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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. 42130

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**REPLY TO MOTION FOR CLARIFICATION THAT COMPLAINANT
IS ENTITLED TO PRESCRIPTION OF A REASONABLE JOINT RATE**

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January 6, 2012

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**REPLY TO MOTION FOR CLARIFICATION THAT COMPLAINANT
IS ENTITLED TO PRESCRIPTION OF A REASONABLE JOINT RATE**

The Board should deny the motion for clarification filed by SunBelt Chlor Alkali Partnership (“SunBelt”). SunBelt asks the Board to “clarify” that it “is entitled to prescription of a joint rate, as well as reparations based upon any joint rate prescription,” if it proves a joint rate charged by Norfolk Southern Railroad Company (“NS”) and Union Pacific Railroad Company (“UP”) from March 31, 2011, through July 29, 2011, was unreasonable. (Motion at 1.) SunBelt claims a decision in its favor will allow the Board to avoid considering the significance of UP’s publication of a local rate for the issue traffic and UP’s evidence that it lacks market dominance over the transportation to which the rate applies – that is, the issues presented in UP’s pending “Motion for Partial Dismissal or, in the Alternative, Expedited Jurisdiction Over Challenged Rates” (“Motion to Dismiss”). (*Id.* at 1-2.) SunBelt is incorrect.

At this point in the case, the Board cannot properly rule on SunBelt’s potential entitlement to a rate prescription for future movements, let alone the form of any future rates.

Even when a complainant prevails in a rate case, the Board has discretion as to whether or not to prescribe rates for future movements and looks to the broader context to determine whether or not a rate prescription appears to be warranted or appropriate. *See AEP Tex. N. Co. v. BNSF Ry.*, STB Docket No. 41191 (Sub-No. 1), slip op. at 18 (STB served May 15, 2009) (citing 49 U.S.C. § 10704(a)(1)); *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 548 (1985). In this case, UP is no longer charging the challenged joint rate. Instead, it is charging a local rate that it believes will prove to be outside the Board's jurisdiction to regulate. The Board cannot properly make any pronouncement about the prescription of future rates until after ruling on the issues raised in UP's Motion to Dismiss. And, even if it denies UP's Motion to Dismiss, the Board still must complete its rate reasonableness analysis of the challenged joint rate before determining whether the prescription of a future joint rate would be appropriate. Accordingly, SunBelt's request for "clarification" regarding its entitlement to a prescription of a future joint rate is improper and must be denied.

The Board also must deny SunBelt's request to "clarify" that SunBelt can obtain reparations for transportation that UP performed under a local rate without proving that UP has market dominance over the transportation to which the rate applies and that the rate is unlawful. SunBelt does not cite any precedent for that proposition because none exists. The Board cannot order a rail carrier to pay damages for charging an unreasonably high rate without determining that it has jurisdiction over the actual rate at issue and that the rate was unreasonably high. *See* 49 U.S.C. §§ 10701(d)(1); 10707(b), (c); 11704(b).

SunBelt's motion is an attempt to leverage UP's participation in a joint rate for a four-month period while SunBelt, NS, and UP attempted to negotiate the renewal of a three-party contract into a ten-year prescription of origin-to-destination rates for its traffic, even though UP

lacks market dominance over its transportation of the issue traffic from New Orleans, Louisiana, to La Porte, Texas. Over the course of their negotiations, all of the parties acted constructively and withheld from taking certain actions that could have ended their efforts to reach agreement. The Board should not resolve this dispute based on whether UP published its local rate before SunBelt filed its Complaint or whether SunBelt could have filed its Complaint earlier. The Board should not discourage respectful, constructive negotiations by turning any one party's cooperative efforts into a reason for ruling against them – especially before it has received any evidence that an unlawful rate has been charged. SunBelt also suggests that the Board should rule in its favor to eliminate potential concerns about how it can proceed efficiently to litigate this case if UP prevails on its Motion to Dismiss. However, the Board's decision on SunBelt's motion should not turn on such concerns. The Board has ample ability to ensure efficient handling of this case if UP prevails on its Motion to Dismiss.

UP's reply is supported by the verified statement of Catie E. Kuester, Senior Business Director – Industrial Chemicals for UP (“Kuester V.S.”).

BACKGROUND

Prior to March 31, 2011, NS, UP, and SunBelt were parties to a joint contract that governed the transportation of SunBelt's chlorine from McIntosh, Alabama, to La Porte, Texas. (Compl. ¶ 7.) NS transported the traffic from the origin in McIntosh to an interchange with UP in New Orleans. (*Id.* ¶ 5.) UP transported the traffic from New Orleans to the destination in La Porte. (*Id.* ¶ 6.)

