

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

234586

SUNBELT CHLOR ALKALI PARTNERSHIP

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

ENTERED
Office of Proceedings
July 26, 2013
Part of
Public Record

Docket No. NOR 42130

MOTION TO STRIKE

Pursuant to 49 C.F.R. §§ 1104.8 and 1117.1 and other applicable authority, Defendant Norfolk Southern Railway Company (“NS”) respectfully submits this Motion to Strike impermissible rebuttal evidence presented by Complainant SunBelt Chlor Alkali Partnership (“SunBelt”) in its June 3, 2013 Rebuttal Evidence. SunBelt’s Rebuttal repeatedly violated the Board’s rules—and thereby threatens the fundamental fairness of this proceeding—by including “new evidence that could and should have been submitted on opening” and by taking positions irreconcilable with its opening evidence. *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, 5 S.T.B. 441, 446 (2001) (“SAC Procedures”). In so doing, SunBelt attempts to deny NS the opportunity to respond and would deny the Board the benefit of evidence fully tested through the adversarial process.

INTRODUCTION

After submitting one of the skimpiest SAC presentations in recent memory—147 pages of SAC narrative for a unique SARR that would carry an extraordinarily high percentage of TIH traffic and that would rely almost exclusively on non-coal traffic—SunBelt submitted a Rebuttal

SAC narrative of 419 pages, nearly three times longer than its opening “case-in-chief.”¹ As a result, 74% of the 566 pages of narrative SAC evidence that SunBelt has submitted to the Board was filed after NS filed its Reply Evidence. Much of this Rebuttal consisted of new evidence and arguments that were required to be included on Opening.² SunBelt repeatedly offered evidence and argument for the first time on Rebuttal, which left little doubt as to its strategy: (1) state a position (or remain silent on an issue) on Opening, revealing as little detail and support as possible; (2) wait for NS to reply; and (3) then spring the “full” evidence on Rebuttal so that NS is deprived of the opportunity to respond substantively and with evidence.

SunBelt’s strategy of withholding evidence and arguments for rebuttal in order to preclude NS from responding to them is a blatant violation of long-established rules, and the Board should strike its impermissible rebuttal. Indeed, striking this evidence is essential to afford NS due process in this proceeding. Failure to strike SunBelt’s prohibited Rebuttal would countenance tactics designed to deny the defendant railroad an opportunity to address the complainant’s evidence, and undermine the adversarial process (including the benefit to the Board of adversarial testing of important elements of the parties’ evidence).³

¹ By comparison, the opening SAC evidence in *AEPCO v. BNSF & UP*, STB Docket No. 42113, totaled 372 pages; opening SAC evidence in *Seminole Elec. Coop., Inc. v. CSX Transp., Inc.*, STB Docket No. 42110, totaled 344 pages; and opening SAC evidence in *Intermountain Power Agency v. UP*, STB Docket No. 42136, totaled 306 pages.

² SunBelt’s Rebuttal submission is riddled with impermissible new rebuttal evidence, arguments, and positions. In this focused Motion, NS conservatively seeks to strike only some of the more egregious improper evidence, including evidence concerning fundamental and indispensable elements of SunBelt’s case-in-chief. In many instances, even the improper rebuttal evidence that SunBelt has submitted is so plainly inadequate that NS has decided not to further burden the Board by seeking to strike such patently insufficient and unacceptable evidence. As the Board reviews the evidence in this proceeding, it should be aware of SunBelt’s penchant for “saving” arguments and evidence until rebuttal, and it should disregard any new Rebuttal Evidence that does not satisfy the exacting requirements for such evidence.

³ NS files this Motion pursuant to the Board’s recent direction that improper rebuttal should be addressed in a motion to strike. See *SunBelt v. Norfolk Southern*, STB Docket No. 42130, Decision at 2 (served July 15, 2013). NS does not believe it is necessary to seek leave to file this

Moreover, although in most instances the flaws, inaccuracies, incorrectness, or inapplicability of SunBelt's improper Rebuttal Evidence is apparent, its acceptance would nonetheless prejudice NS. Had the evidence and arguments improperly raised by SunBelt on rebuttal been included in its Opening, NS would have presented compelling response evidence in its Reply. The Board's consideration of this improper evidence without affording NS a full and timely opportunity to respond would violate NS's due process rights and constitute arbitrary and capricious agency action. *See Jolly v. Listerman*, 672 F.2d 935, 941 n.17 (D.C. Cir. 1982) ("the opportunity to meet and rebut evidence utilized by an administrative agency has long been regarded as a primary requisite of due process").⁴

For at least a decade, the Board's rules regarding the complainant's obligation to present its full case-in-chief on opening, the permissible scope of rebuttal, and the consequences of complainant's failure to abide by those rules have been clear. As the Board summarized in 2003,

where on reply the railroad both (a) demonstrates that what the shipper presented is infeasible and/or unsupported and (b) offers feasible realistic evidence that avoids the infirmities in the shipper's evidence and that is itself supported, the Board will use the reply evidence for its SAC analysis.

