

BEFORE THE
SURFACE TRANSPORTATION BOARD

SUNBELT CHLOR ALKALI PARTNERSHIP)

Complainant,)

v.)

NORFOLK SOUTHERN RAILWAY COMPANY)

Defendant.)

Docket No. NOR 42130

**COMPLAINANT’S REPLY TO DEFENDANT’S
MOTION TO STRIKE**

Complainant, SunBelt Chlor Alkali Partnership (“SunBelt”), hereby replies to the “Motion to Strike,” filed by defendant, Norfolk Southern Railway Company (“NS”), on July 26, 2013 (“Motion”). NS has asked the Surface Transportation Board (“STB” or “Board”) to strike portions of SunBelt’s “Rebuttal Evidence and Argument” filed on June 3, 2013 (“Rebuttal”). The NS Motion presents only a partial and skewed description of the Board’s standards for rebuttal evidence and misapplies those standards to SunBelt’s Rebuttal.

I. SUMMARY OF ARGUMENT.

As a threshold matter, SunBelt objects to NS’s attempt to impugn SunBelt’s motives by accusing it of engaging in a deliberate “strategy of withholding evidence and arguments for rebuttal....”¹ SunBelt has made every effort to comply strictly with the Board’s detailed standards for proper rebuttal evidence. It has no “strategy” with respect to rebuttal evidence, except to respond to the NS Reply Evidence consistent with those standards. In order to do so,

¹ Motion at 2.

SunBelt carefully detailed the standards to which it has adhered in its Rebuttal, at pages I-21 to 24.²

The Rebuttal Evidence NS seeks to strike is a proper response by SunBelt to deficiencies in the NS Reply. In Duke/NS,³ at pages 100 to 101, the Board thoroughly explained its position on the proper role of rebuttal evidence. Significantly, the Board declared that its rebuttal evidence standard “balances the interests of both shippers and railroads” and “it is the nature and quality of both the opening and reply evidence that determines the extent to which rebuttal evidence may be considered.” While the NS Motion makes numerous assertions regarding the quality of SunBelt’s Opening Evidence, it completely disregards the relevance of NS’s own Reply Evidence.

The quality of the NS Reply ultimately determines the outcome of the NS Motion. As to those issues challenged by the railroad on reply, a shipper may submit corrective rebuttal evidence in two scenarios: (1) “[w]here the railroad has identified flaws in the shipper’s evidence but has not provided evidence that can be used in the Board’s SAC analysis,” or (2) where the shipper shows that the railroad’s reply evidence is itself unsupported, infeasible or unrealistic.”⁴ For nearly every challenged subject of its Rebuttal, SunBelt has demonstrated that the NS Reply was unsupported, infeasible, and/or unrealistic.⁵ Therefore, the SunBelt Rebuttal as to those issues clearly is proper and the NS Motion should be denied.

² Furthermore, NS’s anecdotal conclusion that SunBelt must have submitted improper rebuttal because the length of its Rebuttal Evidence was so much longer than its Opening Evidence is a red-herring. Motion at I-2. Rebuttal evidence is by definition a response to the defendant’s reply evidence. In this case, NS submitted 812 pages of narrative on Reply. In that context, SunBelt’s 419 page Rebuttal narrative is eminently reasonable.

³ Duke Energy Corp. v. Norfolk Southern Ry. Co., 7 S.T.B. 89 (2003) (“Duke/NS”).

⁴ Id. at 101.

⁵ This covers the first three categories of evidence identified on page 7 of the NS Motion. The fourth category (*e.g.*, fringe benefits and yard cleaning) implicates different issues.

In addition, NS took a procedural gambit that also opened the door for portions of the challenged Rebuttal.⁶ In balancing the interest of both shippers and railroads, the Board declared that “a railroad may not take unfair advantage of weaknesses in the shipper’s opening evidence by submitting reply evidence...that presents criticism without appropriate evidence that can be used in the Board’s SAC analysis.”⁷ In a footnote to that statement, the Board instructed railroads that “[i]f the shipper’s evidence is so flawed as to preclude the development of appropriate reply evidence to address the flaws, the railroad should file a separate motion bringing that problem to the Board’s attention.”⁸ The NS Reply concluded that SunBelt’s operating plan was so “fatally deficient and infeasible” that NS could not address those flaws, and instead, NS presented an entirely new operating plan developed from scratch based upon the MultiRail computer program. Although the Board’s instructions in Duke/NS clearly directed NS to bring its concerns to the Board’s attention in a motion before filing reply evidence, NS ignored that instruction.

Instead, NS unilaterally proceeded to develop a Reply operating plan based upon a completely different methodology from SunBelt. In doing so, NS gambled that, by using a completely different methodology, it might preclude SunBelt from offering any corrective evidence at all, and thereby force SunBelt and the Board to use NS’s Reply Evidence for nearly every aspect of the SAC analysis.⁹ But, this is precisely the type gamesmanship that the Board’s rebuttal standards are designed to avoid. By choosing to create an entirely new operating plan

⁶ This covers the first and second categories identified on page 7 of the NS Motion (*e.g.* train service plan, car classification, crew deadheading).

⁷ Duke/NS at 101.

⁸ Id., note 20.

⁹ NS doubled down on its gamble to prevent SunBelt from providing corrective evidence, by not providing the Board or Sunbelt access to an interactive version of the MultiRail computer program, without which NS’s MultiRail-based evidence cannot be verified and corrective evidence cannot be developed.

using MultiRail, instead of attempting to correct the alleged flaws in the SunBelt plan, NS has not actually provided “appropriate evidence that can be used in the Board’s SAC analysis.”

