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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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SUNBELT CHLOR ALKALI PARTNERSHIP)
	Complainant)
v.)
)
NORFOLK SOUTHERN RAILWAY COMPANY)
	and)
)
UNION PACIFIC RAILROAD COMPANY)
	Respondents.)
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4/20/15 1:00 PM

Docket No. NOR 42130

**MOTION FOR CLARIFICATION THAT COMPLAINANT IS ENTITLED TO
PRESCRIPTION OF A REASONABLE JOINT RATE**

In this Motion for Clarification, Complainant, Sunbelt Chlor Alkali Partnership (“Sunbelt”) asks the Board to clarify that, because the applicable rate for the issue movement published by Respondents, Norfolk Southern Railway Company (“NS”) and Union Pacific Railroad Company (“UP”), at the time Sunbelt filed its Complaint was a joint rate, Sunbelt is entitled to prescription of a joint rate, as well as reparations based upon any joint rate prescription, if it proves that the joint rate is unreasonable.

This Motion for Clarification is closely related to UP’s September 26, 2011 “Motion for Partial Dismissal or, in the Alternative, Expedited Determination of Jurisdiction Over Challenged Rates” (“Motion to Dismiss”). The premise of UP’s Motion to Dismiss is that, because UP, after Sunbelt’s Complaint was filed, established a local rate for its portion of a through movement in combination with a proportional rate established by NS, market dominance should be determined separately for each Respondent’s segment. Sunbelt is responding to that Motion in a separate pleading being filed contemporaneously with this Motion for Clarification.

However, if the Surface Transportation Board (“STB” or “Board”) grants this Motion for Clarification, the UP Motion to Dismiss will become moot, because market dominance for joint rates is evaluated for the entire through movement. 49 USC § 10707(a) (market dominance is “an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies.”). Cf. Central Power & Light Company v. Southern Pacific Transportation Company, et al., 2 STB 235, 238 (1997) (“Bottleneck II”) (Board states that, in Bottleneck I, “we reaffirmed...that, when railroads establish common carriage through rates, shippers must challenge the reasonableness of the entire rate from origin to destination”); Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company, STB Docket No. 42058, slip op. at 12 (served March 15, 2005) (“Both Supreme Court and agency precedent require that, whether examining joint rates or proportional rates, we must address the reasonableness of the through rate as a whole, rather than the reasonableness of the component parts of the through rate.”).

I. BACKGROUND.

By Complaint filed against both NS and UP on July 26, 2011, Sunbelt challenged the reasonableness of the joint rate then in effect for rail transportation of chlorine from the origin at Sunbelt’s McIntosh, AL production facility, via an interchange with UP at New Orleans, LA, to Sunbelt’s customer in LaPorte, TX. Specifically, as of the date of the Complaint, the issue traffic moved under a joint rate established in an NS tariff, designated as NSRQ 70319. See UP Motion to Dismiss, Kuester V.S. and Ex. A. In its Complaint, Sunbelt requested both a rate prescription and reparations beginning on March 30, 2011, when Sunbelt began shipping chlorine under the joint rate upon expiration of a contract with UP and NS for the same rail service. However, subsequent to the Complaint, UP withdrew from the joint rate and replaced it with a local rate

(Tariff UPTF 4955) from New Orleans to LaPorte. See UP Motion to Dismiss, Kuester V.S. and Ex. B.¹ NS then published a proportional rate from McIntosh to New Orleans. Both UP's local rate and NS' proportional rate became effective on July 30, 2011.

Through its Motion to Dismiss, UP asks to be dismissed from this proceeding due to an alleged lack of market dominance, or in the alternative, requests an expedited determination of market dominance. Specifically, UP asserts that it lacks market dominance for its portion of the through movement, because BNSF Railway also provides rail service between New Orleans and LaPorte in interchange with NS. The core issue presented by UP's Motion to Dismiss is whether market dominance can be evaluated separately for the NS and UP segments or whether it must be evaluated for the entire through movement from McIntosh to LaPorte. That issue is rendered moot, however, if Sunbelt is entitled to seek a rate prescription and reparations on the basis of the joint rate that was in effect when Sunbelt filed its Complaint, regardless of changes to the through rate structure made by UP and NS after the Complaint was filed.

II. ARGUMENT.

In its Motion to Dismiss, UP concedes that, for the period from March 31 through July 30, 2011, during which it provided service pursuant to either a joint rate with NS or a proportional rate, it would not be proper to evaluate market dominance on a segmented basis.² Only after Sunbelt filed its Complaint were those rates replaced by the combination of a local UP rate and a proportional NS rate. It is for the period since July 30, 2011 that UP seeks to be dismissed.