Duke Energy Corp. v. Norfolk Southern Ry. Co., 7 S.T.B. 89, 100-101 (2003) ("*Duke/NS*") (emphasis added).

The integrity of the Board's rate case procedures depends on enforcing its limitation on rebuttal evidence. If a defendant is to be restricted to a single evidentiary filing, due process demands that the complainant present its entire and best case-in-chief on opening so that the

Motion. However, should the Board determine that a request for leave is appropriate, NS hereby requests leave to file this motion to strike.

⁴ *See Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 63 (D.C. Cir. 1999) ("the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation"); *Coughlan v. Director, Office of Workers' Compensation Programs*, 757 F.2d 966, 969 (8th Cir. 1985) ("Fundamental concepts of fairness require that litigants be given equal opportunities to present their respective positions.").

defendant has a fair opportunity to respond. The Board rightly has been “troubled” by complainant tactics of submitting incomplete opening evidence and then using rebuttal to submit additional evidence to which the defendant cannot respond.⁵ That is precisely what has occurred here. The improper rebuttal detailed in this Motion shows that abuse of rebuttal evidence continues unabated. Unless and until the Board takes strong and meaningful action by striking the elements of SunBelt’s Rebuttal detailed in this Motion, complainants will have no incentive to abide by the Board’s rules and curb their introduction of improper rebuttal.⁶

I. THE PROPER SCOPE OF REBUTTAL EVIDENCE DOES NOT INCLUDE EVIDENCE THAT COULD HAVE BEEN PRESENTED ON OPENING.

The Board’s established procedures and rules provide for the complainant to file its full SAC case-in-chief in its opening submission, for the defendant to provide its full response, including corrective evidence, in its reply submission, and for the complainant to file a rebuttal presentation that must be strictly limited to responding to the defendant’s reply presentation. *See SAC Procedure*, 5 S.T.B. at 446. Rules governing the proper role and scope of rebuttal flow from this order of proof. With respect to issues or evidence challenged by the railroad,⁷ the complaining shipper has two rebuttal options. First, it may attempt to show that its opening

⁵*Public Service Co. of Colorado d/b/a Xcel Energy v. Burlington Northern & Santa Fe Ry. Co.*, STB Docket No. 42057, at 2 (served Apr. 4, 2003) (“*Xcel*”) (“We are increasingly troubled by the submission of incomplete or erroneous evidence on opening in a SAC case and a complainant’s reliance upon an opportunity to address deficiencies through later evidentiary submissions, to which the defendant has no opportunity to respond.”).

⁶ Even allowing defendants to submit supplemental evidence to respond to impermissible rebuttal would not adequately address the problem. Such an approach would sanction the practice of withholding until rebuttal evidence that should be presented in a complainant’s opening case-in-chief and prolong cases. If the worst penalty complainants would face as a result of withholding critical evidence until rebuttal is that defendants may be afforded a fair opportunity to respond, complainants would have incentive to continue this unfair practice, secure in the knowledge that they have nothing to lose and much to gain by employing such a strategy.

⁷ Evidence or issues that are not challenged by the railroad are not permissible subjects of rebuttal. *See, e.g., Duke/NS*, 7 S.T.B. at 101, n. 18; *Xcel*, 7 S.T.B. 589, 683-84 (2004).

evidence was adequate, feasible, and properly supported. *See Duke/NS*, 7 S.T.B. at 101.

Alternatively, “it may adopt the railroad’s evidence.” *Id.*⁸ Otherwise, supplying new, different or modified evidence or argument on rebuttal is prohibited. *See id.* Time and again in this case SunBelt flouted that rule by seeking to introduce new and/or substantially different evidence and argument on rebuttal.