If the completely new NS operating plan were considered “appropriate evidence,” the Board’s explanatory footnote 20 would become meaningless. Any defendant is capable of creating a new operating plan from scratch regardless of how flawed the shipper’s evidence may be. Therefore, if all a defendant had to do in order to preclude corrective rebuttal evidence was to present its operating plan using an entirely different methodology than the complainant, every defendant would do so in order to gain this procedural advantage. Such a result would undermine the Board’s objective to balance the interests of both shippers and railroads. Moreover, if NS had filed the requisite motion, and the Board had concluded that the NS concerns had merit, the extreme disconnect between the parties’ operating plan evidence could have been avoided, which is a compelling reason for the Board’s requirement.

As to the fourth category of Rebuttal Evidence challenged by NS (*e.g.* fringe benefits and yard cleaning), NS wrongly accuses SunBelt of changing its Opening position that NS had adopted on Reply. SunBelt did not change its position on either issue, nor did NS adopt SunBelt’s Opening position on fringe benefits.

II. NS HAS INACCURATELY AND INCOMPLETELY DESCRIBED THE BOARD’S REBUTTAL EVIDENCE STANDARDS.

NS has expressed an incomplete understanding of the Board’s rebuttal evidence standards. The Board’s standards, as more thoroughly discussed at pages I-21 to 24 of SunBelt’s Rebuttal, can be summarized by the following rules:

1. A complainant cannot alter opening evidence that the defendant has not challenged.¹⁰

¹⁰ Pub. Serv. Co. of Col. d/b/a Xcel Energy v. Burlington No. & Santa Fe Ry., 7 S.T.B. 589, 643-44 (2004) (“PSCo/Xcel”), and Otter Tail Power Co. v. BNSF Ry., STB Docket No. 42071, slip op. at 4 (served Jan. 27, 2006) (“Otter Tail”).

2. A complainant cannot significantly redesign its SARR or alter the core assumptions upon which its case-in-chief is based.¹¹
3. If a defendant challenges a portion of the complainant's opening evidence, a complainant can accept the defendant's reply evidence, assert the superiority of its opening evidence, or refine its evidence to address the issues raised within the following parameters:
 - a. If the defendant has identified flaws in the complainant's opening evidence but has not provided substitute evidence, the complainant can supply "corrective evidence" with support; or
 - b. If the defendant has identified flaws in the complainant's opening evidence and it has provided substitute evidence, the complainant can show that the defendant's evidence is "unsupported, infeasible or unrealistic," and then supply "corrective evidence" with support.¹²

Acceptable "corrective evidence" can include: (a) any evidence submitted in the opening or reply;¹³ (b) any documents or information produced in discovery;¹⁴ (c) STB precedent;¹⁵ (d) real-world practices of the defendant railroad;¹⁶ and (e) certain other types of evidence, such as what other real-world railroads do.¹⁷ SunBelt has complied with these rules for each element of its Rebuttal that the NS Motion has challenged.

¹¹ See Duke/NS, 7 S.T.B. at 100, 133; Duke Energy Corp. v. Norfolk Southern Ry. Co., 7 S.T.B. 89, 450 (2003) ("Duke/CSXT"); PSCo/Xcel, 7 S.T.B. at 643-44; FMC Wyoming Corp. v. Union Pac. R.R., 4 S.T.B. 699, 790 (2000) ("FMC").

¹² Duke/NS, 7 S.T.B. at 100-101, 141, 175, 190.

¹³ See, e.g., PSCo/Xcel, 7 S.T.B. at 637, Western Fuels Assoc., Inc. v. BNSF Ry., STB Docket No. 42088, slip op. at 71 (served Sept. 10, 2007) ("WFA/Basin").

¹⁴ See, e.g., WFA/Basin, slip op. at 48 (restates taxi expenses based upon contract produced in discovery), FMC, 4 S.T.B. at 814 (STB re-states locomotive and car repair costs based on discovery documents cited by complainant). The Board has held that the complainant is entitled to rely on information received in discovery, and the railroad cannot impeach its own discovery documents. PSCo/Xcel, 7 S.T.B. at 683.

¹⁵ See, e.g., Carolina Power & Light Co. v. Norfolk Southern Ry., 7 S.T.B. 235, 314 (2003) ("CP&L"), WFA/Basin, slip op. at 40.

¹⁶ See, e.g., Otter Tail, slip op. at C-4 (fuel consumption based on defendant's system average); Duke/NS, 7 S.T.B. at 191 (STB uses rebuttal for hook bolts where shipper shows that its rebuttal is based on defendant's standards) (see also CP&L, 7 S.T.B. at 328, same issue); Duke/NS, 7 S.T.B. at 194 (STB uses correction to reply evidence advanced by the complainant on rebuttal for communication system towers where shipper shows that its rebuttal exceeds the real-world practices of the defendant); WFA/Basin, slip op. at 48 (STB uses rebuttal evidence when complainant shows that defendant's contract for taxi expenses is the best evidence of record); WFA/Basin, slip op. at 93 (STB uses compaction ratio for subballast quantities advanced on rebuttal where complainant shows that it was based on defendant's source material)

¹⁷ See, e.g., CP&L, 7 S.T.B. at 293 (STB adopts shipper's rebuttal evidence on dispatchers based on comparison with KCS); Duke/NS, 7 S.T.B. at 177 (STB uses rebuttal for yard drainage where shipper showed that elaborate drainage advanced by defendant on reply is not generally used by railroads) (see also CP&L, 7 S.T.B. at 314 for same issue). Occasionally, the Board has permitted certain other rebuttal, see, e.g., Duke/NS, 7 S.T.B. at 173 (evidence based on physical inspection of line).