The parties were trying to negotiate a new contract when the old contract expired. To facilitate further negotiations, NS published a tariff containing a joint rate for transportation from McIntosh to La Porte. (*Id.* ¶ 8; Kuester V.S. at 2.) At certain points in the negotiations,

SunBelt indicated that it was planning to file a complaint, but it withheld from filing, and the negotiations continued. (Kuester V.S. at 2).¹ At other points, NS and UP told SunBelt they planned to cancel the joint rate and substitute different tariff rates, but they subsequently extended the joint rate solely to allow contract negotiations to continue. (Compl. ¶¶ 8-11; Kuester V.S. at 2-3.)

On July 22, 2011, after SunBelt told UP that it was rejecting the latest settlement offer, UP cancelled its participation in the joint rate and published a local rate for transportation of chlorine from New Orleans to La Porte, effective July 23, 2011. (Kuester V.S. at 3.) On the same day, UP sent SunBelt a copy of its new tariff item and notified SunBelt that it was withdrawing from the joint rate with NS. (*Id.*) After SunBelt received the new tariff item, it expressed concern that it would not obtain a new rate in a timely manner from NS, and UP agreed that SunBelt could use the joint rate through July 29. (*Id.*)

On July 26, 2011, four days *after* UP published the local rate for transportation of chlorine from New Orleans to La Porte, SunBelt filed its Complaint. The Complaint leaves no doubt that SunBelt knew UP had established a local rate *before* SunBelt filed the Complaint: SunBelt expressly alleged that UP had provided notice that the new rate would take effect upon expiration of the joint rate. (Compl. ¶¶ 11-12.)

Since July 30, 2011, the issue traffic has moved via NS from McIntosh to New Orleans under an NS rate, and via UP from New Orleans under a UP local rate. (Kuester at 3.)

¹ SunBelt's motion repeatedly raises the issue of "gaming." (Motion at 4, 6, & 7.) UP therefore believes it is appropriate to describe the negotiation process, in very general terms, to refute the implication that it engaged in any gaming. UP has conducted negotiations in good faith, and it believes SunBelt has done the same. In fact, UP and SunBelt are continuing to explore a potential bilateral settlement of their differences. (Kuester V.S. at 3-4.)

Thus, while SunBelt's chlorine moved under a NS-UP joint rate for four months, it has now moved under UP's local rate for five months, and it continues to move under UP's local rate.

ARGUMENT

SunBelt is seeking relief that the Board cannot lawfully grant. SunBelt wants the Board to declare at the outset of this case that it will prescribe a joint rate that will bind UP into the next decade and award reparations based on that joint rate prescription if it concludes that SunBelt paid an unreasonable joint rate from March 31 through July 29. In other words, SunBelt wants the Board to rule that UP's application of a local rate to SunBelt's traffic beginning July 30 is irrelevant to this case, even if UP lacks market dominance over the transportation to which that local rate applies, and that this case should proceed under the fiction that a non-existent joint rate governs the movement. However, as discussed below: (i) SunBelt's potential entitlement to prescribed future rates turns on a variety of factors, including UP's evidence that it lacks market dominance over transportation of the issue traffic from New Orleans to La Porte, and (ii) SunBelt cannot obtain reparations for charges it paid under UP's local rate without showing that the local rate is unlawful.

I. THE BOARD CANNOT RULE AT THIS STAGE OF THE CASE WHETHER SUNBELT MAY BE AWARDED A PRESCRIPTION OF FUTURE RATES.

Even when a complainant prevails in a rate case, the Board has discretion as to whether or not to prescribe rates for future movements. The Board cannot properly exercise that discretion until after it has evaluated the various factual, legal, and policy issues relevant in determining whether prescription of future rates would be appropriate in a particular case. The Board does not yet have an adequate record to perform that evaluation in this case, and therefore it cannot commit to prescribing future rates at this stage of the proceeding.

The law distinguishes between awards of reparations for past movements and rate prescriptions for future movements. When the Board finds that a carrier has charged a rate that is unreasonably high, it *must* award reparations. See *AEP Tex. N.*, slip op. at 18. However, the statutory provision governing prescription of maximum rates for future movements requires an exercise of discretion. The statute states that “when the Board concludes that ‘a rate charged or collected by a rail carrier . . . will violate this part, the Board *may* prescribe the maximum rate.’” *Id.* (quoting 49 U.S.C. § 10704(a)(1)) (emphasis added). “Thus, in contrast to reparations . . . the complainant has no similar right to a rate prescription for future movements. Rather, the Board has discretion as to whether or not to prescribe rates for future movements.” *Id.*² Accordingly, even if SunBelt proves that NS and UP charged SunBelt an unreasonably high joint rate for the four-month period from March 31 through July 29, SunBelt would have no certain right to prescribed future joint rates, or prescribed future rates of a particular type.

