See generally* Clarification Motion.¹² In light of the foregoing, and in order to eliminate any doubt that NS had intended to establish a “separately challengeable” rate, NS promptly amended its tariff to make it crystal clear that the NS rate was a “local rate,” properly subject to individual challenge and not treatment as a hypothetical joint rate. *See* NSRQ 65912 (Dec. 13, 2011).

Before and after amending its tariff, NS has engaged in discovery (gathering, producing and making available large volumes of relevant data and information) with respect to the portion of the case involving its rate and network, just as it would have in the normal course of a case challenging an NS local rate.¹³ With the exceptions of NS discovery efforts and briefing concerning whether UP possesses market dominance and related issues, this case has otherwise been essentially dormant – at the request of the parties and with the Board’s approval – since late September 2011. Accordingly, regardless of how the Board rules on the UP Motion to Dismiss, NS’s December tariff amendment will not prejudice SunBelt’s ability to challenge the rate that

¹² *See also* SunBelt Surreply to UP Motion at 3-5 (later filing urging the Board to rule that a proportional rate combined with a local rate “must be challenged as a whole,” despite the fact that UP has presented essentially uncontested evidence that it lacks market dominance over the local rate); *id.* at 5 n. 4 (proposing a new rule to deem “non-market dominant, non-bottleneck carriers necessary parties to a rate case,” even though by definition the Board would lack jurisdiction to determine the reasonableness of a “non-market dominant” carrier’s rate).

¹³ The conduct of discovery to date precludes any claim of material prejudice to SunBelt from either delayed or unnecessary discovery or evidentiary development. NS is producing on a normal discovery schedule the information required to challenge its local rate for the period from the filing of the Complaint forward (and that needed to address NS’s segment of the 4-month joint rate). Discovery from UP has been suspended by agreement of UP and SunBelt, for reasons pre-dating and having nothing to do with NS’s amendment of its tariff to clarify that it is a local rate. Given that SunBelt independently agreed not to commence UP discovery *prior* to NS’s amendment of its tariff, that clarifying amendment could cause no prejudice to SunBelt with respect to its intended challenges to UP’s local rate or the four-month joint rate. Thus, NS’s exercise of its rate initiative in December does not prejudice SunBelt at all in terms of time and resources expended on discovery or on evidence development.

applies to transportation of its traffic on the NS system, local tariff NSRQ 65912 (December 13, 2011).¹⁴

In sum, with respect to the challenge to NS's local rate, SunBelt has offered no justification in fact, law, or equity for the Board to grant the extraordinary exception to governing law that it seeks in its Motion. NS properly exercised its statutory rate initiative to establish a local rate tariff. SunBelt's ability to challenge that local rate – or to challenge UP's local rate should the Board find UP has market dominance over that local transportation – is not prejudiced in the least by NS's amendment to its tariff.¹⁵ If SunBelt wishes to challenge NS's tariff from December 13 forward, its challenge must be to NS's local rate only.

III. SUNBELT CONTROLS THE NATURE AND FORM OF ITS CHALLENGES TO THE SHORT-TERM JOINT RATE AND TO NS'S RULE 11 RATE.

Having established that the only NS rate tariff SunBelt may challenge for the overwhelming majority of the time period at issue is the NS local rate as amended December 13, NS will briefly address the two remaining four-month periods covered by SunBelt's Complaint.

A. August to December 2011

Over the last several months, SunBelt has repeatedly requested that NS establish a local rate to cover movement of SunBelt's traffic from McIntosh to New Orleans. Indeed, it complained to the Board in public filings that, despite SunBelt's requests, NS and other carriers

¹⁴ At the same time, to avoid claims or concerns about unfairness of NS amending its tariff in this case, NS offered to waive any objection to SunBelt treating the Rule 11 rate in effect from July 31 to December 13 as a purely local rate. *See* NS Reply to UP Motion for Partial Dismissal at 3 & n.4; *see also* III.A, *infra*.

¹⁵ It may be possible in some future case, that a carrier's change to the form of its rate after a rate case has progressed substantially further (*e.g.*, after the filing of opening evidence) would cause unfair prejudice to the complainant warranting some sort of remedial action by the Board. However, this is not such a case – NS has acted timely and properly, and SunBelt has suffered no prejudice as a result of NS's amendment of its tariff.

had failed to establish local tariffs for portions of the interline movement from McIntosh to LaPorte, including the NS “bottleneck” segment. *See* Comments Submitted by Olin Corporation, STB Ex Parte 705 (filed Apr. 11, 2011); *see also* Reply Comments Submitted by Olin Corporation, STB Ex Parte 705 (filed May 27, 2011). Both UP and NS have now established such local rates. Having obtained the local rates that it sought, SunBelt now protests that those local rates make it inconvenient to pursue a challenge to combined interline rates.