The foregoing standards require the Board to make certain determinations before striking a complainant's rebuttal evidence. Specifically, the Board must determine whether the defendant provided appropriate substitute evidence, and if so, whether that evidence is realistic, feasible, and supported. This requires the Board to consider a complainant's evidence that the defendant's reply is unrealistic, infeasible, or unsupported in order to determine whether the complainant's corrective rebuttal evidence is permissible. The former evidentiary showing clearly is not impermissible rebuttal and the latter is impermissible only if the complainant fails to persuade the Board as to the former. Much of the NS Motion merely assumes that the NS Reply Evidence is itself feasible, realistic, and supported. If it is not, however, then SunBelt's Rebuttal Evidence is permissible.¹⁸ This requires the Board to evaluate the totality of the parties' evidence in order to determine the merits of a motion to strike.¹⁹

The Board has provided a clear and cogent rationale for these rebuttal standards:

This standard balances the interests of both shippers and railroads, as well as the public interest in having rail rate regulation founded on an analysis that is realistic and supported and will help achieve the ultimate goal of the SAC process: a proper evaluation of whether the rate being charged is reasonable. Under this standard, the shipper must plan to submit its best, least-cost, fully supported case on opening. It may not hold back to see the railroad's reply evidence before finalizing or supporting its own case, as an opportunity to correct deficiencies in its opening evidence is not assured. On the other hand, a railroad may not take unfair advantage of weaknesses in the shipper's opening evidence by submitting reply evidence that is itself unsupported, infeasible, or unrealistic, or that presents criticism without appropriate evidence that can be used in the Board's SAC analysis. If it does, the shipper may use rebuttal to correct deficiencies that have been

¹⁸ Furthermore, as discussed in Part III.A.2, even if NS's Reply Evidence were feasible, realistic, and supported, NS was not free under the Board's standards to unilaterally declare SunBelt's Opening Evidence to be fatally deficient and to present alternate evidence based on a completely different method or model, without first presenting its concerns to the Board (via a motion) prior to submitting its Reply Evidence. At the very least, NS's failure to do so enabled SunBelt to offer corrective evidence in response to NS's criticisms in Rebuttal; at worst, the NS Reply was itself impermissible.

¹⁹ Duke/NS at 101 ("Thus, it is the nature and quality of both the opening and reply evidence that determines the extent to which rebuttal evidence may be considered.").

identified. Thus, it is the nature and quality of both the opening and reply evidence that determines the extent to which rebuttal evidence may be considered.²⁰

While the NS Motion focuses upon the quality of SunBelt's Opening Evidence, it ignores the issues that SunBelt has raised as to whether the NS Reply Evidence is itself feasible, realistic, and supported. Yet, the answer to that question ultimately determines whether the challenged elements of SunBelt's Rebuttal are permissible.

III. **SUNBELT'S REBUTTAL EVIDENCE IS CONSISTENT WITH THE BOARD'S STANDARDS.**

The NS Motion largely ignores the Board's standards for determining whether rebuttal evidence is permissible and, instead, attempts to "shoehorn" the challenged evidence into four categories that have only a tangential connection to those standards.²¹ This Reply applies the Board's clearly enunciated rebuttal evidence standards described in Part II above to each portion of SunBelt's Rebuttal that NS has challenged. In all but two instances, the applicable standard is Rule No. 3, which requires the Board to determine whether NS has provided appropriate substitute evidence to correct the alleged flaws in SunBelt's Opening Evidence, and if so, whether that substitute evidence is supported, feasible, and realistic. In the other two instances, the NS Motion implicates Rule No. 1, because NS alleges that SunBelt altered Opening Evidence that NS did not challenge. SunBelt demonstrates separately for each portion of its challenged Rebuttal Evidence that NS's claims are inaccurate and that SunBelt has submitted proper Rebuttal.

²⁰ Duke/NS at 101 [underline added].

²¹ Motion at 7. The four categories created by NS are: (1) instances in which SunBelt's methodological choice on Opening caused it to submit impermissible rebuttal; (2) instances in which SunBelt did not provide any evidence on Opening; (3) instances in which SunBelt submitted new evidence that could have been submitted on Opening; and (4) instances in which SunBelt reversed its position and deprived NS of an opportunity to reply.

A. SunBelt's Rebuttal Operating Plan Was A Proper Response To NS's Reply Evidence Criticisms.

Throughout this case, NS has reserved its harshest criticisms for SunBelt's operating plan, and particularly its allegation that SunBelt omitted 1,622 trains on Opening that are necessary to provide complete on-SARR service. On Rebuttal, SunBelt rejected this NS criticism because the NS traffic data produced in discovery did not show that any of the allegedly missing trains actually moved over the SARR. Nevertheless, because NS offered a plausible explanation for this data deficiency on Reply (albeit an untimely explanation offered for the first time), SunBelt added 1,031 of those trains on Rebuttal.²² It is hard to conceive how such evidence is impermissible because SunBelt responded to the NS criticism by including the very trains that NS said should be included. In other words, SunBelt accepted the NS Reply Evidence on this point.