Because Sunbelt's Complaint seeks reparations back to March 30, 2011, there are four months that, according to UP, require a different market dominance analysis because of different

¹ In addition, a small number of Sunbelt's chlorine movements were billed under a UP proportional rate that was established on May 2, 2011 and expired on July 22, 2011. See UP Motion to Dismiss, note 1.

² See Motion to Dismiss at 3, note 1.

rate formats. Although UP glosses over this point, it also would require a different Stand-Alone Cost (“SAC”) analysis. Such a result would be fundamentally unfair to Sunbelt, which has no control over when or how UP and NS choose to alter the structure of their through rates. If the Board grants UP’s Motion to Dismiss, in order to recover reparations from either NS or UP for the four months during which UP published joint and proportional rates, Sunbelt would have to design two Stand-Alone Railroads (“SARRs”)—one SARR for the joint rate, covering the four month period until July 30, 2011, and a separate SARR for the NS proportional rate, covering the period since July 30, 2011—or file a small rate case against just the joint rate.³ But, the potential reparations for just a four month period, although still sizeable, would not warrant the expense of either option, thereby forcing Sunbelt to leave that money on the table. Thus, simply by changing the rate format after Sunbelt filed its Complaint, UP would have insulated itself and NS from any reparations for that period.

The potential “gaming” that would result, by itself, is a strong public policy reason for granting this Motion for Clarification.⁴ Because this is a situation not previously addressed by the Board, clarification is appropriate. E.g., E.I. du Pont de Nemours and Company v. CSX Transportation, Inc., STB Docket No. 42099 *et al.* (served Jan. 31, 2008) (granting CSXT request for clarification of the Board’s Three-Benchmark standard); AEPCO, 6 STB 322, 327 (2002) (“some guidance and direction is necessary and appropriate at times”); Bottleneck II, 2 STB at 239-240 (granting Petition for Clarification).

³ Forcing SunBelt to file two separate rate cases for this one chlorine movement would also be contrary to the national rail transportation policy. See 49 USC § 10101(2) and (15). Additionally, it would be inconsistent with the Board’s anti-disaggregation rule. Simplified Standards for Rail Rate Cases, Ex Parte No. 646 (Sub-No. 1), slip op. at 32-33 (served Sept. 5, 2007).

⁴ Moreover, there are other possibilities for changing the form of the rate in the course of the multi-year litigation of a SAC complaint. For example, UP and NS might decide in the future to reestablish the joint rate. Would Sunbelt have to submit another SAC using a different starting point for the hypothetical construction?

Although railroads typically have a right to establish either joint, proportional, or local rates for through movements, 49 USC § 10701(c), that right is not unfettered. For example, the Board has ordered UP to establish a common carriage rate that could be used in conjunction with a contract rate of CSXT; in so doing, the Board found the existing UP tariff rate improper because its use was restricted to shipments that also used CSXT's tariff rate. FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company, 2 STB 766, 770 (1997), affirmed Union Pacific Railroad Company v. Surface Transportation Board, 202 F.3d 337 (D.C. Cir. 2000). See also Bottleneck II, 2 STB at 245 ("the bottleneck carrier's discretion to determine the kind of rates that it will offer is not absolute"); Livestock To or From Union Stock Yards, Chicago, 222 ICC 765, 767 (1937) ("Our power...is not limited to a mere casual examination of a tariff for the purpose of determining if it be proper in form.").

A rate case imposes perhaps the most significant restriction on railroad rate setting discretion. When the STB prescribes a through rate, it typically prescribes the rate in the same form as the challenged rate. Thus, for example, in the very recent case of Arizona Electric Power Coop., Inc. v. BNSF Ry. Co. and Union Pac. R.R. Co., Docket No. NOR 42113 (served Nov. 22, 2011) ("AEPCO-2011"), the complainant challenged, and the Board prescribed, a joint rate. So long as the rate prescription remains in effect, the prescribed rate will be a joint rate.

Sunbelt's Motion for Clarification poses the issue as to whether rail carriers may alter the structure of a through rate after a Complaint challenging the reasonableness of that rate has been filed. Sunbelt is unaware of any prior rate case where the structure of the challenged rate was changed subsequent to the complaint. Sunbelt submits that, although railroads may change the structure of a through rate after a complaint is filed, the Board may prescribe a rate and order reparations based upon the structure of the originally challenged rate, whether or not the

respondents subsequently modify the structure of that rate. Such a result is both consistent with the law and desirable public policy, because it preserves the railroads' right to determine the structure of a through rate while precluding them from exercising that right to "game" the system after a complainant has challenged the reasonableness of a different through rate structure.

