

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**SUNBELT CHLOR ALKALI PARTNERSHIP** )

**Complainant,** )

v. )

**NORFOLK SOUTHERN RAILWAY COMPANY** )

**Defendant.** )

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**Docket No. NOR 42130**

**COMPLAINANT’S REPLY TO DEFENDANT’S  
APPEAL OF JULY 3, 2013 DECISION IMPOSING THIRTY-PAGE LIMIT ON BRIEFS**

Complainant, SunBelt Chlor Alkali Partnership (“SunBelt”), hereby submits this Reply to the “Appeal of July 3, 2013 Decision Imposing Thirty-Page Limit on Briefs,” filed by Defendant, Norfolk Southern Railway Company (“NS”), on July 8, 2013 (“Appeal”). By a decision served in this proceeding on July 3, 2013 (“Decision”), the Surface Transportation Board (“Board”) imposed a 30-page limit upon the Final Briefs in this proceeding that are due on July 19, 2013. NS has filed an emergency appeal of that Decision, asking that the Board not impose any page limits, or alternatively, that the page limit be increased to 100 pages. SunBelt opposes the NS Appeal and asks the Board to affirm the Decision.

The NS Appeal is predicated upon multiple inaccurate and/or specious arguments. The overarching theme is that NS somehow is entitled to submit a longer brief and that the page limit imposed by the Decision is a denial of due process. Appeal, p. 1. Because NS has no right to

submit a Final Brief at all, much less one of unlimited length, there can be no violation of NS's due process.<sup>1</sup>

The use of briefs by the Board is, and always has been, discretionary.<sup>2</sup> Indeed, before it became routine for the parties in rate cases to agree to final briefs, briefs were permitted only upon submitting a request to the Board.<sup>3</sup> When the agency granted such requests, it routinely imposed page limits and occasionally even defined the issues to be addressed.<sup>4</sup> In addition, the agency explained that the purpose of briefs is “to focus the issues and thereby contribute to greater efficiency in analyzing the record.”<sup>5</sup> The foregoing precedent clearly indicates that briefs

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<sup>1</sup> NS's assertion of a due process right to longer page limits is extraordinary because two rounds of evidence by defendants is nearly absent from American judicial procedure. For example, the U.S. Courts of Appeals only permit each party to file one responsive brief as a matter of right. See Fed. R. App. P. 28(c) (“The appellant may file a brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed.”). Surely, if final briefs were critical to due process and ensuring an “adequate discussion of the major issues” in cases (Appeal, p. 1), the Federal Rules of Appellate Procedure would provide another round of briefs as a matter of right. Moreover, many state judicial systems follow the same approach, permitting briefs after rebuttal only in special circumstances. See, e.g., Cal Civ. Proc. Code § 1005(b) (only providing for moving papers, opposition papers, and reply papers in motion practice); 75 Ill. Comp. Stat. 5/2-602 (limiting pleadings to a complaint, answer, and reply, unless the court requires otherwise); N.Y. C.P.L.R. 5530(a) (only providing for an appellant brief, appellee's brief, and appellant's reply). Indeed, most defendants and appellees in our judicial system would consider NS's opportunity to file a final brief in this proceeding, let alone one that is 30 pages, a luxury.

<sup>2</sup> West Texas Utilities Company v. Burlington Northern Railroad Company, ICC Docket No. 41191, 1995 ICC Lexis 236 (served Sept. 8, 1995) (“WTU”).

<sup>3</sup> E.g., Id.; McCarty Farms v. Burlington Northern, Inc., ICC Docket No. 37809, 1987 ICC Lexis 94 (Oct. 21, 1987) (“McCarty”); Wisconsin P & L v. Union Pac. R.R. Co., Docket No. 42051, (served Nov. 15, 2000) (“WPL”); FMC Wyoming Corp. v. Union Pac. R.R. Co., Docket No. 42022 (served July 2, 1999) (“FMC”); Ariz. Pub. Serv. Co. v. The Atchison, Topeka and Santa Fe Ry. Co., Docket No. 41185 (served March 15, 1996).