Nevertheless, NS raises three objections. First, NS claims that, based upon the Board's decision in Intermountain Power Agency v. Union Pac. R.R. Co., STB Docket No. 42127 (served April 4, 2012) ("IPA"), SunBelt may not correct its own mistake or methodological choice on rebuttal.²³ Second, NS claims that SunBelt could only "correct" NS's Reply Evidence, not SunBelt's Opening Evidence, because NS itself did not attempt to restate SunBelt's Opening Evidence on Reply, but instead developed a completely different operating plan based upon MultiRail.²⁴ Therefore, according to NS, SunBelt's only option was to accept the MultiRail-based operating plan. Third, NS claims that, even if SunBelt were permitted to correct its

²² SunBelt Reb. at I-40 to 41; III-C-28 to 29. Even if the Board were to strike this evidence, SunBelt clearly has taken the position on Rebuttal that its Opening Evidence is fully supported by the traffic data that NS provided in discovery and upon which SunBelt is entitled to rely. Id. at III-C-25 to 30.

²³ Motion at 8.

²⁴ Motion at 9 ("[E]ven if SunBelt had shown that NS's Reply Evidence was unsupported or infeasible, it did not even purport to 'correct' NS's evidence.").

Opening Evidence, it was not permitted to accept the NS criticism for fewer than all 1,622 allegedly missing trains.²⁵ All three assertions are wrong.

1. NS's reliance upon IPA is misplaced.

NS blatantly misstates the Board's rebuttal evidence standards when it asserts that "a complainant may not file additional evidence to correct its own mistake or methodological choice."²⁶ NS's reliance upon IPA for this proposition reads too much into that decision. IPA does not hold that a complainant cannot make corrections to its opening evidence on rebuttal, as NS contends.²⁷ Indeed, that would be contrary to the Duke/NS standards, which permit corrective evidence in the circumstances described in Part II above. Rather, IPA held that a technical error is not "grounds to modify a core part" of the complainant's evidence or to "significantly modify the foundation of its case," which is what the complainant in IPA sought leave to do through the submission of supplemental evidence. IPA, slip op. at 3. In contrast, SunBelt has not attempted to make any "core" modifications to the "foundation" of its case on Rebuttal.

NS confusingly argues that SunBelt employed a flawed methodology on Opening that somehow precludes SunBelt's Rebuttal Evidence:

If a complainant were permitted to provide new evidence on rebuttal because the defendant on reply has shown the fallacy in the methodology chosen by the complainant on opening, the railroad would be denied the opportunity to examine and provide evidence regarding the new methodology.²⁸

This argument is confusing because SunBelt did not change its methodology between Opening and Rebuttal. In both sets of evidence, SunBelt applied the same methodology that complainants

²⁵ Id. at 9-10 (n. 17).

²⁶ Motion at 8.

²⁷ Motion at 10 (n. 18).

²⁸ Motion at 8.

and defendants alike have used in past cases.²⁹ SunBelt's Rebuttal merely corrected an alleged flaw in SunBelt's execution of that methodology by including trains that NS alleged should not have been omitted by SunBelt on Opening. NS confuses a technical correction to an alleged flaw in execution with a wholesale change in methodology.

The Board should not give any weight to NS's claim to be prejudiced by SunBelt's addition of the missing trains.³⁰ NS had every opportunity to add those trains itself in its Reply Evidence, but instead chose to use a completely different methodology based upon a computer program, MultiRail, that has never before been accepted by the Board for use in rate cases. As demonstrated in the next subsection, that was a choice that NS made unilaterally based upon assertions that the SunBelt operating plan was too "fatally deficient and infeasible" for NS to fix on Reply. If this were true, NS was required to bring that concern to the Board's attention prior to submitting its Reply. Perhaps NS believed (wrongly) that it could prevent SunBelt from responding to NS's criticism of its Opening Evidence on Rebuttal if NS refused to do so itself on Reply. If so, that was an unsuccessful gambit for which NS has only itself to blame.

2. The NS use of MultiRail did not preclude SunBelt from correcting its Opening Evidence on Rebuttal.

NS incorrectly asserts that SunBelt could only correct NS's Reply Evidence on Rebuttal, not SunBelt's Opening Evidence.³¹ Although the NS Reply criticized SunBelt for omitting trains in its Opening Evidence operating plan, NS claims that SunBelt may not add the missing trains on Rebuttal because NS itself did not add them on Reply. In other words, because NS chose to deviate completely from the SunBelt operating plan by using MultiRail on Reply, NS asserts that

²⁹ SunBelt Reb. at III-C-52 to 54.

³⁰ Motion at 10.

³¹ Motion at 9 ("[E]ven if SunBelt had shown that NS's Reply Evidence was unsupported or infeasible, it did not even purport to 'correct' NS's evidence.").

SunBelt was prohibited from offering any corrective evidence in response to NS's criticisms of SunBelt's Opening Evidence. This argument has multiple factual, legal and logical flaws.

First, the Board's rebuttal standards expressly permit the complainant to present corrective evidence on rebuttal in response to the defendant's criticism of the opening evidence in two clearly defined scenarios: (a) "[w]here the railroad has identified flaws in the shipper's evidence but has not provided evidence that can be used in the Board's SAC analysis," or (2) "where the shipper shows that the railroad's reply evidence is itself unsupported, infeasible or unrealistic...."³² Therefore, NS is wrong legally when it claims that SunBelt was restricted to offering corrective evidence to the NS Reply.