Although it is not NS’s responsibility to offer rates to facilitate a shipper’s preferred form of rate challenge, NS has nonetheless proposed to eliminate any perceived unfairness by offering to waive any objection to SunBelt challenging NS’s former Rule 11 rate as a local rate. This would eliminate any doubt as to whether SunBelt is allowed to challenge the NS rate as a separate local rate from the filing of the Complaint forward. And, it would ensure that SunBelt is in the same position today as it was when it filed the case: required to file one set of evidence to challenge the joint rate in effect from April 1 to July 30, and two sets of evidence to challenge the carriers’ separately challengeable rates from July 31 forward. If the Board dismisses the case against UP’s local rate, then SunBelt would be required to submit a single set of SAC evidence to challenge the NS local rate, and a second set of evidence should it wish to maintain a challenge to the temporary joint rate that was in place for the four months preceding the filing of the Complaint in 2011. Thus, under NS’s proposal, SunBelt could challenge a single local NS rate from the time of the Complaint forward, obviating the need for a separate set of evidence for the short period covered by the Rule 11 rate (August through December 2011).

In response, SunBelt appears inclined to reject NS’s proffered accommodation, because NS has not cited any authority expressly authorizing the retroactive application of a tariff. *See* SunBelt Reply to Reply at 1, n.1 (Dec. 19, 2011). This misses the point. NS does not seek to

have its local rate apply retroactively. Rather, NS has offered to effect a limited *waiver* of the right to assert an objection based on its ratemaking right, in order to avoid potential inefficiency and perceived unfairness that could result if the Board were to determine that NS's Rule 11 rate must be challenged separately from its local rate. There is no need for express authority for NS to waive its right. Just as carriers sometimes waive their right to require complainants to submit evidence to prove the carrier has market dominance over the transportation to which the challenged rate applies, here NS has offered to waive its right to insist that its Rule 11 rate and its local rate be challenged separately.

SunBelt may accept NS's offer to proceed with a single challenge to the NS local rate from August forward, or it may reject that proposal and attempt to pursue a challenge to NS's Rule 11 tariff or some other challenge for the period from August to December. But it should not be heard to assert that the complexity of litigating a challenge to NS's Rule 11 rate justifies the creation of a fictional joint rate while at the same time refusing NS's proffered accommodation to resolve the issue and simplify Sunbelt's evidentiary presentation.¹⁶

¹⁶Such a challenge might be difficult to maintain. As SunBelt suggests, if the Board finds it lacks jurisdiction over the UP local rate, the Board could find that SunBelt is precluded from challenging the NS Rule 11 rate by the Bottleneck Rule. *See* SunBelt Reply at 5 (“The only exception that the Board created to the bottleneck rule, which prohibits a separate challenge to a proportional rate, is when the connecting carrier provides the shipper with a contract rate. . . . The Board has not recognized a similar exception when the non-bottleneck carrier publishes any form of common carrier tariff rate for its portion of the through movement, including local rates.”) (emphasis in original). In this scenario, SunBelt would have refused to consider the Rule 11 rate a local rate, it would have forced the dismissal of its claim under the bottleneck rule because NS would be precluded from treating its former Rule 11 rate as a local rate and forced to treat it as a proportional rate. According to SunBelt, application of the bottleneck rule would thus “prohibit a separate challenge to [NS’s] proportional rate” in place from July 31 to December 13, 2011. *See* SunBelt Reply to UP Motion at 5 (citing *Bottleneck* decisions). Alternatively, if UP is not dismissed from the case for lack of market dominance, UP might still argue that its local rate must be challenged separately from the NS Rule 11 rate. As discussed above, the primary limitation on a carrier’s right to establish any lawful rate recognized by the

B. SunBelt Has Discretion Whether to Challenge the Four-Month Joint Rate, April Through July 2011.

The final remaining question raised by the Clarification Motion concerns Sunbelt's retrospective challenge to the temporary joint tariff the carriers established to facilitate contract negotiations from April through July. SunBelt correctly notes that if it wishes to challenge that short-term joint rate and the carriers' separate individual rates established in July, it would be required to submit distinct and independent evidence challenging the short-term joint rate. *See, e.g.*, Clarification Motion at 4; SunBelt Surreply at 6 (noting "[t]he NS agreement to waive any objection to a SunBelt challenge to the previous proportional rate does nothing to address the four month period during which NS and UP charged SunBelt joint rates," and acknowledging that SunBelt would have to file separate evidence to challenge the four-month joint rate). As demonstrated above, however, because UP published its local rate before SunBelt filed its Complaint, SunBelt knew – or certainly should have known – when it filed this case that its challenge covered both a historical joint rate and at least one prospective local rate. *See supra* at 6-7; *see also* NS Reply to UP Motion at 4-5. Because a local rate is properly challenged individually, SunBelt's election to challenge both the previous joint rate and the newly established individual rates necessarily means that (if it proves the Board has jurisdiction over the rates in question) SunBelt will be required to submit one set of evidence for the joint rate and one or more additional sets of evidence for the individual rates. *Cf.* Motion for Clarification at 4 (conceding that if the Board grants UP Motion, then in order to seek reparations from UP or NS "for the four months during which UP published joint and proportional rates, SunBelt would

Board is that exercise of such rate initiative may not thwart another carrier's exercise of its rate initiative. *See, e.g. Bottleneck II*, 2 S.T.B. 235, 245. Here, requiring UP to defend a constructive joint rate instead of the local rate it established on July 22 might be deemed to deny UP its rate initiative.

have to design two [SARRs]—one SARR for the joint rate, covering the four month period until July 30, 2011, and a separate SARR for the NS proportional rate, covering the period since July 30, 2011”).