SunBelt’s Rebuttal discussion of the “proper scope of rebuttal evidence” sought to obscure the governing rule by focusing entirely on the narrow and limited exception to the rule for such evidence. *See* Reb. I-22–23. That exception provides that if and only if the complainant first demonstrates that the defendant’s reply evidence is infeasible, unrealistic, or unsupported, then the complainant may propose alternative “corrective” evidence on rebuttal. *See Duke/NS*, 7 S.T.B. at 101 (exception to rebuttal rule applies “where the shipper shows that the railroad’s reply evidence is itself unsupported, infeasible, or unrealistic.”)⁹ In the absence of such proof by the complainant, however, permissible rebuttal is limited to arguing for the complainant’s opening evidence or position or adopting the defendant’s evidence or position. It does not create an infinitely elastic loophole for complainants to offer new arguments and evidence for the first time on rebuttal. Nor—contrary to SunBelt’s approach—does it afford a complainant an opportunity to advocate the adoption of a selectively modified version of the defendant’s reply evidence. As the Board made clear in *Duke/NS*, the “corrective evidence” exception does not change the fact that a shipper must “submit its best, least-cost, fully supported case on opening.” *Duke/NS*, 7 S.T.B. at 101. To hold otherwise would let the exception swallow

⁸ In some limited circumstances, a party may petition the Board for permission to submit supplemental evidence. *See id.* Because SunBelt filed no such petition, that extraordinary exception is not implicated in this case.

⁹ Where the defendant identifies a flaw in complainant’s opening evidence but fails to provide alternative evidence that can be used in the Board’s SAC analysis, the complainant may introduce substitute evidence on rebuttal. *See id.* SunBelt does not contend that this contingent exception applies in this case.

the fundamental rule that “[r]ebuttal may not be used as an opportunity to introduce new evidence that could and should have been submitted on opening to support the opening submissions. New evidence improperly presented on rebuttal will not be considered.” *SAC Procedures*, 5 S.T.B. at 445–46.

This Motion does not seek to strike permissible responses to NS’s evidence.¹⁰ What this Motion seeks to strike is some of the plainly improper rebuttal evidence that SunBelt “used as an opportunity to introduce new evidence that could and should have been submitted on opening to support the opening submissions.” This improper Rebuttal should not be considered.

II. SUNBELT VIOLATED THE REQUIREMENT TO PROVIDE ITS FULL AND BEST EVIDENCE AND ARGUMENT ON OPENING TO AFFORD NS AN ADEQUATE OPPORTUNITY TO RESPOND.

While SunBelt’s Rebuttal included a four-page section purporting to delineate “the proper scope of rebuttal evidence,” Reb. I-21–24, that summary did not even mention the most basic principles that underlie the Board’s rules: that a complainant must present its entire case-in-chief in its opening evidence and may not use rebuttal to introduce new evidence that should have been submitted on opening. As the Board has explained:

[T]he party with the burden of proof on a particular issue must present its entire case-in-chief in its opening evidence. Rebuttal presentations are limited to responding to the reply presentation of the opposing party. Rebuttal may not be used as an opportunity to introduce new evidence that could and should have been submitted on opening to support the opening submissions. New evidence improperly presented on rebuttal will not be considered.

SAC Procedures, 5 S.T.B. at 445–46. The Board recently applied these principles to strike substantial portions of improper rebuttal evidence in *Total Petrochemicals & Ref. USA, Inc. v.*

¹⁰ Because the Board’s procedures do not afford NS any opportunity to comment on SunBelt’s alleged “corrections,” the Board should carefully review each of these “corrections,” most of which are based on mischaracterizations of the facts and faulty data, or which upon examination turn out not to make the claimed “correction.”

CSX Transp., Inc., STB Docket No. 42121 (served May 31, 2013) (“*TPI*”), holding that “Board rules clearly direct that complainants put forth their best and most complete case on opening,” and that “[p]rinciples of fairness and the orderly handling of cases require that ‘parties submit their best evidence on opening, so that each party has a fair opportunity to reply to the other’s evidence.’” *Id.* at 9 (quoting *Xcel* at 2 (served Apr. 4, 2003)). This restriction applies both to new rebuttal evidence that should have been submitted on opening¹¹ and to new rebuttal arguments that could have been made in opening.¹² A long line of Board decisions has affirmed the fundamental requirement that a shipper must submit its “best” evidence on opening and “may not hold back to see the railroad’s reply evidence before finalizing or supporting its own case.” *Duke/NS*, 7 S.T.B. at 101.¹³

This Motion addresses some of SunBelt’s violations of this basic rule, which can be categorized as follows (1) instances in which SunBelt’s methodological choice on Opening caused it to submit impermissible Rebuttal evidence; (2) instances in which SunBelt did not provide any evidence on Opening; (3) instances in which SunBelt submitted on Rebuttal new evidence “that could and should have been submitted on Opening to support the Opening submissions;” and (4) instances in which SunBelt reversed its position and thereby deprived NS an opportunity to reply.

