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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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EX PARTE NO. 790

**DELTA SOUTHERN RAILROAD, INC. -- COMMENTS ON THE
REVIEW OF REPLIES TO REPLIES**

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Dated: June 17, 2026

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REVIEW OF REPLIES TO REPLIES**

Delta Southern Railroad, Inc., (“DSRR”) has been or is a participant in various proceedings before the Board and submits these comments. The Board has long struggled with its rule that prohibits a reply to a reply, which applies unless otherwise specified.¹ The Board should either have a rule and enforce it or should eliminate the rule. The status quo of having a prohibition on filing a reply to a reply but nevertheless evaluating whether to accept such a filing on a case-by-case basis whether nevertheless to accept such a filing does not work. There currently is no downside to a party to filing a currently “prohibited” reply to a reply because parties assume the Board will read it anyway to determine whether to accept it.

It is time to jettison the rule – with limitations. The Board should permit, but not require, a reply to a reply (which for clarity in this filing DSRR will call a rebuttal) with limitations on the time for filing, the page length, and restrictions on what is appropriate for a rebuttal brief. Many courts allow such briefs primarily to give the moving party a chance to respond to new arguments and counter-authorities raised by the opposing side, to ensure fairness, to clarify

¹ For example, 49 CFR 1112.2 provides for an opening statement, reply, and rebuttal in a modified procedure.

points of disagreement, and to help decisionmakers isolate the core issues. By permitting a rebuttal brief, the Board would enjoy these benefits as well.

When the Board allows a rebuttal brief as a matter of rule, it should:

- Require a rebuttal brief to be filed within seven or ten days after the responding party's filing.
- Limit the rebuttal brief to five pages.
- Be clear that the rebuttal brief should be a concise rebuttal of arguments set out in the responding party's brief and should not iterate arguments made in the motion.
- Confirm that the Board's existing case law regarding the scope of rebuttal applies and that submitting new evidence in a rebuttal brief is improper.

II. Rebuttal Briefs Serve An Important Function.

Rebuttal briefs serve an important role. In legal proceedings, the moving party gets the last brief because it bears the burden of proof or burden of persuasion for the specific request it is making to the court. A rebuttal brief gives the moving party a mechanism to counter the opposing side's arguments without leaving them permanently unchallenged.² A rebuttal brief helps cut through distractions and clarify exactly what the decisionmaker needs to decide.

The biggest risk to permitting rebuttal briefs is that the moving party could try to sandbag by withholding arguments or evidence from the motion itself. DSRR has experienced that sandbagging itself, as discussed below. A limitation on the time to file a rebuttal, the length of a rebuttal brief, as well as enforcing the Board's longstanding limitations on the scope of proper arguments and evidence submitted in the rebuttal can mitigate that risk.

² See generally, *Some Thoughts on Reply Briefs*, The Journal of Appellate Practice & Process, Vol. 23, Issue 2, at page 396-97 (Summer 2023).

III. Limitations on Rebuttal Briefs Will Help Ensure That They Serve Their Important Function Better.

While rebuttal briefs are incredibly useful, courts have strict guidelines on how they can be used to prevent unfair tactics. The Board should consider making a rebuttal brief due in relatively short order after the filing of the reply brief because there is no need for the party filing the rebuttal to generate new evidence or argument, both of which are prohibited. Accordingly, rebuttal briefs should be due between seven and ten days after the date on which the reply brief is filed.

To crystalize the rebuttal brief, the Board should consider a page limitation. A page limitation of about five pages, forces the moving party to be laser-focused only on the significant issues raised in the responding party's brief. Because the moving party already had the opportunity to present its case and new evidence is prohibited, rebuttal briefs can be significantly shorter and highly focused.

Additionally, the Board should state in the rule the limited purpose of the rebuttal brief. For example, the North Carolina Rules of Appellate Procedure were changed in 2013 to provide an appellant with a guaranteed right to a rebuttal brief, whereas earlier versions of the Rules allowed a rebuttal brief only in certain circumstances. *See* N.C. R. App. P. 28(h). Under the current North Carolina rule, the rebuttal should be a "concise rebuttal of arguments set out in the appellee's brief" and should not "reiterate arguments" from the principal brief.

III. Enforcing Prohibitions on Introducing New Evidence and Argument on Rebuttal Is Important to Ensure Rebuttal Briefs Serve Their Important Function and to Maintain Control Over the Proceeding.

While it may seem obvious, it is worth stressing that the proper purpose of a rebuttal brief is to reply, not to present new arguments or evidence at a time when the responding party can no

longer respond to them. Any Board-adopted rule should make this point explicitly clear to prevent the moving party from sandbagging by withholding argument or evidence from the motion or primary pleading itself.

