

234510

ENTERED

Office of Proceedings

July 8, 2013

Part of Public
Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

SUNBELT CHLOR ALKALI PARTNERSHIP

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

**EXPEDITED
CONSIDERATION
REQUESTED**

Docket No. NOR 42130

APPEAL OF JULY 3, 2013 DECISION IMPOSING THIRTY-PAGE LIMIT ON BRIEFS

Pursuant to 49 C.F.R. § 1115, Defendant Norfolk Southern Railway Company (“NS”) respectfully submits this emergency appeal from the Director’s July 3, 2013 decision “direct[ing] the parties to limit their closing briefs in this proceeding to 30 pages.” *SunBelt Chlor Alkali P’ship v. Norfolk So. Ry. Co.*, STB Docket No. NOR 42130 (July 3, 2013) (“July 3 Decision”). Thirty pages is drastically shorter than the amount necessary to adequately address the evidence and issues in this case, where Complainant SunBelt Chlor Alkali Partnership’s (“SunBelt’s”) Rebuttal Summary of Argument was 88 pages alone. A thirty-page limit for final briefs would amount to a denial of due process and prevent NS from providing an adequate discussion of the major issues in this case. The prejudice is particularly severe because the July 3 Decision was issued without prior notice, without requesting the parties’ input, and just over two weeks before the long-established deadline for final briefs.¹

If the Board wishes to impose some page limit on the final briefs in this proceeding, NS would not object to the Board setting a page limit at 100 pages (inclusive of any exhibits that the

¹ The eleventh-hour timing of the July 3 Decision has left NS with no choice but to ask the Board for an expedited determination of this Appeal. NS asks the Board to direct SunBelt to file any response it has to this Appeal by Wednesday, July 10 (one day before the deadline set by 49 C.F.R. § 1115.9(b)) and requests that the Board decide this Appeal as soon as possible thereafter.

parties might choose to submit). Such a page limit would take appropriate account of both the length of the narrative evidence presented in this case (which exceeds 1600 pages) and the novel issues presented in this litigation.

The prejudice to NS from the July 3 Decision is particularly severe because it rewards SunBelt for its decision to flout the Board's rules by strategically "saving" significant quantities of new evidence for its Rebuttal. While the Board's instructions on the preparation of SAC evidence envision an orderly pattern in which the Complainant submits a complete and fully supported case in chief on opening and limits its rebuttal to responding to the defendant's reply evidence,² SunBelt reversed that pattern—filing a short Opening barely sketching the outlines of its case, followed by a substantially longer Rebuttal that unveils significant quantities of new evidence. SunBelt has submitted Rebuttal SAC evidence that is nearly three times the length of its opening SAC evidence³ and that in almost every area includes new or greatly expanded arguments. For example, SunBelt's Opening presented an operating plan for the SBRR in just seventeen narrative pages that (among many other deficiencies) made no provision for car classification and blocking for the over 470,000 carloads of general freight traffic in the SBRR's traffic group. *See* SunBelt Opening § III-C; NS Reply at III-C-45-46. But SunBelt's Rebuttal Section III-C is 111 pages, the majority of which is devoted to attempts to shore up its Opening evidence—including by positing a new car classification scheme.

The result of SunBelt's tactics is that, while it has submitted 566 pages of narrative SAC evidence in this proceeding, NS has had the opportunity to respond to only 147 pages of that evidence. Put differently, a full 74% of the narrative SAC evidence that SunBelt has submitted to the Board was filed after NS filed its Reply Evidence. Final briefs are an important check

² *See, e.g., General Procedures for Presenting Evidence in Stand-Alone Cost Cases*, 5 S.T.B. 441, 445-46 ("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.").

³ The SAC portion (*i.e.*, Section III) of SunBelt's Opening Narrative was 147 pages; the SAC portion of its Rebuttal Narrative was 419 pages.

against this kind of gamesmanship, because they allow defendants to present arguments to the Board that address the full evidentiary record. While NS, like any defendant, may not present surrebuttal evidence without leave of the Board, NS's right to respond to SunBelt's expansive Rebuttal evidence in a final brief is essential to the proper functioning of the adversarial process and the fundamental fairness and constitutional validity of this proceeding. A decision to limit NS's final brief to a length just 7% of that Rebuttal Narrative would cause substantial irreparable harm and undue prejudice to NS and would be a substantial detriment to the public interest in a fair and complete record. *See* 49 C.F.R. § 1115.9(a)(4). Unless and until the Board enforces its restrictions on Rebuttal evidence and on complainants violating those rules like SunBelt has, a severe page limit on briefs undermines the railroad's ability to defend itself.