Second, NS inexplicably asserts that SunBelt has "neither attempted to justify its opening methodology nor to demonstrate that NS's Reply Evidence was 'unrealistic, unsupported, or infeasible.'"³³ In fact, SunBelt's Rebuttal presented both a vigorous defense of its Opening methodology (which SunBelt has continued to use in Rebuttal) and extensive evidence that the NS MultiRail-based operating plan is "unrealistic, unsupported, and infeasible."³⁴ Indeed, Part I.D.4.b. of SunBelt's Rebuttal is even titled "NS use of MultiRail is unsupported, and is otherwise infeasible and unrealistic, and therefore the Board should not accept NS's operating plan." While NS may not agree with SunBelt's criticism of NS's MultiRail-based evidence as infeasible, unrealistic or unsupported, NS cannot credibly deny that SunBelt presented such evidence. Therefore, if the Board agrees that NS's MultiRail-based operating plan is not feasible, realistic, or supported, SunBelt's Rebuttal Evidence on missing trains clearly is permissible.

³² Duke/NS at 101.

³³ Motion at 9.

³⁴ SunBelt Reb. at I-37 to 58; III-C-4 to 30; and III-C-52 to 95.

Third, NS may not use its decision to base its Reply operating plan upon MultiRail, rather than to correct the alleged flaws in SunBelt's Opening, as grounds to prevent SunBelt from correcting those alleged flaws itself. The Board's rules permit SunBelt to present corrective evidence if NS has identified flaws but has not provided evidence that can be used in the Board's SAC analysis.³⁵ Here, NS identified an alleged flaw, missing trains, and even identified every single train, but made no attempt to correct that flaw. Instead, NS used this criticism as an excuse to present a brand new operating plan based upon MultiRail. The Board wisely has precluded this sort of gamesmanship through its standards for rebuttal evidence.

Specifically, the NS decision to present a completely different operating plan, rather than make corrections to the SunBelt plan, was a blatant failure to follow Board procedures. The NS Reply spends 118 pages berating SunBelt's operating plan as "fatally deficient and infeasible."³⁶ Indeed, NS concluded that SunBelt's operating plan was so deficient that, on Reply, NS completely disregarded that plan and began anew with a completely different plan developed using a completely different methodology based upon MultiRail. In other words, NS concluded that SunBelt's evidence was so flawed, as to preclude the development of appropriate reply evidence, that NS had to start over from scratch, rather than correct the alleged flaws in the SunBelt plan. But, when the Board presented its rebuttal standards in Duke/NS, it also placed railroads on notice that, "[i]f the shipper's evidence is so flawed as to preclude the development of appropriate reply evidence to address the flaws, the railroad should file a separate motion bringing that problem to the Board's attention."³⁷ NS did not follow the Board's instruction to

³⁵ Duke/NS at 101.

³⁶ NS Reply at III-C-118.

³⁷ Duke/NS at 101 (n. 20).

bring the allegedly fatal flaws in SunBelt's evidence to the Board's attention by filing a separate motion.

NS now seeks to exploit its procedural decision to create a brand new operating plan, without first filing a separate motion with the Board, as an excuse to preclude SunBelt from offering corrective evidence itself on rebuttal.³⁸ NS has gambled that, by using a completely different methodology from SunBelt, rather than correct the alleged flaws in SunBelt's operating plan, it might preclude SunBelt from offering any corrective evidence at all, and thereby force SunBelt and the Board to use NS's Reply Evidence, which is based upon a version of the MultiRail computer program that NS has not provided to the Board or SunBelt, for nearly every aspect of the SAC analysis. This is precisely the type of gamesmanship that the Board's rebuttal standards are designed to avoid.³⁹

Furthermore, SunBelt clearly does not agree with NS's assertion that the SunBelt operating plan is "fatally deficient and infeasible." Whether or not NS's claims are true is for the Board, not NS, to determine. NS may not unilaterally declare SunBelt's evidence to be irreparable and thereby deny SunBelt the opportunity even to counter that claim. Otherwise, if all a defendant had to do in order to preclude corrective rebuttal evidence was to present its operating plan using an entirely different methodology than the complainant, every defendant would do so in order to gain this procedural advantage. This is not what the Board had in mind when it adopted a rebuttal standard that "balances the interests of both shippers and railroads, as well as the public interest in having rail rate regulation founded on an analysis that is realistic

³⁸ Motion at 5 ("permissible rebuttal is limited to arguing for the complainant's opening evidence or position or adopting the defendant's evidence or position [and complainant may not] advocate the adoption of a selectively modified version of the defendant's reply evidence.")

³⁹ Duke/NS at 101 ("[A] railroad may not take unfair advantage of weaknesses in the shipper's opening evidence by submitting reply evidence...that presents criticism without appropriate evidence that can be used in the Board's SAC analysis.").

and supported and will help achieve the ultimate goal of the SAC process: a proper evaluation of whether the rate being charged is reasonable.”⁴⁰

Thus, by choosing to create an entirely new operating plan using MultiRail, NS has not actually provided “appropriate evidence that can be used in the Board’s SAC analysis,” as the Board requires.⁴¹ For sure, NS has provided its own version of an operating plan. But, if the completely new NS operating plan were considered “appropriate evidence,” the Board’s explanatory footnote 20 would become meaningless, because any defendant is capable of creating a new operating plan from scratch regardless how flawed the shipper’s evidence may be. NS was not free under the Board’s standards to unilaterally declare SunBelt’s operating plan to be so fatally deficient as to warrant the presentation of a completely different plan, and then to assert that different plan as grounds to preclude SunBelt from offering any corrective evidence at all on Rebuttal. Rather, if NS could not work within the broad contours of SunBelt’s methodology, it was required to present its concerns to the Board prior to submitting its Reply Evidence. Indeed, if NS had done so, the enormous disconnect between the parties’ evidence in this proceeding could have been avoided, which of course is why the Board requires defendants to bring such claims to the Board’s attention prior to the filing of reply evidence. NS’s failure to do so provides SunBelt with the opportunity under the Board’s rebuttal standards to offer corrective evidence in response to NS’s criticisms because NS has not provided such evidence itself. This is neither unfair nor prejudicial because NS created this situation itself by failing to follow the Board’s clearly-stated procedure.