¹¹ See *Otter Tail Power Co. v. BNSF Ry. Co.*, STB Docket No. 42071 (served Jan. 27, 2006) (“*Otter Tail*”) (striking new rebuttal evidence of productivity improvements); *Texas Mun. Power Agency v. BNSF Ry. Co.*, 6 S.T.B. 573, 691–92 (2003) (“*TMPA*”) (striking new maintenance of way evidence submitted on rebuttal); *Duke Energy Corp. v. CSX Transp., Inc.*, STB Docket No. 42070, at 5 (served Mar. 25, 2003) (striking rebuttal evidence relocating SARR terminus and tunnel).

¹² See *TPI* at 9, 12 (striking new arguments on intermodal competitive options and product integrity); *M&G Polymers USA LLC v. CSX Transp., Inc.*, STB Docket No. 42123, at 9–10 (served Sept. 27, 2012) (striking new argument on intermodal competitive options) (“*M&G*”).

¹³ See also *M&G* at 9–10; *Otter Tail* at 4; *TMPA*, 6 S.T.B. at 691–92.

A. Instances in Which SunBelt’s Methodological Choice(s) Led to its Submission of Impermissible Rebuttal Evidence.

The Board has been very clear that a complainant may not file additional evidence to correct its own mistake or methodological choice. In *Intermountain Power Agency*, the Board stated that:

It is the duty of the complainant to make its best case on opening. The complainant cannot claim that a technical error, brought on by the complainant’s own mistake, is grounds for it to modify a core part of its evidence after the defendant carrier has already filed a reply to that evidence.

Intermountain Power Agency v. Union Pacific R.R. Co., STB Docket No. 42127, at 3 (served Apr. 4, 2012) (“*IPA*”).¹⁴ 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. Such tactics deny the Board the benefit of the adversarial process testing the evidence and unfairly prejudice the defendant railroad.

Train Service Plan. SunBelt’s belated attempt to repair its fatally deficient SBRR train service plan constitutes improper rebuttal that should be rejected. The “automated” train selection process that SunBelt used on Opening to develop a list of the SBRR’s trains failed to capture 1,622 trains that are necessary to provide complete on-SARR service—including the NS local trains required to originate 91% of the “issue” traffic. Reply III-C-12-19. Moreover, SunBelt’s workpapers showed that the exclusion of those trains was the result of a conscious and intentional decision—the programming instructions specified by SunBelt’s experts explicitly

¹⁴ Although the Board in *IPA* was considering whether to permit *IPA* to submit “supplemental evidence” in that case, the same principle applies equally to rebuttal evidence. In both instances, the complainant has made a choice of methodology for building an aspect of its case-in-chief, and the defendant railroad has critiqued and provided evidence in response to that choice.

required that a train report movement at multiple operating stations in order to be included in the SBRR train list.¹⁵

On Reply, NS showed that SunBelt's Opening operating plan failed to provide complete service from origin (or on-SARR point) to destination (or off-SARR point). Further, NS provided a feasible, well-supported, and realistic complete operating plan for the traffic group selected for the SBRR.

On Rebuttal, SunBelt neither attempted to justify its opening methodology nor to demonstrate that NS's Reply Evidence was "unrealistic, unsupported, or infeasible." Under the Board's rules, this failure left it only one option—adopt NS's evidence. Moreover, even if SunBelt had shown that NS's Reply Evidence was unsupported or infeasible, it did not even purport to "correct" NS's evidence.¹⁶ Rather it impermissibly tried to "cure" the blatant deficiency in its Opening operating plan—generated by its chosen methodology—by adding 1,031 of the 1,622 trains that NS identified as missing from the SunBelt operating plan. Reb. III-C-25–30. (Of course, even that sleight of hand did not correct the problem in its operating plan, because it still omitted nearly 600 trains.)¹⁷ But having failed to buttress its own operating plan

¹⁵ See Reply WP "SunBelt Base Year Trains-Response.xlsx," Tab "Sql," row 142 ("Requiring >1 Milepost from Train Sheet Data OnSARR" in order for a train to be included). A note at the top of the list of trains excluded by SunBelt's train selection methodology explains that "[t]hese trains were removed from the list because they only [sic] the SARR system at one of the SARR end points, or only move a few miles on the SARR system before exiting the system." Op. WP "SunBelt Base Year Trains.xlsx"; see also Reply WP "SunBelt Base Year Trains-Response.xlsx," Tab "Removed."