The Board cannot properly exercise its discretion to prescribe future rates until after completing a rate reasonableness analysis and evaluating the other factual, legal, and policy implications of a decision to regulate rates in a particular case. In this case, that means the Board could not prescribe future joint rates without evaluating the significance of UP’s publication of a local rate for the transportation of SunBelt’s chlorine from New Orleans to La Porte, including the evidence that UP lacks market dominance for the transportation to which that rate applies, and also determining the extent to which the challenged joint rate exceeds a reasonable maximum, if at all.

² In *AEP Texas North*, the Board exercised its discretion not to prescribe future rates after its stand-alone cost analysis indicated that challenged rates would become unreasonable, but only with regard to certain coal mine origins and only towards the end of the analysis period. *Id.* at 18-19.

In *Coal Rate Guidelines*, the Interstate Commerce Commission, the Board's predecessor, emphasized the discretionary nature of rate prescriptions and the importance of striking a balance between providing relief to a shipper that has been harmed by unreasonably high rates and minimizing the impact on market-based pricing by rail carriers. The Commission explained that if it found that a challenged rate was unreasonably high, it would "take whatever action is appropriate, based upon the nature and extent of the violation shown, to afford relief to the complaining shipper and to promote proper pricing by the carrier." 1 I.C.C.2d at 548. The Board again emphasized the need for balancing when it explained that it "look[s] at the broader context to determine whether or not a rate prescription appears to be warranted and appropriate." *AEP Tex. N.*, slip op. at 18.

At this stage of the case, the Board lacks the "broader context" it needs to exercise its discretion properly. *Id.* It does not know what its analysis of the joint rate would show about "the nature and extent of the violation," assuming a violation is shown. *Coal Rate Guidelines*, 1 I.C.C.2d at 548. The Board cannot know whether the rate will be shown to be unreasonable, or by how much, or over what portion of the analysis period, until after it completes its analysis of the joint rate. *See, e.g., AEP Tex. N.*, slip op. at 18 (declining to prescribe future rates based on the results of a stand-alone cost analysis).

More importantly, the Board has not considered the implications of the issues presented by UP's Motion to Dismiss – that is, UP's publication of a local rate and the evidence that UP lacks market dominance over the transportation to which that rate applies – factors that would be relevant in deciding whether UP should be subject to a ten-year prescription of future rates based on its four-month participation in a joint tariff rate while cooperatively trying to negotiate a new three-party contract with SunBelt.

If the Board were to conclude that SunBelt must separately challenge UP's local rate, especially if UP lacks market dominance over the transportation to which that rate applies – that is, if the Board agrees with UP's position in its Motion to Dismiss – a decision that ignored UP's local rate and required UP to charge a joint rate for the next ten years would be beyond the Board's authority to prescribe future rates. Congress gave the Board authority to prescribe future rates when a rail carrier is charging an unlawful rate so that it can put an end to the violation. *See* 49 U.S.C. § 10704(a)(1) (Board may prescribe the maximum rate when the challenged rate “does or will violate this part” and “may order the carrier to stop the violation”). At the very least, prescription of a future joint rate under the circumstances – that is, when UP is currently charging a local rate and lacks market dominance over the transportation to which the rate applies – would be incompatible with Congress's intent to minimize federal regulation of the rail transportation system and maximize reliance on market forces in establishing rates. *See* 49 U.S.C. § 10101(2) (policy “to minimize the need for Federal regulatory control over the rail transportation system”); *id.* § 10101(1) (policy “to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail”). In addition, a Board decision allowing SunBelt to obtain a prescription of future rates based on UP's brief, temporary participation in a joint tariff rate would effectively negate UP's choice to withdraw from the joint rate before SunBelt even filed its Complaint, a result that would be inconsistent with Congress's deregulatory policies and UP's specific statutory right to choose the form of the rates it offers. *See* 49 U.S.C. § 10701(c).

This case requires the Board to resolve substantial questions regarding its jurisdiction over UP's transportation of SunBelt's traffic between New Orleans and La Porte. These questions are presented in UP's Motion to Dismiss, and the Board can resolve them when

it decides that motion. The Board cannot make any pronouncement about SunBelt's potential entitlement to a prescription of future joint rates until it resolves those issues and completes its rate reasonableness analysis of the challenged joint rates.