⁴⁰ Duke/NS at 101.

⁴¹ Duke/NS at 101.

3. SunBelt is not required to accept NS criticisms wholesale.

NS is wrong when it asserts that the Board's rebuttal standards do not permit a complainant to advocate adoption of a selectively modified version of the defendant's reply evidence.⁴² In the case of the allegedly missing trains, NS claims that SunBelt could not accept fewer than all 1,622 trains.⁴³ This does not make sense. Otherwise, NS could include any number of allegedly missing trains in addition to those that might be legitimate and then require SunBelt to accept even the illegitimate trains in order to correct for the legitimate trains. This does not comport with the Board's goal of properly evaluating whether the rate being charged is reasonable.⁴⁴

In this case, SunBelt has identified missing trains for which the NS explanation of its data deficiency may be plausible (albeit untimely), and others for which it is not. Although SunBelt continues to question the legitimacy of the former, it conservatively added those trains on rebuttal, while rejecting the latter. SunBelt did so despite its right to rely upon the data that NS produced in discovery as to all of the allegedly missing trains.⁴⁵

Furthermore, there is no rational reason to limit the complainant's corrective evidence to entirely different methods from what the defendant used when the defendant's evidence can be rendered feasible or realistic with certain modifications. Indeed, there are multiple examples of the Board accepting rebuttal evidence that is predicated only in part on the defendant's reply.⁴⁶

⁴² Motion at 5.

⁴³ Motion at 9-10 (n. 17).

⁴⁴ Duke/NS at 101.

⁴⁵ E.g., AEP Texas North Co. v. BNSF Ry. Co., STB Docket No. 41191 (Sub-No. 1), slip op. at 80-81, 83 (served Sept. 10, 2007) (complainant entitled to rely upon information received in discovery; defendant may not impeach its evidence with information not provided during discovery); WFA/Basin, slip op. at 101-02 (railroads may not discredit evidence produced in discovery; shipper not obligated to verify all materials produced by railroad); PSCo/Xcel, 7 S.T.B. at 630-31 ("parties must be able to rely on information supplied in discovery").

⁴⁶ E.g., Duke/NS, 7 S.T.B. at 175 (shipper proposed different equipment mix for grading than defendant's reply); id. at 177 (although shipper did not include yard drainage on opening, it conceded that yard drainage is needed on rebuttal, but advocated much less elaborate system than defendant, which the Board accepted); id. at 194 (on rebuttal, shipper switched from satellite to

Therefore, NS's assertions that SunBelt had to accept all 1,622 allegedly missing trains or none is both irrational and incorrect.

B. NS Incorrectly Asserts That An Issue May Not Be Addressed In Rebuttal Evidence If It Was Not Addressed In Opening Evidence.

On two issues, NS claims that SunBelt cannot offer rebuttal evidence because it failed to address those issues in its opening evidence.⁴⁷ Those issues are "Car Classification" and "Crew Deadheading." Again, NS misconstrues both the Board's rebuttal standards and SunBelt's Rebuttal. In fact, there are many examples of the Board adopting the complainant's rebuttal evidence when the complainant did not submit any opening evidence on the subject.⁴⁸

1. SunBelt's car classification evidence was a proper response to NS's unsupported, infeasible and unrealistic Reply.

SunBelt's car classification rebuttal evidence was permissible because it was in response to NS's unsupported, infeasible and unrealistic car classification plan. Where the complainant fails to present feasible, realistic, or supported evidence on opening, it may accept the defendant's reply evidence or it may present corrective evidence if the defendant's reply evidence is unsupported, infeasible or unrealistic. Although NS plainly acknowledges this principle, it asserts matter-of-factly that SunBelt has not made the requisite demonstration.⁴⁹ But, the entire NS car classification plan is based upon NS's operating plan developed from MultiRail, which SunBelt has vigorously challenged as unsupported, unrealistic, and infeasible.⁵⁰ If the foundation of the NS operating plan is rejected, so must the car classification plan that rests

microwave communication system advocated by defendant, but corrected defendant's costs); id. at 191 (STB adopted rebuttal evidence of hook bolts on every 4th timber even though defendant included on every timber); WFA/Basin, slip op. at 40 (shipper added defendant's car repair fee on rebuttal but limited application to only shipper-owned cars); id. at 100 (rebuttal accepted need for yard track at locomotive shop, but used less track than defendant's reply).

⁴⁷ Motion at 10-14..

⁴⁸ Duke/NS, 7 S.T.B. at 177(yard drainage), 191 (hook bolts); CP&L, 7 S.T.B. at 314 (yard drainage), 328 (hook bolts); WFA/Basin, slip op. at 40 (car maintenance), 59 (night crew), 100 (locomotive shop yard track).