<sup>4</sup> McCarty (imposing 20 page limit); WTU (imposing 50 page limit and prohibiting “appendices or attachments”); WPL, slip op. at 2 (imposing 25 page limit); FMC, slip op. at 2-5 (imposing 25 page limit and posing specific questions to each party); PPL Montana LLC v. The Burlington Northern and Santa Fe Railway Company, Docket No. 42054, slip op. at 2 (served Dec. 12, 2001) (imposing 25 page limit).

<sup>5</sup> WPL, slip op. at 1. See also, WTU (the purpose of briefs is to provide “a short summary of the evidence or record [and] to assist the [agency] in evaluating the record compiled in the

are a tool for the benefit of the agency, not the parties, and thus it is appropriate for the agency to define how briefs would best serve its objectives, not those of the parties. The Board's imposition of a 30-page limit for briefs in this proceeding is consistent with this precedent.<sup>6</sup>

NS nevertheless argues that the Board should disregard its precedent because this case is somehow different. First, NS contends that this case is different because both the complainant and defendant filed three rounds of evidence in earlier rate cases, whereas defendants now only get a single reply. Appeal, p. 4. But NS conveniently ignores the fact that the defendant's opening and rebuttal evidence in those cases were limited to market dominance issues concerning the calculation of variable costs and product and geographic competition, all of which were issues where the defendant had the burden of proof.<sup>7</sup> The reason defendants no

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proceeding so that it can make a fair and informed decision.”); FMC, slip op. at 2 (“briefs, properly employed, can focus the issues and thereby contribute to greater efficiency in analyzing the record.”).

<sup>6</sup> NS misrepresents Board precedent as inconsistent with a 30-page limit for final briefs. Appeal, p. 4 (note 7). The cases that NS cites for this proposition, however, deal with initial petitions and replies; they do not cover briefs following the submission of evidence. Pa. R.R.—Merger—N.Y. Cent. R.R., STB Fin. Docket No. 21989 (Sub-No. 4), slip op. at 1 (Sept. 3, 2009) (waiving the 30-page limit on the petition for review of an arbitration decision); Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., STB Fin. Docket No. 32760 (Sub-No. 45), slip op. at 1-2 (Feb. 29, 2008) (waiving 30-page limit on a petition for appeal of an arbitration award); Canadian Nat'l Ry.—Control—EJ&E W. Co., STB Fin. Docket No. 35087, slip op. at 2 (Jan. 8, 2009) (granting permission to exceed the page limit for a petition for stay and the reply to the petition). Moreover, even though the Board granted these petitions in arguably “simpler cases,” it has rejected similar requests in the rate case context. PPL Mont., LLC v. Burlington N. & Santa Fe Ry., STB Docket No. 42054, slip op. at 1 (Aug. 29, 2002) (denying request for waiver of the page limitation on petition for reconsideration).

<sup>7</sup> Market Dominance Determinations—Product & Geographic Competition, 3 S.T.B. 937, 941, 950 (1998) (noting that the defendant had the burden of proof on product and geographic competition); Product & Geographic Competition, 2 I.C.C.2d 1, 15 (1985) (shifting the burden of proof on product and geographic competition to the defendant); see, e.g., Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 51 (Oct. 30, 2006) (noting that parties typically filed three rounds of evidence on variable costs issues); Carolina Power & Light Co. v. Norfolk S. Ry., 7 S.T.B. 235, 344 n. 63 (2003) (“In rail rate cases, the parties each file three rounds of evidence . . . because the variable cost analysis determines both the jurisdictional

longer submit opening and rebuttal evidence is that the Board since has precluded movement-specific adjustments to variable costs and it no longer considers product and geographic competition in determining market dominance.<sup>8</sup> Moreover, the Board imposed briefing page limits in those cases even though they encompassed market dominance issues that are not present in this case, in addition to the stand-alone cost (“SAC”) issues. At no time did defendants ever have three rounds of evidence for SAC issues. Thus, NS’s characterization of the 30-page limit as “draconian” under the current regulatory framework of a single reply filing is blatant hyperbole that does not withstand scrutiny. Appeal, p. 4.