II. SUNBELT CANNOT OBTAIN REPARATIONS FOR CHARGES PAID UNDER UP'S LOCAL RATE WITHOUT PROVING THE RATE IS UNLAWFUL.

The Board also must deny SunBelt's request that the Board "clarify" that SunBelt would be entitled to "reparations based upon any joint rate prescription." (Motion at 1.) SunBelt wants the Board to rule that it can obtain reparations for transportation that UP performed under a local rate, without demonstrating that UP had market dominance over the transportation and that the rate was unlawful. (*Id.* at 7.) SunBelt does not cite any precedent for that proposition because none exists. The Board cannot simply order a rail carrier to pay damages for charging an unreasonably high rate without determining that it has jurisdiction over the rate at issue and that the rate was unreasonably high. *See* 49 U.S.C. §§ 10701(d)(1); 10707(b), (c); 11704(b).

The Board's authority to award reparations when a carrier has charged a rate that is unreasonably high arises from 49 U.S.C. § 11704(b). *See AEP Tex. N.*, slip op. at 18. Under section 11704(b), a "rail carrier providing transportation subject to the jurisdiction of the Board under this part is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this part." 49 U.S.C. § 11704(b). "Thus, when [the Board] find[s] that a carrier has violated 49 U.S.C. 10701(d)(1) by charging a rate that is unreasonably high, [it] must award reparations." *AEP Tex. N.*, slip op. at 18. However, the Board cannot find that a carrier has violated section 10701(d)(1)'s prohibition against charging unreasonably high rates unless it first determines, "under section 10707 of this title, that a rail carrier has market dominance over the transportation *to which a particular rate applies.*" 49 U.S.C. § 10701(d)(1) (emphasis added). Section 10707(b) reinforces the requirement that the Board's analysis focus on the rate

at issue by stating that “the Board shall determine whether the rail carrier proposing the rate has market dominance *over the transportation to which the rate applies.*” *Id.* § 10707(b). Section 10707(c) makes clear that the Board’s market dominance and rate reasonableness analyses must be performed on the rate that is alleged to violate section 10701(d). It provides that, if the Board finds that a rail carrier has market dominance “over the transportation to which the rate applies it may then determine that rate to be unreasonable if it exceeds a reasonable maximum for that transportation.” *Id.* § 10707(c).

Moreover, if UP’s current rate is a separately challengeable local rate, SunBelt cannot presume UP’s market dominance over the transportation to which the rate applies or the rate’s unreasonableness using evidence relating only to the temporary, superseded joint rate. Board precedent confirms that such use of presumptions is not permissible. *See, e.g., Metro. Edison Co. v. Conrail*, 5 I.C.C.2d 385, 401-02 (1989).

In essence, SunBelt is arguing that the Board should not treat UP’s current rate as a separately challengeable local rate. But the legal status of UP’s current rate is the issue that is pending before the Board in UP’s Motion to Dismiss. The Board cannot avoid addressing that issue by ruling on SunBelt’s motion before it rules on UP’s Motion to Dismiss. Indeed, SunBelt ultimately acknowledges this when it enumerates the specific “clarifications” the Board logically must provide to rule in SunBelt’s favor. On the very last page of SunBelt’s motion, after earlier assertions that UP’s Motion to Dismiss would be “rendered moot” if SunBelt were to prevail on its motion (Motion at 3), SunBelt asks the Board to hold that it “may prove qualitative market dominance for the entire through movement, as opposed to each Respondent’s segment of the movement.” (*Id.* at 8.) But whether SunBelt must separately demonstrate that UP has market dominance over the transportation to which the local rate applies is the exact same issue raised

by UP's Motion to Dismiss, as SunBelt admits earlier in its motion. (*See id.* at 3 ("The core issue presented by UP's Motion to Dismiss is whether market dominance can be evaluated separately for the NS and UP segments or whether it must be evaluated for the entire through movement from McIntosh to La Porte."))³

The Board *should* address whether UP's publication of a local rate means that the Board must separately evaluate UP's market dominance for the transportation UP is providing under the local rate, but it should address the issue directly, when it decides UP's Motion to Dismiss.

III. THE BOARD CANNOT DEPART FROM ESTABLISHED LAW BASED ON SUNBELT'S UNWARRANTED CLAIMS ABOUT "GAMING."

In its motion, SunBelt does not address the statutes or case law that explain why the Board cannot grant the requested "clarifications." Instead, SunBelt says it is entitled to relief based on the Board's "ample discretion to protect the integrity of its processes from abuse." (Motion at 6, quoting *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), slip op. at 32 (STB served Sept. 5, 2007).) In particular, SunBelt claims to be concerned about "gaming" that "alter[s] the economic benefits to the complainant, or unduly complicat[es] complainant's presentation of evidence." (*Id.* at 7.) But UP's publication of a local rate did not involve "gaming." Moreover, SunBelt's concerns about the potential complications involved in

³ SunBelt also buries on the last page of its motion requests for clarification that "[t]he challenged rate structure for the issue through movement is the joint rate structure that was effective when SunBelt filed its Complaint on July 26, 2011" and that "SunBelt may present its SAC evidence in the form of a single SARR for the entire through movement." (Motion at 8.)