⁴⁹ Motion at 13

⁵⁰ SunBelt Reb. at I-45 to 58; III-C-52 to 95.

upon that foundation. Thus, the permissibility of SunBelt's car classification rebuttal evidence will depend upon the Board's resolution of those charges.

Furthermore, SunBelt did not offer a brand new car classification methodology on Rebuttal; it adopted the NS Reply methodology, which clearly is permissible under the Board's standards presented in Duke/NS.⁵¹ NS claims, however, that SunBelt's car classification evidence is impermissible because it does not respond to, much less correct, NS's Reply Evidence.⁵² This charge is based upon the fact that SunBelt applied the NS Reply car classification methodology to the NS car event data produced in discovery, rather than to NS's MultiRail-based car statistics.⁵³ Of course, it would be pointless for SunBelt to apply the NS procedures to the MultiRail-based statistics because that operating plan is itself unsupported, unrealistic, and infeasible.⁵⁴ This NS argument is identical to NS's assertion that SunBelt cannot add any of the allegedly missing trains to its operating plan because NS instead chose to develop a brand new operating plan based upon MultiRail rather than correct the SunBelt evidence. As discussed in Part III.A.2 above, NS's unilateral decision to create a brand new operating plan, rather than correct SunBelt's alleged errors, was a procedural choice, in violation of clear Board instructions, and therefore, does not foreclose SunBelt's right to submit corrective rebuttal evidence based on its operating plan when NS has refused to do so.

2. SunBelt's crew deadheading evidence was a proper response to NS Reply Evidence criticism.

SunBelt's crew deadheading rebuttal evidence was permissible because it was in response to NS's claim that directional imbalances on the SBRR required deadheading crews.

⁵¹ Id. at III-C-31 to 32

⁵² Motion at 13.

⁵³ Id.

⁵⁴ Id. at III-C-52 to 87.

SunBelt accepted the NS criticism that there would be some crew imbalance on the SBRR, but demonstrated that NS's crew deadheading evidence was unsupported, infeasible and unrealistic.⁵⁵ First, the NS Reply Evidence on crew imbalances was based upon statistics produced by the MultiRail-based operating plan, which itself is infeasible, unrealistic and unsupported. Thus, it made no sense for SunBelt to use those statistics. Second, SunBelt demonstrated that NS's approach to determining the existence of an imbalance based solely upon a point-to-point analysis was unrealistic. As SunBelt has discussed above for both missing trains and car classification, NS's decision to use MultiRail does not preclude SunBelt from submitting corrective rebuttal evidence based on SunBelt's operating plan when NS has refused to do so.

C. SunBelt Has Not Presented New Evidence on Rebuttal That Should Have Been Submitted on Opening.

NS claims that SunBelt's Rebuttal Evidence on General and Administrative ("G&A") expenses and roadmaster territories was impermissible because it should have been submitted on opening. Again, NS misconstrues both the Board's rebuttal standards and SunBelt's Rebuttal.

1. G&A Rebuttal.

NS inaccurately accuses SunBelt of "holding back" its G&A evidence for Rebuttal in order to see NS's Reply Evidence before finalizing its case.⁵⁶ NS has identified three impermissible areas of G&A rebuttal evidence: marketing, revenue accounting, and claims. Once the veil of misrepresentations is lifted from the NS claims, however, SunBelt's Rebuttal clearly constitutes permissible responses to the NS Reply evidence.

Marketing Department. The SunBelt Rebuttal partially accepted the NS Reply by adding two marketing managers, but rejecting seven other employees.⁵⁷ SunBelt presented five

⁵⁵ SunBelt Reb. at III-D-20.

⁵⁶ Motion at 14.

⁵⁷ SunBelt Reb. Ex. III-D-1, pp. 17-18.

separately enumerated Rebuttal arguments, and it is worth noting that the NS Motion only alleges that two of them are impermissible.

The first challenged argument pertains to SunBelt's claims of a simplified rate making process and the SBRR's role as a Rule 11 overhead carrier. Although NS presents these as separate points in the Motion, they both are part of the same SunBelt argument.⁵⁸ SunBelt was responding directly to arguments that NS made in its Reply based upon Rule 11 traffic. NS contended that SunBelt's marketing department was too small because Rule 11 traffic would require the SBRR to negotiate and publish rates separately for each customer.⁵⁹ On Rebuttal, SunBelt explained why the Board should not credit the NS Reply evidence because it was unrealistic and unsupported.⁶⁰

The second challenged argument is that intermodal traffic would have reduced marketing needs.⁶¹ Again, SunBelt was responding directly to the NS Reply argument that a separate marketing manager is required for intermodal traffic.⁶²

If the Board were to strike this Rebuttal, it would grant *carte blanche* to defendants to present reply evidence to which complainant's could not respond merely because they did not anticipate the defendant's evidence on opening. This would be particularly onerous because complainants bear the burden of proof.

Revenue Accounting Department. NS erroneously asserts that SunBelt attempted to support its addition of a Manager of Revenue Accounting on Rebuttal with new arguments that the SBRR would have less revenue accounting responsibilities for trainload and overhead

⁵⁸ *Id.*, pp. 18-20 (discussion of SunBelt's *third* argument).

⁵⁹ NS Reply at III-D-68-69

⁶⁰ SunBelt Reb. Ex. III-D-1, pp. 18-20.

⁶¹ SunBelt Reb. Ex. III-D-1, p. 20.

