

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
July 16, 2014
Part of
Public Record

SUNBELT CHLOR ALKALI PARTNERSHIP

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

Docket No. NOR 42130

**NORFOLK SOUTHERN'S REPLY TO
COMPLAINANT'S MOTION FOR EXTENSION OF PAGE LIMIT**

Defendant Norfolk Southern Railway Company ("NS") respectfully submits this Reply to Complainant SunBelt Chlor Alkali Partnership's ("SunBelt's") "Motion for Extension of Page Limit" (filed July 14, 2014) (the "Motion"). While NS does not object to some of the multiple requests for relief sought by the Motion, others are unnecessary and contrary to Board precedent.

The caption of SunBelt's Motion is incomplete and does not capture the multiple different requests for relief SunBelt presents in that Motion. SunBelt seeks more than just a single page limit extension. It seeks:

- (i) An extension of the governing page limit for petitions for reconsideration;
- (ii) Authorization to file a second "technical corrections" petition "supplement" that is not authorized by Board rules or precedents;
- (iii) Authorization to file such an unauthorized second technical corrections petition individually rather than jointly with NS; and
- (iv) Authorization for that separate "technical corrections supplement" alone to be up to 20 pages in length, which is double the page limit for more complex reconsideration petitions and would result in more pages for "technical corrections" petitions than SunBelt seeks for its substantive reconsideration petition. *See* Motion at 2-3.

As explained below, NS does not object to TPI's request for an extension of the page limit for reconsideration petitions and replies, but it does object to TPI's unsupported request for a second, 20-page one-party technical corrections petition.

I. NS DOES NOT OBJECT TO SUNBELT'S REQUEST FOR AN EXTENSION OF THE PAGE LIMIT FOR RECONSIDERATION PETITIONS AND REPLIES.

Counsel for SunBelt did not contact counsel for NS prior to filing the Motion to discuss its motion or determine NS's position with respect to the relief SunBelt intended to seek. Had SunBelt contacted NS prior to filing, NS would have advised that it would not oppose a request for extension of the page limit for reconsideration petitions and replies to 30 pages. Assuming that the page extension would apply equally to both parties and to both petitions and replies, NS does not oppose the Motion's request for an extension of the reconsideration petition page limit to 30 pages each for a party's petition and reply.¹

II. TECHNICAL CORRECTIONS PETITIONS ARE PROPERLY LIMITED TO JOINT PETITIONS TO CORRECT SIMPLE COMPUTATIONAL AND TECHNICAL ERRORS, NOT TO CIRCUMVENT RECONSIDERATION PETITION PAGE LIMITS.

The Motion seeks to avoid fundamental limits on technical corrections petitions that the Board established ten years ago in *Xcel v. BNSF Railway*, which authorized such petitions and clearly described their limited purpose and limitations:

[P]arties to SAC cases may file a separate petition to correct technical and computational errors within 20 days of the Board's decision. However, *to ensure that this process is limited to matters clearly requiring technical corrections and does not become an avenue for addressing substantive issues, a petition to correct technical errors should be submitted by the parties jointly. . . .* Because a petition to correct technical errors is limited to matters that are technical errors, they *need not be lengthy*. The Board is not prepared to prescribe a page limitation before experience is gained in how long a joint submission needs to be to clearly explain the errors and set forth the proposed corrections. *Matters that are not technical errors*

¹ The rule that governs motions for reconsideration of a decision of the full Board is 49 C.F.R. 1115.3(d). Compare to Motion at 2.

should be addressed in a petition for reconsideration rather than a petition to correct technical errors.

Public Service Company of Colorado, D/B/A Xcel v. Burlington N. & Santa Fe Ry. Co., 7 S.T.B. 1029, 1030 (2004) (emphasis added). Thus, in authorizing technical corrections petitions, the Board made very clear that all such petitions should be: (1) joint; and (2) limited to technical errors and not address matters that should be addressed in a reconsideration motion. The *Xcel* decision also appropriately indicated that because of their limited purpose, technical corrections motions generally should be short. *See id.* The relief the Motion seeks with respect to technical corrections petitions would violate each of those three basic requirements and limitations.

First, SunBelt seeks to eliminate the requirement that a technical corrections petition must be *joint*, filed by both parties together so as to limit the requested corrections, to the greatest extent possible, to agreed technical errors. *See id.* This requirement is important to ensure that the parties confer and discuss with one another the items they have identified as technical errors in the Board's implementation of its decision. Through such discussions, the parties should attempt to reach consensus on what are technical errors and how they should be corrected. A joint filing should list the items on which the parties agree that a technical correction is warranted and may list items that one party thinks merits a technical correction to which the other party does not agree. The joint filing requirement should serve to identify technical errors on which the parties are in consensus and minimize disputes regarding appropriate technical corrections. Without a joint filing requirement, it is unlikely that such meaningful and productive discussions between the parties would take place.

The exception SunBelt seeks would swallow the Board's joint petition rule. If a party were allowed to file a "supplemental" technical corrections petition of its own as to all matters on which it did not agree with the opposing party, there would be little incentive for the parties to

attempt to reach agreement to the full extent reasonably possible. Instead, each party could simply file its own separate individual technical corrections motion presenting its subjective views, thereby defeating the Board’s purpose of providing for a joint filing that is limited to truly technical errors, *and* at the same time require even more filings by the parties to respond to the individual technical corrections petitions. Thus, allowing “supplemental” technical corrections motions would effectively authorize the parties to file and brief three motions to revise a Board SAC decision (an initial joint petition and one supplemental petition by each party), which would increase the time, costs, and resources the Board and the parties would be required to devote to a SAC case *after* the Board has issued its decision on the merits.