NS also contends that a 30-page limit is inappropriate for this case because of the many “novel and complex issues” presented. Appeal, pp. 3, 4-5. Every rate case has posed novel and complex issues. Indeed, that is how rate cases have grown exponentially in complexity over the years. Many issues that are now considered settled were novel when first presented in prior cases, including those where the Board imposed page limits upon briefs.<sup>9</sup> Although NS identifies several allegedly “novel” issues in this proceeding, it does not explain how those issues are any more novel or complex than the novel issues in prior cases with briefing page limits or

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threshold for rate review (as to which the railroad bears the burden of proof . . .) and the regulatory floor for rate relief (as to which the shipper seeking that relief assumes some responsibility).”); W. Tex. Utils. Co. v. Burlington N. R.R., 1 S.T.B. 638, (1996) (noting that the defendant filed “its rebuttal on product and geographic competition and jurisdictional threshold”).

<sup>8</sup> Major Issues, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 51, 59 (Oct. 30, 2006) (disallowing movement-specific adjustments); Market Dominance Determinations, 3 S.T.B. 937, 941, 950 (1998) (eliminating consideration of product and geographic competition from market dominance determinations).

<sup>9</sup> FMC, 4 S.T.B. 699, 753-55 (2000), posed novel issues dealing with switching studies performed at multiple locations by both parties. WPL, 5 S.T.B. 955, 968-73 (2001), posed novel issues dealing with traffic forecasts using multiple different EIA coal production forecasts for the first time. PPL Mont., LLC v. Burlington N. & Santa Fe Ry., 6 S.T.B. 286, 297-300 (2002), presented the novel issue of an internal cross-subsidy for the first time.

why it cannot address those issues within the 30-page limit imposed by the Board in this case, especially since the details already have been addressed in the parties' evidence and the purpose of briefs is to summarize and focus upon key issues.<sup>10</sup>

Next, NS attempts to justify a longer brief so that it can address allegedly improper rebuttal by SunBelt. Appeal, pp. 2-3. As a threshold matter, this justification is inconsistent with NS's assertion that it does not intend to use its brief to present "surrebuttal." *Id.*, p. 5. Putting that issue to the side, however, NS's claims of improper rebuttal evidence by SunBelt are predicated upon a specious comparison of the length of SunBelt's rebuttal evidence against its opening evidence. Such a comparison says nothing about the propriety of the contents of the rebuttal evidence. Furthermore, even as an anecdotal assessment, it would be far more appropriate to compare the length of complainant's rebuttal evidence to the defendant's reply evidence, because the former is supposed to be a response to the latter. The NS Reply contains 812 pages of SAC narrative compared with 419 pages in SunBelt's rebuttal.<sup>11</sup> Rebuttal evidence that is nearly half the length of the reply evidence to which it responds is hardly indicative of improper or even excessive evidence. The fact is that the length of SunBelt's rebuttal evidence was influenced primarily by NS's voluminous reply evidence, which among other things challenged many established SAC standards.<sup>12</sup>

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<sup>10</sup> In *FMC*, for example, the Board imposed a 25-page limit on briefs (*see* note 4, *supra*) in a case that embraced 16 different rates for six different non-coal commodities, and where market dominance was vigorously contested. *FMC*, 4 S.T.B. 699, 704, 711-20 (2000). The traffic group included coal, field crops, TOFC/COFC, soda ash, phosphate rock, motor vehicles, and general freight that moved over a 3,000 mile stand-alone railroad. *Id.* at 724-25. The parties vigorously argued over movement-specific adjustments to variable costs. *Id.* at 747-60. If anything, *FMC* posed a greater number of novel issues of similar, if not greater, complexity than this proceeding, and yet the Board permitted even fewer pages for final briefs.