Even if SunBelt had not violated rules on Rebuttal evidence so flagrantly, thirty pages is insufficient for a final brief in a SAC case with as many novel and complex issues as this one. While no SAC case is simple, the unique SARR that SunBelt has designed for this SAC case makes it significantly different from, and more complicated than, those from most previous cases. Less than 2% of the SBRR's traffic is coal, and a substantial percentage of that non-coal traffic is general freight traffic that requires classification switching and blocking, movement in multiple trains, and extensive local train operations to serve customer facilities. *See* NS Reply at III-D-50; III-C-45. And the SBRR would be constructed in challenging, swampy terrain crisscrossed by waterways.⁴ But more than anything, SunBelt's SARR is unique because SunBelt has selected an eye-popping amount of toxic-by-inhalation ("TIH") traffic: the SBRR has over six times the percentage of TIH traffic as NS. *See id.* at III-D-206. One out of every 40 SBRR cars carries TIH materials, as opposed to one out of every 250 cars on NS. *See id.* While SunBelt used the revenues from this TIH-heavy traffic mix to pad the bottom line of its SARR, it failed to properly account for all the costs of transporting that traffic. This case thus presents unique disputes about the effect of the SBRR's TIH traffic on the SBRR's operating plan, its

⁴ *See id.* at III-F-92 ("approximately 69% of the soils along the SBRR alignment are wetter than optimum"); III-D-41 (noting SBRR's "[u]nusually large bridge inventory").

G&A spending, and its insurance costs; about how to account for the increased relative risk of a catastrophic accident; and about how to allocate TIH-specific costs in any MMM analysis that the Board might perform. And the fact that the SBRR is the first-ever SARR to rely almost exclusively on non-coal traffic, including large volumes of general freight traffic requiring classification and blocking, creates operational issues that do not occur in a run-of-the-mill coal SAC case.⁵ These complicated issues cannot be adequately addressed in a mere thirty pages.

Simply because some past SAC cases imposed a thirty-page limit on final briefs does not make such a limitation appropriate here. The Board's past orders limiting the length of final briefs all date from the pre-*Major Issues* era in which both parties typically filed three rounds of evidence. The Board has never before imposed such a draconian limit under the current regulatory framework, which restricts defendants to a single reply filing.⁶ Now the railroad files only once; the complainant saves its case for Rebuttal; and—under the July 3 Decision—the railroad is prevented from addressing the substantial new evidence and argument submitted by the complainant on Rebuttal. And the 30-page limits applied to past unit-train, coal SARRs are not appropriate for the predominantly non-coal, TIH-heavy, carload SARR that SunBelt has proposed. In addition, a thirty-page limit is out of step with what the Board itself has found to be a reasonable length for briefing in other, simpler cases.⁷ The need for full briefing on complex

⁵ While some prior SARRs have involved significant amounts of non-coal traffic (e.g., the SARR in *DuPont v. NS*), no prior SARR has an amount of non-coal traffic that even approaches the 98% of non-coal traffic in the SBRR's traffic mix.

⁶ No page limitation was set for the briefing in *Arizona Electric Power Cooperative, Inc. v. Burlington Northern & Santa Fe Railroad Co.*, STB Docket No. 42058; *Seminole Electric Cooperative, Inc. v. CSX Transp., Inc.*, STB Docket No. 42110, or *E.I. du Pont de Nemours & Co. v. Norfolk So. Ry. Co.*, STB Docket No. 42125.

⁷ See, e.g., *Pennsylvania R.R. Co.—Merger—New York Central R.R. Co. (Arbitration Review)*, STB Fin. Docket No. 21989 (Sub-No. 4) (Sept. 3, 2009) (granting petition to waive thirty-page limit for appeals from arbitration decision and accepting brief of 50 pages with several volumes of exhibits); *UP et al.—Control—SP et al. (Arbitration Review)*, STB Fin. Docket No. 32760 (Sub-No. 45) (Feb. 29, 2008) (granting petition to waive thirty-page limit for appeals from arbitration decision and accepting brief of 41 pages with two volumes of exhibits); see also *Canadian Nat'l Ry. Co. & Grand Trunk Corp.—Control—EJ&E West Co.*, STB Fin. Docket No.