Second, the relief requested by the Motion would facilitate the use of a single-party “supplemental technical corrections” petition to address substantive issues (*i.e.* not technical implementation issues) that are properly addressed in a reconsideration petition. Allowing separate, single-party “technical corrections” petitions would allow a party to evade the limits on reconsideration petitions (SunBelt’s Motion already seeks a separate extension of the page limit for reconsideration petitions), and to violate the Board’s express prohibition of such tactics. *See Xcel*, 7 S.T.B. at 1030. Because the difference between a technical corrections request and a reconsideration request in some instances may be subjective, a third post-Decision petition (by each party) likely would lead to more disputes and litigation about whether issues raised or relief sought in such supplemental petition(s) are permissible technical corrections.

Third, the additional 20 pages for supplemental technical corrections that SunBelt seeks is excessive and would contravene the Board’s intention that technical corrections petitions be short, simple, and objective. A true technical corrections petition should address objectively clear implementation errors, and require little argumentation to justify and support it. The joint

technical corrections petition the parties filed in *DuPont* provides an instructive comparison. *DuPont* was a larger and more complex case than the instant case, involving the largest and most complex SARR ever proposed. And the *DuPont* decision involved an unusual number of significant technical errors. The joint technical corrections petition in that case took less than 13 pages (not including exhibits) to address all of the technical corrections in that large, complex case. See *DuPont v. NS*, STB Docket No. NOR 42125, “Joint Technical Corrections Petition of E.I. du Pont de Nemours & Company and Norfolk Southern Railway Company” (filed April 14, 2014). But here, SunBelt seeks not only the unlimited pages already allowed for a technical corrections petition; *and* 30 pages for a reconsideration petition, but also an *additional* 20 pages for a second, “supplemental” technical corrections petition. SunBelt makes this unprecedented request without even suggesting that it has identified an extraordinary number of technical errors in the Board’s decision. Nor does it present any argument that it believes any technical errors are likely to require more pages to address than the technical errors addressed by the parties jointly in *DuPont*.²

Although NS believes SunBelt has not justified the granting of leave to file any supplemental technical corrections petition, it does not oppose the Board authorizing each of the parties to file a short supplemental technical corrections petition *if*: (i) each party’s supplemental petition (and any reply) is limited to no more than five (5) pages in length; and (ii) the filing party represents to the Board that all issues addressed in its supplemental petition were proposed by the filing party for a joint technical corrections petition but the parties could not agree that

² SunBelt’s speculation that the parties may not be able to agree that certain items are appropriate for technical corrections—even if it were to prove accurate—would form no basis for an additional individual technical corrections petition. If the parties do not agree that a particular item is appropriate for a technical corrections petition, either party is free to address that item in a reconsideration petition.

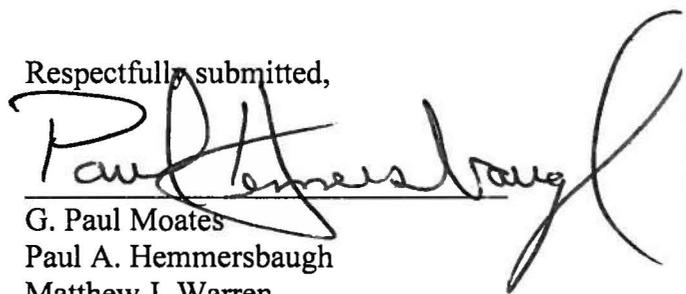
those issues be included in that joint petition. NS will not oppose this limited exception as an accommodation to SunBelt, and to avoid any suggestion that the standard operation of the Board's rules somehow disadvantaged the complainant in this case.

CONCLUSION

For the foregoing reasons, NS does not oppose SunBelt's request for an extension of the page limit for reconsideration petitions and replies. NS opposes SunBelt's request for leave to file a 20-page supplemental technical corrections petition. However, NS does not oppose the Board authorizing supplemental technical corrections petitions limited to no more than five pages and to alleged technical errors as to which the parties were unable to agree should be included in their joint technical corrections petition.

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Respectfully submitted,



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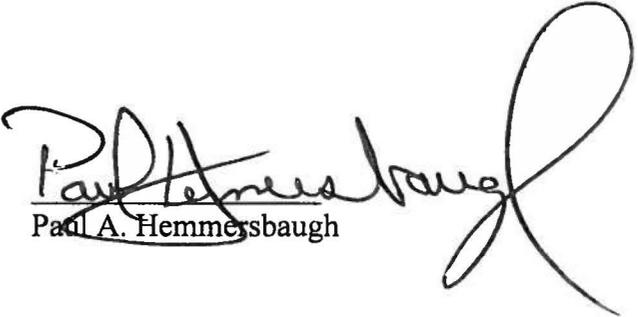
Dated: July 16, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July 2014, I caused a copy of the foregoing NS Reply to Complainant's Motion For Extension of Page Limit, to be served by email and first class U.S. mail or more expeditious method of delivery upon:

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