If SunBelt is asking whether it can choose not to challenge UP's local rate, it can make that choice without seeking any "clarification" from the Board. Moreover, if SunBelt is seeking confirmation that its challenge to the four-month joint rate should address the through rate, UP agrees. However, if SunBelt is simply reframing its request for clarification, the Board should deny the requested "clarifications" for the reasons discussed in this reply.

litigating this case are overblown and, in any event, they do not justify a Board decision to ignore the legal consequences that flow from UP's publication of a local rate.

SunBelt's arguments about "gaming" are an attempt to draw attention away from the goal of its motion, which is to obtain a ten-year prescription of origin-to-destination rates for its traffic, even though UP lacks market dominance over the transportation of the traffic between New Orleans and La Porte. In making its arguments about "gaming," SunBelt ignores the facts and the history of cooperation among the parties to this case. UP should not be punished for trying to reach a settlement with SunBelt.

At the outset, SunBelt is wrong when it says its motion "poses the issue as to whether rail carriers may alter the structure of a through rate *after* a Complaint challenging the reasonableness of that rate has been filed." (Motion at 5, emphasis in original.) UP did not alter its rate structure after SunBelt filed its Complaint: UP published a local rate for the issue traffic *before* SunBelt filed its Complaint. Indeed, as discussed above, the local rate was scheduled to take effect before SunBelt filed its Complaint, but UP agreed to use the prior joint rate for a few more days after SunBelt expressed concern that it might not obtain a new rate in a timely manner from NS and asked UP to continue applying the joint rate until it could obtain a new rate from NS. In short, SunBelt knew that UP had published a local rate *before* it filed its Complaint.⁴

SunBelt also ignores the facts when it claims UP cancelled its joint rate with NS and published a local rate to make SunBelt prepare two stand-alone cost analyses or to save four months' worth of reparations. (Motion at 3-4.) UP participated in the joint rate while the parties attempted to negotiate a new three-party contract. When the three-party negotiations broke

⁴ As UP explained above, UP does not believe that the precise timing should matter. The Board should not penalize UP for accommodating the three-party negotiation process by initially entering into a joint rate, and it should not penalize SunBelt for waiting to file its Complaint. The Board should apply the law, which precludes it from granting the relief SunBelt seeks.

down, UP published a local rate to eliminate its potential exposure to a ten-year rate prescription because it lacks market dominance over the transportation of SunBelt's traffic from New Orleans to La Porte. UP had a valid reason to publish a local rate and to publish the rate when it did. UP plainly was not acting with the intent to impose litigation costs on SunBelt or otherwise complicate this case. UP's legitimate exercise of its right to choose the form of the rate it offered SunBelt after the three-party negotiations broke down cannot constitute gaming. *See* 49 U.S.C. § 10701(c).⁵

SunBelt's only attempt to offer a legal basis for its requested relief is to cite cases it characterizes as showing that a railroad's right to choose the form of the rate it offers "is not unfettered." (Motion at 5.) However, the cases actually help show why UP's publication of a local rate was well within UP's statutory right and must be respected by the Board.

In particular, SunBelt cites Board decisions that limit the right of a so-called bottleneck carrier to insist on using a joint rate. (*See id.*) Those Board decisions hold that, if a connecting carrier enters into a contract for its portion of a through route, the bottleneck carrier "cannot insist on only providing joint-rate service," and instead must "provide a rate necessary to complete the transportation." *Cent. Power & Light Co. v. S. Pac. Transp. Co.*, 2 S.T.B. 235, 245 (1997). Those decisions do not help SunBelt's cause. They reflect the principle that a bottleneck carrier's discretion to choose the form of its rates "must necessarily be accommodated with that [discretion] equally held and exercised *by the origin carrier.*" *Id.* (emphasis added).⁶ That is,

⁵ SunBelt recognizes that UP's Motion to Dismiss "poses a significant legal question." Reply of SunBelt Chlor Alkali Partnership to Motion for Partial Dismissal or in the Alternative, Expedited Determination of Jurisdiction Over Challenged Rates at 2 (Dec. 6, 2011).