<sup>11</sup> These pages counts reflect solely the Part III SAC narrative in each parties' filing.

<sup>12</sup> Examples of the new issues posed by NS on reply include NS's attempt to modify the DCF and MMM procedures in Part III-H, and NS's deviation in Part III-C from standard SAC

The only concrete example that NS provides of allegedly impermissible rebuttal is SunBelt's car classification and blocking plan. Appeal, p. 2. SunBelt's rebuttal evidence, however, was perfectly appropriate.<sup>13</sup> NS is simply wrong in its assertion that SunBelt did not include any car classification and blocking plan in its opening evidence.<sup>14</sup> However, on Rebuttal, SunBelt conceded that it had not accounted for classification of cars originating or terminating in every yard.<sup>15</sup> Under the Board's guidelines for rebuttal evidence, if the defendant has identified flaws in the complainant's opening evidence and has provided substitute evidence, the complainant can accept the defendant's evidence or show that the defendant's substitute evidence is "unsupported, infeasible or unrealistic," and then supply "corrective evidence" with support.<sup>16</sup> In order to develop its classification car counts on rebuttal, SunBelt accepted the NS methodology, but applied that methodology to the trains in SunBelt's operating plan rather than the trains created through the MultiRail software that NS used to develop its operating plan, because the NS plan was unsupported, infeasible and unrealistic.<sup>17</sup> Thus, this example does not support NS's assertion of improper rebuttal by SunBelt.

Finally, NS claims that it has been severely prejudiced by the timing of the Decision to impose page limits, because it already "has devoted considerable time and effort to disentangling

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procedure in the development of a completely different operating plan, using a third-party computer model, that is divorced from NS's actual operations. Thus, on rebuttal, SunBelt was required both to defend its operating plan and to mount a critique of NS's totally different operating plan.

<sup>13</sup> At pages I-21 to 25 of its Rebuttal, SunBelt painstakingly described the Board's precedent on the proper scope of SAC rebuttal precisely so that NS could not make misleading claims about the propriety of SunBelt's evidence.

<sup>14</sup> See SunBelt Reb. at III-C-10.

<sup>15</sup> Id., at III-C-31.

<sup>16</sup> Duke/NS, 7 S.T.B. at 100-101.

<sup>17</sup> SunBelt Reb. at III-C-31 to 32.

SunBelt's Rebuttal Summary of Argument and comparing it to SunBelt's actual Rebuttal evidence; to identifying the flaws that continue to exist in and undermine SunBelt's evidence; and to preparing a final brief that addresses the full evidentiary record as expanded by SunBelt's Rebuttal," which will all "be for naught" if the Decision stands. Appeal, p. 6. This claim is disingenuous because NS surely would have undertaken most of those tasks regardless of the length of its final brief. The only task that might be for naught would be the drafting of text that NS chooses to cut from its brief due to the page limits, and then only to the extent that NS had already drafted such text prior to the Decision. Because SunBelt is in the same position, what little prejudice the Decision may create in that regard is equally distributed. Moreover, by appealing the Decision, NS is adding to its own costs because, instead of preparing a single 30-page brief, it now must prepare two alternate briefs just in case its appeal is successful.

For the foregoing reasons, the Board should affirm the Decision to limit final briefs in this case to 30 pages.

Respectfully submitted,



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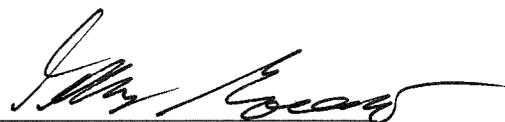
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Partnership*

Dated: July 10, 2013

## CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July 2013, I served a copy of the foregoing by email and U.S. mail, upon:

G. Paul Moates  
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A handwritten signature in black ink, appearing to read "Jeffrey O. Moreno", written over a horizontal line.

Jeffrey O. Moreno