A rebuttal brief should not be a free for all, a do-over, or a chance to bolster the original motion or pleading. The Board has long lived by this principal in rate cases where the reply is called a rebuttal. In those cases, the rebuttal is limited to “simply seeking to support what it presented in its opening evidence or adopting evidence.” *Duke Energy Corp v. CSX Transp., Inc.*, STB Finance Docket No. 42070, 2003 STB LEXIS 134 at *8 (STB decided Mar. 21, 2003). “The party with the burden of proof . . . must present its full case-in-chief in its opening evidence.” *Duke Energy Corp v. CSX Transp., Inc.*, STB Finance Docket No. 42069, 2003 STB LEXIS 713 at *19-20 (STB decided Nov. 5, 2003). The policy reason underlying that rule is that the defendant is entitled to address the validity of the presentation, which it cannot do when evidence is improperly introduced on rebuttal. *Id.* at *21. Where evidence was available and could have been submitted earlier in the proceeding, it is improper for a party to submit it on rebuttal. *Union Pac. Corp et al – Control – Chicago and N.W. Transp. Co. et al*, 1994 STB LEXIS 250 at *23 (ICC decided Nov. 17, 1994).

This Board has enforced the same restriction on providing new evidence on rebuttal with respect to a feeder line application filed to take one of DSRR’s rail lines. When the applicant filed an 86-page rebuttal that did not rebut anything but rather attempted to bolster the flawed original application, the Board struck it. Decision No. 51261 at 8. In allowing the applicant a do-over to file an amended application, the Board cautioned against such behavior in the future when the applicant filed its amended application. Decision No. 51261 at n. 15 (“The amended application should consider all shippers that currently use the Southern Segment of DSR’s line to

move traffic between the Madison Parish Port” and the interchange at Tallulah); Decision No. 51261 at 8 (“The Board cautions LPPC that the amended application must include all historical information known or reasonably available to LPPC in support of its case-in-chief for a Board-ordered sale.”).

Limitations on the scope of rebuttal briefs is not unique to the Board. Many courts impose similar restrictions on the scope of rebuttal briefs. As the court stated in the oft-cited *State Farm Fire and Casualty Co. v. LiMauro* decision, 103 A.D.2d 514 (2d Dept. 1984), *aff’d*, 65 N.Y.2d 369 (1985), “[i]t is beyond cavil that raising a new substantive issue of law for the first time in a reply brief is improper.” Even arguments of a constitutional dimension may be deemed waived when improperly raised for the first time in a rebuttal brief. *See, e.g., Schulz v. New York State Executive*, 233 A.D.2d 43 (3d Dept. 1997). A rebuttal brief is strictly for responding to the opposition's brief. Moving parties should not be permitted to raise brand-new arguments or introduce new issues of evidence that should have been in their opening brief. *Larsen v. Black Diamond French Truffles, Inc.*, No. COA14-1040 (N.C. Ct. App. May 5, 2015) held that “a reply brief does not serve as a way to correct deficiencies in the principal brief.”

Striking or disregarding an improper rebuttal brief is the appropriate remedy for breach of this standard. The court may strike only the offending portion of an otherwise acceptable rebuttal brief (*see, e.g., Brosnan v. Behette*, 243 A.D.2d 524 (2d Dept. 1997)), or the court may simply disregard the new arguments or matters raised for the first time in a rebuttal brief, even without a motion to strike. *See, e.g., Turner v. Canale*, 15 A.D.3d 960 (4th Dept. 2005). *See Cahill v. American Family Mut. Ins. Co.*, 610 F.3d 1235, 1239 (10th Cir. 2010) (citing *Hill v. Kemp*, 478 F.3d 1236, 1250-51 (10th Cir. 2007) (arguments first raised in a reply brief come too late)); *Ulibarri v. City & Cty. of Denver*, 742 F. Supp. 2d 1192, 1218 (D. Colo. 2010) (argument first

raised in reply brief may be disregarded); *Ethica Corp. Fin. S.r.L v. Dana Inc.*, 2018 WL 3954205, at *3 (Del. Super. Ct. Aug. 16, 2018) (“Delaware Courts do not favor ‘sandbagging’ in reply briefs. Sandbagging is ‘raising new bases for dispositive relief for the first time in a reply brief.’ Courts may disregard or deem waived any arguments made in a reply brief which was not raised in the opening brief.”) (citations omitted).

The Board should be clear in any rule that the scope of a rebuttal brief is limited and should not hesitate to strike or disregard improper rebuttal filings even when they are expressly permitted by rule.

Respectfully submitted,

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