⁶ In its motion, SunBelt quotes the first half of this sentence, which says that "the bottleneck carrier's discretion to determine the kind of rates that it will offer is not absolute." (Motion at 5.) However, SunBelt omits the conclusion of the sentence, which is the critical part for purposes of this case, because it explains that the bottleneck carrier's discretion must yield

they acknowledge that one carrier may not force the use of a joint rate when another carrier has a competing right to choose the form of its own rate. *See id.*; *see also FMC Wyo. Corp. v. Union Pac. R.R.*, 2 S.T.B. 766, 770 (1997) (“[A] bottleneck carrier cannot unilaterally impose restrictions that would preclude a connecting carrier from moving the traffic under a contract rate.”). Those decisions do not allow the Board to ignore UP’s publication of a local rate, either in exercising its discretion as to whether or not to prescribe future rates, or in awarding damages for charges SunBelt actually paid under the local rate.⁷

In fact, the only relevance those decisions have in this case is to make clear that NS cannot defeat UP’s choice to establish a separately challengeable local rate for transportation from New Orleans to La Porte by publishing the rate for its own portion of the through service in the form of a proportional rate.⁸ That is, the Board’s “bottleneck” decisions establish that a rail carrier has a right to avoid subjecting itself to joint and several liability for an unreasonably high through rate by entering into a contract, and a carrier should have the same right to avoid being subjected to joint and several liability by publishing a local rate. Indeed, the Board relied on that proposition in its recent decision in *Arizona Electric Power Cooperative, Inc. v. BNSF Railway & Union Pacific Railroad*, STB Docket No. 42113 (STB served Nov. 22, 2011) (“AEPCO”).

when it conflicts with the rights of *another carrier*. As discussed in the next paragraph, this principle helps explain why UP’s local rate is a separately challengeable rate that requires a separate market dominance determination, as discussed in UP’s Motion to Dismiss.

⁷ SunBelt also cites *Livestock to or from Union Stock Yards, Chicago*, 222 I.C.C. 765 (1937). The case merely reflects the principle that a carrier’s right to choose the form of its rates does not allow a carrier to establish a rate that would violate the law: the Interstate Commerce Commission required a stock yard, which was, with respect to part of its business, a common carrier, to separately publish its charges for unloading and loading livestock to unlawful discrimination among railroads that required those services.

⁸ As in a typical “bottleneck” case, NS is the only rail carrier that can provide SunBelt with service from McIntosh to New Orleans, while UP faces competition with BNSF for the service it provides from New Orleans to La Porte.

See AEPCO, slip op. at 13 (“For example, UP could have quoted a transportation rate from the interchange point with BNSF to the utility plant. Had it done so, AEPCO could have challenged this rate from the interchange to the utility.”).

SunBelt also tries to justify Board interference with UP’s right to publish a local rate by arguing that the Board imposes “significant restriction[s] on railroad rate setting” when it “prescribes a through rate.” (Motion at 5; *see also id.* at 7.) But this argument also does not help SunBelt’s cause. Of course, if the Board were to prescribe a joint rate for future movements of SunBelt’s traffic *after* finding a violation of section 10701(d)(1), UP would not have the right under section 10701(c) to insist that SunBelt use a local rate, because the Board has authority to prescribe future rates in those circumstances under section 10704(a)(1).⁹ But the Board has not found a violation of section 10701(d)(1), and, if it ever does, it might well exercise its discretion not to prescribe any future rates, for the reasons discussed above. Moreover, even if the Board were to prescribe future joint rates, it would not change the fact that SunBelt has been shipping traffic under UP’s local rate for the past five months. As also discussed above, SunBelt cannot recover damages for charges it has paid under UP’s local rate without proving that UP’s local rate is unlawful.

SunBelt’s final argument for ignoring UP’s publication of a local rate is that addressing multiple rates would “unduly” complicate its “presentation of evidence.” (Motion at 7.) SunBelt’s argument presumes that UP would prevail on its Motion to Dismiss, and SunBelt would be required to challenge both the joint rate and the NS proportional rate to obtain all the

⁹ However, SunBelt is incorrect when it points to *AEPCO* as a case in which the Board prescribed a joint rate. (Motion at 5.) In *AEPCO*, the Board said nothing about the form of the rate the defendants were required to charge in the future; it just said the rates could not exceed the prescribed revenue-to-variable cost levels. The Board ordered defendants “to establish and maintain rates for movements of the issue traffic that do not exceed the maximum reasonable revenue-to-variable cost levels prescribed in this decision.” *AEPCO*, slip op. at 39.

reparations to which it is entitled. (*Id.* at.4.) However, if UP prevails on its Motion to Dismiss, and thus is not subject to liability for the period after it published its local rate, it would be remarkably unjust to negate that outcome just so SunBelt could save litigation costs. Under those circumstances, any additional costs associated with SunBelt's evidentiary presentation would not be "undue," they would be entirely justified. Even setting aside the fairness issue, requiring SunBelt's evidentiary presentation to comport with the law cannot be considered "unduly" complicated.