¹⁶ SunBelt may belatedly contend that NS's operating plan somehow is unsupported, or infeasible perhaps by reprising its arguments about NS's use of MultiRail and/or that the data produced by NS to SunBelt in discovery was deficient. But NS has thoroughly and repeatedly debunked those arguments. See NS Reply III-C-19–30, III-C-122; NS Brief at 12-15. And, the time for making any such showing was in SunBelt's Rebuttal, not with post-hoc rationalizations in response to a motion to strike improper rebuttal.

¹⁷ Contrary to SunBelt's apparent view, a complainant is not permitted to "partially adopt" or "adopt with modifications" evidence offered by NS on Reply. As NS has emphasized, unless SunBelt shows that NS's Reply evidence is deficient, its only options on Rebuttal were either to

evidence or show a flaw in NS's operating plan evidence, SunBelt's only permissible option was to accept NS's evidence. *See, e.g., IPA* at 3 (citing *Duke/NS*). Instead, SunBelt impermissibly attempted to change its flawed evidence (which omitted necessary trains for 91% of the issue traffic) by attempting to insert missing trains on Rebuttal. SunBelt's improper tactic seeks to deny NS the ability to submit evidence demonstrating that SunBelt did not correctly add these trains and has not properly accounted for them in its operating "plan" or its RTC model. Because this critical flaw in SunBelt's Opening evidence was the product of an intentional methodological choice made by SunBelt, it is not entitled to change its evidence on Rebuttal.¹⁸

Further, the SAC process provides that the complainant must present its actual case on opening in order for that evidence to be tested through an adversarial process in which the defendant can examine and critique or object to the evidence proffered by the complainant. SunBelt's methodological choice produced a fatally-flawed plan. By attempting to backtrack from that choice on Rebuttal, SunBelt has denied NS an opportunity to respond, while simultaneously denying the Board the benefits of testing the new evidence through the adversarial process. The Board should prohibit SunBelt from profiting from its gambit by striking the newly adopted assumptions and evidence regarding SunBelt's operating plan.

B. Instances in Which SunBelt Offered No Evidence on Opening.

On a number of occasions, SunBelt failed entirely to address a critical issue or element of its case on Opening, and attempted to supply that evidence for the first time on Rebuttal, thereby depriving NS of the opportunity to respond to SunBelt's evidence or argument. In these

attempt to show its Opening Evidence was correct and adequate, or adopt NS's evidence. There is no intermediate option of presenting a hybrid of elements of SunBelt's Opening Evidence, NS's Reply Evidence, and other new evidence. Yet this is precisely what SunBelt attempted to do here and in numerous other instances on Rebuttal.

¹⁸ Even if SunBelt's exclusion of necessary trains were inadvertent, *IPA* teaches that such a "technical error" may not be corrected on rebuttal. *See IPA* at 3.

instances, SunBelt, which has the burden of proof on SAC issues, indisputably failed to “present its entire case-in-chief in its opening evidence” and its “new evidence improperly presented on rebuttal [must] not be considered.” *SAC Procedures*, 5 S.T.B. at 445–46; *see TPI* at 9 (repeating admonition that “principles of fairness and the orderly handling of cases require that ‘parties submit their best evidence on opening, so that each party has a fair opportunity to reply to the other’s evidence.’”) (quoting *Xcel* at 2 (served April 4, 2003)). The Board’s clear and oft-repeated rules preclude consideration of evidence SunBelt omitted on Opening and attempted to insert on Rebuttal.

In some instances, SunBelt attempted to excuse its failure to present evidence on Opening by claiming that it meant to provide the information on Opening and “inadvertently failed to do so.” But regardless of SunBelt’s explanation of its failure to present the evidence on Opening, it has deprived NS of an opportunity to address SunBelt’s evidence on these issues, in violation of the Board’s rules. Accordingly, the Board must strike SunBelt’s impermissible Rebuttal Evidence, which attempted to “correct” SunBelt’s own misconceived and fatally-deficient Opening Evidence.