⁶² NS Reply at III-D-70.

traffic.⁶³ SunBelt's addition of this new position constituted partial acceptance of the NS Reply, which added that position and 16 other employees. SunBelt's Rebuttal demonstrated why the other 16 employees added by NS were unrealistic.⁶⁴

Claims Department. NS incorrectly claims that SunBelt proffered new justifications for its Claims Department staffing on Rebuttal, when SunBelt was merely responding to the NS Reply Evidence. NS proposed a higher level of staffing by scaling its own claims experience to a carrier the size of the SBRR.⁶⁵ On Rebuttal, SunBelt demonstrated that NS's scaling methodology was flawed because the SBRR's traffic profile is different from NS's profile.⁶⁶ This was not new evidence in support of SunBelt's opening position, but rather a critique of NS's Reply.

2. Roadmaster Territories.

NS asserts that the testimony of SunBelt's Maintenance of Way expert regarding his personal knowledge of an NS track crew based at Savannah, GA, was impermissible rebuttal.⁶⁷ While SunBelt established 200 mile roadmaster territories on Opening, NS proposed only 100-mile territories on Reply. SunBelt offered the challenged testimony to demonstrate that NS's roadmaster territory size is unrealistic based upon NS's own practices.⁶⁸ The Board's rebuttal standards permit complainants to offer evidence that the defendant's reply is unsupported, infeasible, or unrealistic. Thus, there is nothing improper about this Rebuttal Evidence.

⁶³ Motion at 15.

⁶⁴ SunBelt Reb. Ex. III-D-1, pp. 24-25.

⁶⁵ NS Reply at III-D-93.

⁶⁶ SunBelt. Reb. Ex. III-D-1, p. 36.

⁶⁷ Motion at 15.

⁶⁸ NS contends that it would have shown that SunBelt's testimony was false if afforded the opportunity. Motion at 15. Presumably, this would have been the same evidence that NS introduced at page 74, note 116, of its Final Brief in Docket No. 42125. SunBelt's evidence was based upon a conversation that its MOW expert had with an NS track supervisor while working at an NS project site in Savannah a few years ago. Because crew sizes, locations and assignments are always subject to change, it is entirely possible that the current practice of NS is different. This would not negate the fact that NS has operated roadmaster territories comparable to those proposed for the SBRR.

D. SunBelt Did Not Change Its Positions on Rebuttal.

NS alleges that SunBelt improperly changed its position on Rebuttal on two issues after NS had accepted SunBelt's Opening position. Those two issues are fringe benefits and yard cleaning costs. NS mischaracterizes SunBelt's Rebuttal in order to support its Motion.

1. NS wrongly claims that SunBelt changed its position on fringe benefits after NS had adopted SunBelt's Opening position.

NS's challenge of SunBelt's fringe benefits Rebuttal is predicated upon highly selective and particularly outrageous mischaracterizations. In Opening, SunBelt used a 37.5% fringe benefit ratio published by the AAR for all Class I railroads in 2009.⁶⁹ In Reply, NS used different AAR data to calculate a higher fringe benefit ratio.⁷⁰ Thus, NS disingenuously claims that it adopted SunBelt's Opening position. In Rebuttal, SunBelt reiterated its Opening position, and offered as further support evidence that NS itself had presented in its Reply.⁷¹ Thus, NS also disingenuously claims that SunBelt changed its position on Rebuttal. NS consequently has failed to establish either of the required predicates for its Motion: that NS adopted SunBelt's Opening Evidence and that SunBelt changed its Opening Evidence on Rebuttal.

2. SunBelt did not change its Opening position on yard cleaning costs.

NS also incorrectly claims that SunBelt's Rebuttal changed its Opening position on yard cleaning costs by claiming that a railroad does not clean all yards annually, after NS had accepted SunBelt's Opening statement that the SBRR would clean its yards annually.⁷² SunBelt's Opening and Rebuttal cost for yard cleaning is unchanged, at \$41,705 per year, based

⁶⁹ See SunBelt Reb. at III-D-24 (n. 49), which cites to SunBelt Op. WP "III-D-4 Salaries.pdf"

⁷⁰ NS Reply at III-D-38-40.

⁷¹ SunBelt Reb. at III-D-25.

⁷² Motion at 17.

upon an actual quote.⁷³ On Reply, NS challenged the accuracy of the quote provided by SunBelt and provided alternative cost evidence.⁷⁴ SunBelt rejected that alternative evidence because it presumed that every single track in every single yard would be cleaned annually, which is not necessarily true in the experience of SunBelt's expert witness. SunBelt simply noted that it is neither a necessary nor a routine practice to clean each and every track within each yard annually. Although SunBelt's witness also noted that railroads do not typically clean every yard annually, SunBelt never changed its Opening position that the SBRR would do so. That testimony merely demonstrated the reasonableness of SunBelt's Opening Evidence.

SunBelt also pointed out that it had presented the best evidence of record because NS had failed to provide any yard cleaning costs in discovery.

IV. CONCLUSION.

For the foregoing reasons, the Board should deny the NS Motion to Strike as to all portions of SunBelt's Rebuttal.

Respectfully submitted,



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

*Counsel for SunBelt Chlor Alkali
Partnership*

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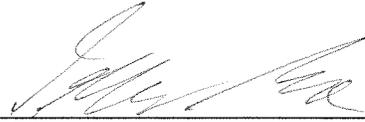
⁷³ SunBelt Reb. Ex. III-D-2, p. 49.

⁷⁴ NS Reply at III-D-187-89.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August 2013, I served a copy of the foregoing by
email and U.S. mail, upon:

G. Paul Moates
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005



Jeffrey O. Moreno