issues is greater in this case than in these past cases, and the Board should grant NS's request for a sufficient number of pages to present such briefing.⁸

Moreover, if the July 3 Decision was motivated by complaints raised in another proceeding about the brief NS filed in STB Docket No. 42125, *E.I. du Pont de Nemours & Co. v. NS*, those complaints lack merit. See TPI Motion for Procedural Schedule, *TPI v. CSXT*, STB Docket No. 42121 (filed June 21, 2013). NS's *DuPont* brief fully complied with the applicable procedural orders in that case, and it was an appropriate response to the substantial amount of new rebuttal material submitted by DuPont.⁹ TPI's complaints about "surrebuttal" are irrelevant. NS did not submit any surrebuttal evidence in *DuPont*, and it will not do so in this proceeding without explicit authorization from the Board.¹⁰ In any event, whatever claims TPI has raised in its case about the supposed "unfairness" of one party filing a longer brief than the other would be alleviated by an order setting a reasonable, 100-page limit on both sides' briefing.¹¹

35087 (Decision No. 17) (Jan. 8, 2009) (accepting 58-page motion to stay and granting equivalent length for reply).

⁸ The Board can also be guided by regulations of other federal agencies that recognize that complex regulatory proceedings cannot be adequately briefed in thirty pages. The Federal Energy Regulatory Commission, a sister agency with a shared heritage from the Interstate Commerce Commission, has set the page limit on briefs proposing or opposing exceptions to an initial decision at 100 pages, and allows parties to move to increase that limit. See 18 C.F.R. § 385.711(a)(2). At earlier stages of the proceeding, any page limits imposed on briefs must be set "with due regard for the nature of the proceeding." *Id.* § 385.705(a). Another apt example is the Federal Maritime Commission, which has a standard page limit of 80 pages for briefs, which can be exceeded "for good cause shown." 46 C.F.R. § 502.221(f).

⁹ NS's brief was also in line with final briefs submitted in prior cases where complainants added substantial volume of new evidence on rebuttal. See Final Br. of CSX Transp., *Seminole Elec. Cooperative, Inc. v. CSX Transp. Inc.*, STB Docket No. 42110 (filed June 4, 2010) (160 page brief); *id.* at 13-14 (noting examples of rebuttal evidence that dwarfed opening submission).

¹⁰ TPI emphasized the fact that NS submitted several exhibits with its final brief. But one of those exhibits was a list of impermissible rebuttal items, three were publicly available documents appended for the Board's convenience, and the remainder were annotated excerpts from the evidence that also were appended for the Board's convenience.

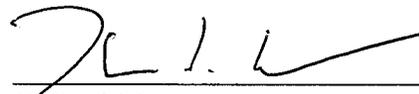
¹¹ TPI's complaints about the alleged inequity of the briefs filed in *DuPont* ignore the fact that DuPont filed a brief of nearly 100 pages, which included a new exhibit and workpaper.

Finally, NS has been severely prejudiced by the timing of the July 3 Decision. Final briefs have been part of the procedural schedule of this case since its outset, but the Board never suggested before July 3 that it intended to set any page limit on those briefs. As a result, NS has devoted considerable time and effort to disentangling 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 significantly expanded by SunBelt's Rebuttal. Those efforts will be for naught if the July 3 Decision stands, and NS will have been forced to waste significant time and money because of the delay in issuing a page limit order until barely more than two weeks before final briefs are due.

CONCLUSION

For the foregoing reasons, the July 3 Decision's thirty-page limit on final briefs should be overruled, and the Board should replace it with a page limit of 100 pages. NS respectfully requests that the Board order SunBelt to file any response it has to this Appeal no later than Wednesday, July 10, and that the Board decide this Appeal as soon as possible thereafter.

Respectfully submitted,



G. Paul Moates
Paul A. Hemmersbaugh
Terence M. Hynes
Matthew J. Warren
Hanna M. Chouest
Marc A. Korman
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

John M. Scheib
David L. Coleman
Christine I. Friedman
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

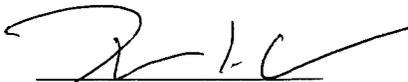
Counsel to Norfolk Southern Railway Company

Dated: July 8, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July 2013, I caused a copy of the foregoing Appeal of July 3, 2013 Decision Imposing Thirty-Page Limit on Briefs to be served by email and hand-delivery upon:

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



Matthew J. Warren