SunBelt says it "is unaware of any prior rate case where the structure of the challenged rate was changed subsequent to the complaint." (Motion at 5.) However, that is exactly what happened in *Arkansas Power & Light Co. v. Burlington Northern Railroad*, 3 I.C.C.2d 757 (1987). While Arkansas Power & Light's challenge to joint rates for unit train transportation of coal to two power plants by Burlington Northern and Missouri Pacific was pending, Burlington Northern cancelled the joint rates and published a proportional rate for its portion of the movements. *See id.* at 758. After the shipper unsuccessfully protested Burlington Northern's cancellation of the joint rates and establishment of the proportional rate, it filed a rate complaint challenging the proportional rate. *See id.* at 758-60. The parties submitted separate stand-alone cost presentations for the different rates, *see id.* at 772, and the agency separately evaluated the reasonableness of each rate, *see id.* at 780-782.

If UP were dismissed from the case for the period after it published its local rate, SunBelt would potentially have several ways of recovering all the reparations it is due without incurring significantly higher litigation costs. The most obvious is that SunBelt could design a stand-alone railroad from McIntosh to La Porte to address the joint rate, and reuse the McIntosh to New Orleans portion of its evidence to challenge the NS rate, eliminating UP revenues from

the analysis. Or, SunBelt might need to construct only a single stand-alone railroad. That is, SunBelt and NS may be in essentially the same circumstance as the shipper and the remaining defendant in *Metropolitan Edison*. See 5 I.C.C.2d at 409.¹⁰ Another possibility is that SunBelt could seek to recover reparations for the four months it paid the joint rate under one of the Board's *Simplified Standards* and then challenge the NS rate on a stand-alone basis. In any event, the Board has ample authority to ensure that SunBelt's case proceeds efficiently if it grants UP's Motion to Dismiss. See *Ford Motor Co. v. ICC*, 714 F.2d 1157, 1169-70 (D.C. Cir. 1983).

Ultimately, however, the Board must decide SunBelt's motion based on the law, not on speculation about how SunBelt might proceed if UP prevails on its Motion to Dismiss.

CONCLUSION

The Board should deny SunBelt's motion for clarification. Any decision about SunBelt's potential right to a prescription of future joint rates is premature, and a decision that SunBelt could recover damages for the period during which its traffic has moved under UP's local rate, without first demonstrating that UP has market dominance over the transportation to which the rate applies and that the rate is unreasonable, would be contrary to law. Moreover, there is no need for the Board to resolve these issues in the abstract. The Board should decide the issues presented by UP's Motion to Dismiss before proceeding any further with this case.

¹⁰ In its Motion to Dismiss, UP indicated that, if it is dismissed and discovery of UP proves necessary, UP would participate voluntarily to the extent SunBelt or NS makes reasonable requests for information from UP. (Motion to Dismiss at 9 n.6.)

Respectfully submitted,

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January 6, 2012

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 6th day of January, 2012, I caused a copy of the foregoing Reply to Motion for Clarification That Complainant Is Entitled to Prescription of a Reasonable Joint Rate to be served by e-mail and by first-class mail, postage prepaid, on:

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Michael L. Rosenthal

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

SUNBELT CHLOR ALKALI PARTNERSHIP)	
)	
Complainant,)	
)	
v.)	Docket No. 42130
)	
NORFOLK SOUTHERN RAILWAY COMPANY)	
)	
and)	
)	
UNION PACIFIC RAILROAD COMPANY)	
)	
Defendants.)	

VERIFIED STATEMENT OF CATIE E. KUESTER

My name is Catie Kuester, and I am Senior Business Director - Industrial Chemicals for Union Pacific Railway Company ("Union Pacific"), a position I have held for a year and a half. In this capacity, my responsibilities include performing market research and providing analysis used to establish Union Pacific's rates for transporting industrial chemicals, including chlorine shipments by SunBelt Chlor Alkali Partnership ("SunBelt"). Prior to my current position, I held another Senior Business Director role within Marketing and Sales - Chemicals for over two years where I had pricing and sales accountability for Union Pacific's soda ash market. In addition to the Senior Business Director roles, I have held a variety of positions in Marketing and Sales and have been employed at Union Pacific for over 22 years. I am submitting this statement in support of Defendant Union Pacific's Reply to Motion for Clarification that Complainant is Entitled to Prescription of a Reasonable Joint Rate. This statement sets forth certain information regarding SunBelt's shipment of chlorine from McIntosh, Alabama, to La Porte, Texas. Of particular importance, this statement describes

events that occurred between SunBelt, Union Pacific, and Norfolk Southern Railway Company (“NS”) from March 30, 2011, to July 30, 2011.