The Board has "ample discretion to protect the integrity of its processes from abuse," and should exercise that discretion here. Simplified Standards, slip op. at 32. Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 15-16 (served Oct. 30, 2006) ("We firmly believe that we must remove the 'gaming' temptation or possibility to protect the integrity of the rate dispute resolution process."); Major Issues, slip op. at 58-59 (rejecting UP assertion about using actual car rental costs in URCS calculations because it "would be subject to manipulation by the carriers"); Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, 6 STB 573, 590-591 (2003) (rejecting BNSF argument about the traffic available for the stand-alone traffic group due to concern about potential for railroad "manipulat[ion]"). See also Simplified Standards, slip op. at 33 (Board aware of railroad actions that might "force the shipper to use a more expensive methodology").

Rate cases, especially those prosecuted under the SAC constraint, require significant investments of time and money. The Board has estimated the cost to shippers at \$5 million and a time line of three years. Simplified Standards, slip op. at 5 and 30-32. Moreover, SAC cases require shippers to construct a hypothetical SARR that could look very different if the through rate is a joint rate as opposed to a combination of local rates. The Board noted this fact in the recent AEPCO-2011 decision, slip op. at 13. In order to prepare SAC evidence, Complainants need certainty as to the structure of the rate that they are challenging, because a constantly changing rate structure could mean constantly changing SARRs. A constantly changing rate

structure also creates uncertainty as to what form of rate the Board may prescribe and the availability of reparations if the prescribed rate differs in format from the assessed rate. Therefore, the Board should clarify that Sunbelt is entitled: (1) to challenge the reasonableness of the through rate structure as it existed when the Complaint was filed, (2) to obtain a prescribed rate with the same rate structure, and (3) to obtain reparations based upon the difference between the prescribed rate and the collected rates, regardless of the through rate structure of the collected rates.

This clarification would not constrain the Respondents' right to establish whatever through rate structure they choose or prohibit them from changing that rate structure as many times as they choose while the rate case is pending. At the end of the case, if the complainant fails to prove the rate level is unreasonable, the Respondents' rate structures for whatever time periods they were in effect would remain the applicable rates. However, if the Board determines that the rate level is unreasonable, it can and should prescribe a rate with the same structure that existed when the complaint was filed and the complainant shall be entitled to reparations on the same basis. This is no more a constraint upon rail pricing than already is granted to the Board in its rate prescription powers. Potomac Electric Power Company v. ICC, 744 F.2d 185, 192 (D.C. Cir. 1984) ("the Commission has substantial discretion to select the method and basis by which it will determine the reasonableness of coal rates"); Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 548 (1985) ("If we determine that a rate has been set at an unreasonably high level, we will take whatever action is appropriate, based upon the nature and extent of the violation shown, to afford relief to the complaining shipper and to promote proper pricing by the carrier."). This clarification will prevent railroad defendants from "gaming" the process, altering the economic benefits to the complainant, or unduly complicating complainant's presentation of evidence.

II. CONCLUSION.

Wherefore, for the foregoing reasons, Complainant requests that the Board issue the following clarifications as guidance to the parties in this proceeding:

1. The challenged rate structure for the issue through movement is the joint rate structure that was effective when Sunbelt filed its Complaint on July 26, 2011.
2. Sunbelt may prove qualitative market dominance for the entire through movement, as opposed to each Respondent's segment of the through movement.
3. Sunbelt may present its SAC evidence in the form of a single SARR for the entire through movement.
4. If Sunbelt demonstrates that the joint rate is unreasonable, it will be entitled to a prescribed joint rate for a 10 year period beginning March 30, 2011, and shall be entitled to reparations beginning on that same date measured as the difference between the level of the prescribed joint rate and whatever rate(s) were collected during the reparations period for the issue movement.

Respectfully submitted,



Jeffrey O. Moreno
Jason D. Tutrone
Thompson Hinc LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036
(202) 263-4107
Counsel for Sunbelt Chlor Alkali Partnership

December 6, 2011

CERTIFICATE OF SERVICE

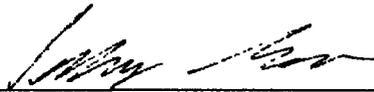
I hereby certify that I have caused the foregoing "Motion For Clarification That Complainant Is Entitled To Prescription Of A Reasonable Joint Rate" to be served by both electronic mail and first class mail, this 6th day of December 2011, on:

G. Paul Moates
Paul A. Hemmersbaugh
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
Tel: (202) 736-8000
Email: pmoates@sidley.com
pheammersbaugh@sidley.com

Counsel to Norfolk Southern Railway Company

Michael L. Rosenthal
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 662-6000
Email: mrosenthal@cov.com

Counsel to Union Pacific Railroad



Jeffrey O. Moreno