Nothing that UP or NS has done after the filing of the Complaint changed the fact that in order to challenge the short term joint rate, SunBelt will be required to submit a separate set of evidence from that submitted for the individual rates in place on July 31. Because SunBelt made the decision to challenge both the joint rate and the individual rate fully aware of the facts and circumstances requiring a separate evidentiary presentation for the joint rate, its complaint about being required to do exactly that is much ado about nothing. The same rules, requirements, and relevant facts that apply today also existed at the time SunBelt filed its Complaint defining the parameters of its rate challenges.

* * * *

In sum, the Board should reject SunBelt’s attempt to leverage an interim four-month joint rate tariff— established and temporarily extended by the carriers to facilitate contract negotiations – into a frozen-in-time 10-year joint rate, thereby disregarding the local rates established by both participating carriers and eviscerating their core statutory right to establish and modify any lawful rate. At bottom, SunBelt objects to the neutral application of existing laws and rules to the facts. But the fact that SunBelt would prefer to challenge a single hypothetical joint rate does not warrant discarding or evading the requirements of established law. With respect to the vast majority of the case – the 9½ years following NS’s amendment of its tariff to clearly establish a solely local rate – SunBelt’s unprecedented proposal for the Board to construct a fictitious joint rate as a basis for a rate reasonableness challenge and a 10-year rate prescription would violate both the carriers’ statutorily guaranteed rate initiative and statutory

limits on the Board's rate reasonableness authority that limit it to adjudicating challenges to rates actually charged or collected by a carrier. Since the expiration of the temporary joint rate on July 30, neither NS nor UP has charged or collected a joint rate for the issue movement.

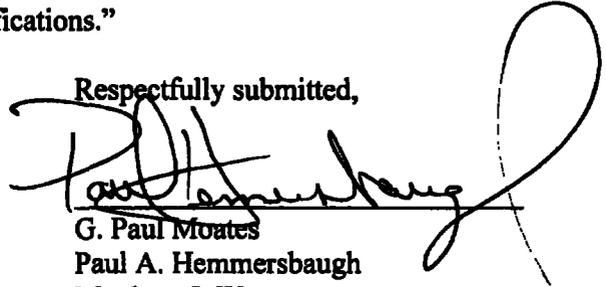
The months from April to December 2011 constitute less than seven percent of the total time period covered by this case. With respect to the period covered by NS's former Rule 11 rate, NS has offered to eliminate any additional burden on SunBelt and avoid further dispute by allowing it to challenge that rate as a local rate. SunBelt may accept or reject that option, but it cannot claim that NS's amendment of its tariff left it with no viable option to challenge NS's local rate in a single rate presentation. Nor can SunBelt claim that it was prejudiced in any significant way by NS's December amendment of its tariff to make clear that it was a local tariff – *discovery between NS and SunBelt has proceeded apace, opening evidence is not due for five months, and UP and SunBelt have not yet even commenced discovery.* NS's early exercise of its statutory right to change its tariff has caused no harm to SunBelt, and provides no justification for the Board to create an exception to statutory requirements and limits established by Congress.

Finally, with respect to the joint tariff, SunBelt has known from the start that if it wished to challenge that short-term interim rate, it would be required to present a separate set of evidence. Contrary to SunBelt's suggestion, this fact was known to it before it filed the Complaint, and it nonetheless decided to include a retrospective challenge to that short-term joint rate. Having made that discretionary decision with its eyes wide open, SunBelt should not now be heard to feign surprise and request extraordinary, unprecedented, and unlawful measures to relieve it of the straightforward application of the law to the suit it alone designed and filed.

CONCLUSION

The Board should reject SunBelt's invitation to engage in administrative agency legislation, and its attempt to leverage a short-term joint rate into a long-term rate prescription, by denying SunBelt's motion and its requested "clarifications."

Respectfully submitted,



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Dated: January 6, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 2012, I caused the foregoing Norfolk Southern Railway Company's Reply in Opposition to Complainant SunBelt Chlor Alkali Partnership's Motion for Clarification that Complainant is Entitled to Prescription of a Reasonable Joint Rate, to be served by first class mail, postage prepaid or more expeditious method of delivery on the following counsel for Complainant SunBelt Chlor Alkali Partnership and Defendant Union Pacific Railroad Company:

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