Car Classification. Although SunBelt selected 470,000 cars of general freight traffic for the SBRR’s traffic group, its Opening operating plan made no provision for essential car classification, switching, or blocking. On Rebuttal, SunBelt admitted it had not addressed classification switching on Opening, but claimed that it “unintentionally omitted classification switching services” for cars being switched between trains. Reb. III-C-96, 101–03. SunBelt’s Rebuttal then presented for the first time a “block analysis” and “classification car counts.” *Id.* SunBelt is not permitted to present such a fundamental component of its operating plan for the first time on Rebuttal, when NS has no opportunity to respond to it. The Board should refuse to consider this impermissible new Rebuttal Evidence.

SunBelt’s excuses for its late submission lack merit. While SunBelt characterized this glaring omission as “unintentional” (Reb. III-C-96), it defies explanation how its witness McDonald—who SunBelt touts as “an acknowledged railroad operating expert” (Reb. III-C-1)—could possibly have overlooked the fundamental requirement for the SBRR to classify carload traffic. Nor did SunBelt correct its purported “oversight” by filing a timely errata to its Opening Evidence. Only after NS’s Reply Evidence (III-C-30–37 and III-C-133–46) exposed that glaring deficiency in SunBelt’s operating plan, did SunBelt proffer for the first time on Rebuttal an estimate of the number of cars that the SBRR would be required to classify. The Board should not countenance such sandbagging tactics.

SunBelt offered another, contradictory rationale by claiming on Rebuttal that its Opening operating plan “effectively adopted NS’s own blocking plans.” Reb. III-C-10.¹⁹ But SunBelt’s actual Opening operating plan—which under the rules must constitute SunBelt’s entire and fully supported case in chief—does not even hint at such an “adoption.” SunBelt’s belated claim that it “effectively adopted” NS’s blocking plans on Opening collapses under the weight of its Rebuttal classification claims that the SBRR could operate with far fewer classification facilities than the NS uses in the real world to move substantially more traffic in the peak-year than NS does today. Reb. III-C-10. For example, SunBelt’s assertion that its Rebuttal classification analysis shows that the SBRR does not need a hump yard at Birmingham belies its claim that its Opening “adopted” the real-world NS blocking plan that utilizes a major hump yard at that location.

¹⁹ See SunBelt Reply to Appeal of July 3, 2013 Decision Imposing 30-Page Limit on Briefs, at 6 (July 10, 2013) (claiming that “NS is simply wrong in its assertion that SunBelt did not include any car classification and blocking plan in its opening evidence” and citing to Rebuttal III-C-10 to support that claim).

SunBelt’s claim that its evidence is just “corrective” to NS’s car classification evidence is unavailing for two reasons. First, SunBelt is not allowed to present “corrective” evidence because it failed to make the prerequisite showing that NS’s blocking plan is unsupported, infeasible, or unrealistic. SunBelt’s only attack on NS’s evidence—after failing to provide any evidence itself on Opening—was to complain that NS used the MultiRail computer program tool to assist it in compiling the evidence that it was SunBelt’s burden to provide on Opening. As the Board knows, those attacks on MultiRail fail because MultiRail is a widely used and publicly available tool that the Board has seen and accepted in prior proceedings. *See* Reply III-C-122.

Second, SunBelt’s newly-minted car classification evidence does not respond to, much less “correct” NS’s evidence. SunBelt did not even attempt on Opening to determine the number of cars that the SBRR would need to classify in each yard. On Reply, NS showed that SunBelt had all the information necessary to conduct a car classification analysis. *See* Reply III-C-45–50. Further, NS provided a car classification analysis based on NS’s detailed work to create an operating plan for the SBRR’s carload network. Rather than “correct”—or even address—NS’s car classification evidence, SunBelt supplied for the first time a car classification analysis based on its own flawed Opening operating plan, using the methodology that NS showed that SunBelt could have used on Opening. That new evidence did not “correct” anything; it was simply a desperate attempt to patch over one of the most glaring deficiencies in SunBelt’s case-in-chief, and a quintessential instance of evidence that could and should have been submitted on opening.

Crew Deadheading. SunBelt’s Opening assumed that no crew deadheading would be required on the SBRR, even though deadheading costs from crew imbalances are commonly accepted parts of a SAC analysis. *See* Reply III-D-30; *Arizona Elec. Power Coop., Inc. v. BNSF Ry. Co. & Union Pac. R.R. Co.*, STB Docket No. 42113, at 46 (served Nov. 22, 2011); *FMC Wyoming Corp. v. Union Pac. R.R. Co.*, 4 S.T.B. 699, at 770 (2000) (“*FMC*”). On Rebuttal,

however, it changed position and submitted for the first time an analysis that purported to estimate crew imbalance costs. *See* Reb. III-D-20. SunBelt’s decision to withhold its evidence of this important and well-recognized operating personnel cost factor until Rebuttal has denied NS any ability to respond to SunBelt’s evidence. This impermissible Rebuttal should be stricken.