Before March 31, 2011, SunBelt’s shipments of chlorine from McIntosh, Alabama, to La Porte, Texas, moved under a three-party contract that established a through rate. SunBelt, NS, and Union Pacific were involved in negotiating a new three-party contract when the existing contract expired on March 30, 2011. To facilitate the parties’ further negotiations, NS published a tariff with a joint rate for transportation from McIntosh to La Porte in NSRQ 70319, which the complaint traffic moved under beginning March 31, 2011.¹

In comments filed on April 11, 2011, in STB Ex Parte No. 705, SunBelt expressed its frustration with terms and conditions railroads were offering in the parties’ contract negotiations and stated that it would soon file a rate complaint.² Union Pacific was committed, however, to trying to reach either a three-party agreement or a SunBelt-Union Pacific agreement. Although SunBelt indicated several times during the negotiations that it was planning to file a rate complaint, SunBelt withheld from filing and continued negotiating.

NS and Union Pacific also took steps to try to ensure that negotiations were not disrupted. They repeatedly granted extensions of NSRQ 70319 to accommodate further negotiations. In fact, NSRQ 70319 was set to expire on five different dates before SunBelt filed

¹ On May 2, 2011, Union Pacific established a joint rate, designated UPTF 4955, Item 1000-A, which applied to chlorine originated by NS at McIntosh, interchanged at New Orleans, and delivered by Union Pacific at La Porte. Only a few of SunBelt’s movements were rated under this Item, and Union Pacific cancelled this Item on July 22, 2011. In my Verified Statement that was submitted as part of Union Pacific’s Motion for Partial Dismissal or, in the Alternative, Expedited Determination of Jurisdiction Over Challenged Rates, UPTF 4955, Item 1000 was incorrectly described as a proportional rate.

² Comments Submitted by Olin Corporation, Exhibit A, *Competition in the Railroad Industry*, STB Ex Parte No. 705 (April 11, 2011). SunBelt is a wholly owned subsidiary of Olin Corporation.

its complaint, and its terms were extended each time. The three-party negotiations stalled in late July as the fifth expiration date for NSRQ 70319 approached. After SunBelt rejected the latest settlement offer, Union Pacific notified SunBelt on July 22 that it was withdrawing from a NS-Union Pacific joint rate and publishing a local rate for transportation of chlorine from New Orleans to La Porte, effective July 23, 2011. On the same day, Union Pacific provided SunBelt with a copy of its local rate, designated UPTF 4955, Item 1100. After SunBelt expressed concern about obtaining a new rate from NS in a timely manner, Union Pacific agreed that NSRQ 70319 would apply through July 29, 2011, if NS extended it. NSRQ 70319 expired on July 29, 2011, the sixth and final expiration date. Since July 30, SunBelt's chlorine has moved via NS from McIntosh to New Orleans under a NS rate authority and via Union Pacific from New Orleans to La Porte under UPTF 4955, Item 1100. Thus, while SunBelt's chlorine moved under a NS-Union Pacific joint rate for four months, it has now moved under Union Pacific's local rate for five months and continues to move under Union Pacific's local rate.

Union Pacific's rate in UPTF 4955, Item 1100, is a local rate. The rate applies to chlorine moving from New Orleans to La Porte, which are points served by Union Pacific. The rate applies without regard to whether traffic has a prior or subsequent movement on another carrier through a specified interchange point. No other carrier participated in setting the rate. Union Pacific issues the freight bill and collects the rate.

Union Pacific's settlement negotiations with SunBelt have continued. SunBelt and Union Pacific asked the Surface Transportation Board ("Board") to extend the official mediation period to November 23, 2011. Although neither party asked for a further extension of the Board's official mediation period, Union Pacific and SunBelt remain actively engaged in private negotiations, and numerous exchanges have occurred through December and into

January. In my experience, negotiations are typically a lengthy process, and Union Pacific's ongoing negotiations with SunBelt are no different. Frequently Union Pacific and its customers are unable to reach complete agreement on new terms before an existing contract or other price document expires. While the negotiations continue, the parties may agree to extend the prior contract, ship under a term sheet, or ship under common carrier rates to keep the customer's traffic moving without escalating the level of conflict.

VERIFICATION

I, Catie E. Kuester, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 6th day of January, 2012.



Catie E. Kuester