C. Instances in Which SunBelt Submitted on Rebuttal New Evidence that Should Have Been Submitted on Opening.

In yet other instances, SunBelt withheld its evidence and arguments on issues barely noted in opening. Instead, SunBelt advanced evidence and arguments for the first time on Rebuttal that the Board requires a complainant to provide on Opening.²⁰ Accordingly, the Board must strike that evidence as well.

G&A. G&A is a stark illustration of the signature SunBelt tactic of barely sketching the outlines of its positions on Opening and then unveiling most of its alleged support on Rebuttal. Indeed, placing SunBelt’s skeletal 21-page Opening G&A Exhibit next to its 61-page Rebuttal G&A Exhibit and comparing the evidence that SunBelt presented issue-by-issue leaves no doubt that SunBelt did not submit its “best and most complete case on opening” but rather “h[e]ld back to see the railroad’s reply evidence before finalizing or supporting its own case.” *TPI* at 9. For example:

- **Marketing:** SunBelt’s Opening Evidence devoted a total of five-and-a-half lines to justify its decision to provide only one marketing employee. *See* Op. Ex. III-D-2 at 7. SunBelt’s Opening justification consisted of the single claim that the SBRR’s reliance on cross-over traffic meant it would have “minimal direct customer contacts” and could rely on its “connecting carriers” for marketing. *Id.* SunBelt’s Rebuttal included multiple new justifications for its staffing proposal, including a new claim that a “simplified” rate making process allows less marketing staff, Reb. Ex. III-D-1 at 18–19; a greatly expanded argument that

²⁰ In many instances, SunBelt changed (or presented for the first time) on Rebuttal the rationale for its position on an issue, which is prohibited. *See, e.g., TMPA*, 6 S.T.B. at 691 (prohibiting change of rationale on rebuttal because defendant is not afforded an opportunity to respond).

Rule 11 overhead carriers have a reduced marketing role, *id.* at 19–20; and a new argument that intermodal traffic would have reduced marketing needs. *Id.* at 20. NS had no opportunity to respond to these newfound claims, and the Board should strike them.

- **Revenue Accounting:** SunBelt presented no evidence on Opening to justify its lack of revenue accounting staff, a necessary function typically provided for in past cases. *See, e.g. WFA I* at 43; *AEP Texas* at 55. On Rebuttal, SunBelt added a single Manager of Revenue Accounting and attempted to support that staffing with new arguments that the SBRR would have less revenue accounting responsibilities for trainload traffic and for overhead traffic. *See id.* at 25. NS had no opportunity to demonstrate why these newly articulated theories are wrong, and the Board should strike them.
- **Claims:** On Opening SunBelt asserted that it would outsource claims and that a single Manager–Claims & Internal Auditing would oversee that outsourcing along with multiple other duties. *See Op. Ex. III-D-2* at 4. It included no arguments or other support for that staffing. On Rebuttal, however, SunBelt unveiled several new alleged justifications for its claims staffing: that “SBRR will be responsible for investigation of claims on local and received traffic only;” that most damages are “the customers’ responsibility;” and that “claims against the railroads have been decreasing.” *Reb. Ex. III-D-1* at 36. NS had no opportunity to demonstrate why these new contentions are incorrect, and this evidence should be stricken.

Roadmaster Territories. While on Opening SunBelt’s maintenance of way expert provided no empirical support for his roadmaster districts, on Rebuttal he alleged that his proposed district sizes were consistent with a NS track crew district with which he was “familiar.” *Reb. Ex. III-D-2* at 24. This blatant sandbagging deprived NS of any opportunity to respond to the new evidence, which should be stricken. Moreover, if NS had been afforded the opportunity to address this newly-minted claim, it would have shown that SunBelt’s representation about that crew district is demonstrably false. The erroneous anecdote that Mr. Crouch offers about this crew district at page 24 of Rebuttal Exhibit III-D-2 should be stricken.

D. Instances in Which SunBelt Changed Its Position on Rebuttal and Thereby Deprived NS of an Opportunity to Reply.

SunBelt also repeatedly changed its position on issues after NS accepted the SunBelt proposed method for calculating certain costs and after NS showed that SunBelt had

miscalculated those costs under that methodology. It is well established that a complainant may not change a methodology or other evidence that the defendant carrier has not challenged. *See, e.g., Xcel*, 7 S.T.B. at 643–44. The Board has long held in rate cases that parties may not change their methodology and evidence on rebuttal once that methodology or evidence has been accepted and relied on by the defendant. *See id.* For example, in *TMPA* the Board made clear that a complainant could not change its rationale on rebuttal even if the new rationale did not substantially change the resulting estimated costs. *TMPA*, 6 S.T.B. at 691.²¹ In this case, SunBelt has attempted to change its rationale for various assumptions and methodologies after NS accepted them in its Reply submission. But when NS was able to show that SunBelt had miscalculated the costs using an accepted assumption or rationale in a number of instances on rebuttal, SunBelt tendered a new one. By changing its position, rationale, or methodology after NS accepted it, SunBelt has deprived NS of the opportunity to reply with evidence to SunBelt’s new position. The following are two examples of such tactics which NS requests the Board strike from SunBelt’s Rebuttal filing.

Fringe Benefits. On Opening, SunBelt proposed a methodology for calculating fringe benefits for the SBRR based on the average Class I fringe benefit ratio. *See Op. III-D-11–12.* On Reply, NS accepted SunBelt’s proposal to calculate fringe benefits based on the average Class I ratio, but pointed out that SunBelt had incorrectly calculated that ratio. *See Reply III-D-38–41.* Thus, NS accepted SunBelt’s method and rationale, and simply corrected its

²¹ *FMC*, 4 S.T.B. at 790 (“For the Laramie subdivision, FMC initially provided for triple track for the entire eastern end of this subdivision between mile post (MP) 565.41 (Laramie) and MP 510.78 (West Cheyenne). UP agreed that triple track would be needed over the mountainous grade between Laramie and Speer. However, FMC changed its track configuration on rebuttal, ending the triple track at MP 545.6, just prior to the Hermosa tunnel, and limiting investment to only double track from that point into Laramie, without explaining why it no longer considered triple track necessary for that segment. We cannot accept such a change on rebuttal when the opposing party has acquiesced to the original evidence but is not afforded the opportunity to reply to the new evidence.”).

calculations. Upon learning that its proposed ratio was based on a miscalculation—and that the actual average Class I ratio is higher than SunBelt first thought—SunBelt changed methodologies on Rebuttal, instead claiming that the SBRR’s fringe benefit ratio should be based on the average fringe benefit ratio just for BNSF and KCS. *See* Reb. III-D-25. But a complainant may not change on rebuttal an opening methodology that the defendant has not challenged, and has accepted. By changing theories on Rebuttal, SunBelt has deprived NS of the opportunity to address its new claims, and accordingly its attempt to use a BNSF/KCS average to justify its opening position should be stricken.

Yard Cleaning Costs. On Opening SunBelt claimed that “[t]he SBRR’s yards should be cleaned once a year.” Op. Ex. III-D-3 at 20. On Reply NS accepted that position but also showed that SunBelt had underestimated yard cleaning costs, but SunBelt then changed its position on Rebuttal to claim that “a railroad does not clean all yards annually.” Reb. Ex. III-D-2 at 49. NS was deprived of an opportunity to rebut this new position with evidence, and the improper rebuttal should be stricken.

* * *

On numerous occasions, the Board has admonished complainants to submit complete and supported evidence on opening and not to present new evidence on rebuttal. But the Board’s repeated warnings have not cured the endemic problem of complainants abusing the rules. If the Board is serious about requiring complainants to follow the rules and affording defendants a fair and reasonable opportunity to reply to complainant’s evidence, then it must make them pay the price for their gamesmanship by striking improper rebuttal evidence. Indeed, a failure to strike SunBelt’s improper rebuttal would encourage future gamesmanship, by suggesting that the Board will permit complainants to wait to file their full cases-in-chief until after defendants have completed their evidentiary submissions and have no opportunity to respond. If the Board were

to give consideration to any of SunBelt's improper rebuttal, it would undermine the fairness of these proceedings, deprive the Board of evidence vetted through the adversarial process, and violate NS's due process right to be permitted to respond to SunBelt's full and complete case-in-chief.

CONCLUSION

For the foregoing reasons, the impermissible rebuttal detailed in this Motion should be stricken from the record, and the Board should not rely on any such evidence in its consideration of this case.

Respectfully submitted,



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Dated: July 26, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July 2013, I caused a copy of the foregoing

Motion to Strike to be served by email and hand-delivery upon:

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