

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

233839

233840

ENTERED

Office of Proceedings

February 22, 2013

Part of

Public Record

E.I. DUPONT DE NEMOURS & COMPANY

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

SUNBELT CHLOR ALKALI PARTNERSHIP

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

Docket No. NOR 42125

Docket No. NOR 42130

**NORFOLK SOUTHERN RAILWAY COMPANY'S
MOTION FOR LEAVE TO FILE A REPLY TO COMPLAINANTS' JOINT REPLY TO
DEFENDANT'S PETITION FOR CLARIFICATION**

Norfolk Southern Railway Company ("NS") hereby moves for leave to file the attached Reply to Complainants E.I. du Pont de Nemours & Co.'s ("DuPont") and SunBelt Chlor Alkali Partnership's ("SunBelt") Joint Reply to Defendant's Petition for Clarification. A reply to a reply is permitted for "good cause." *See, e.g.,* Decision, *Sierra R.R. Co. v. Sacramento Valley R.R. Co., LLC*, STB Docket No. NOR 42133 at 1, n.1 (served March 9, 2012); Decision, *Cross Oil Ref. & Mktg., Inc. v. Union Pac. R.R. Co.*, STB Docket No. 33582 at 1 (served Oct. 27, 1998).¹ NS has good cause to file a reply. Complainants' "reply" to NS's narrow Petition for

¹ 49 C.F.R. § 1104.13(c) states that "[a] reply to a reply is not permitted." The Board has frequently waived that provision for good cause. *See generally*, 49 C.F.R. § 1100.3 ("The rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented.").

Clarification asserts unresponsive claims, issues and arguments, makes multiple requests for different affirmative relief extending far beyond the scope of NS's Petition, mischaracterizes important facts and law, and makes false and unsupported ethical claims against NS and its counsel. The Board should refuse to consider the non-responsive and improper claims, issues, and requests for relief raised in Complainants' non-responsive Reply. If the Board gives any consideration to any of Complainants' non-responsive, erroneous, and improper new claims, it should grant NS leave to file the attached Reply memorandum. Such leave is necessary to afford NS an opportunity to address new claims and issues raised by Complainants' Reply and to provide the Board with a complete record to aid its decision-making process.

I. BACKGROUND

As NS explained in its Petition, in both of these cases, Complainants failed to present in their cases-in-chief a feasible, complete, and detailed operating plan that meets the minimum standards established by the Board. The "operating plans" that Complainants submitted with their opening evidence in these cases were woefully incomplete and missing essential components; fundamentally flawed and unsupported; and infeasible and unworkable.² Complainants' fundamental and irremediable failures forced NS to create a real, workable carload network operating plan for the traffic selected by Complainants. NS's operating experts used a software tool called "MultiRail" to aid them in developing car blocking and train service plans for the large and complex traffic groups selected by the Complainants. To facilitate Complainants' review of those elements of the SARR operating plans that NS developed with the aid of MultiRail, NS paid the owner of the MultiRail tool—Oliver Wyman—for limited licenses for Complainants' use. NS also arranged for a MultiRail license for the Board to facilitate its review of the operating plans presented in NS's Reply Evidence in the two cases. DuPont and SunBelt then requested additional, broader use of the MultiRail tool and asserted

² See, e.g., *SunBelt Chlor Alkali P'ship v. Norfolk Southern Ry. Co.*, STB Docket No. 42130, NS Reply Evid. at I-3 to I-15, III-C-1 to III-C-118 (Jan. 7, 2013); *E.I. du Pont de Nemours and Co. v. Norfolk Southern Ry. Co.*, Docket No. 42125 NS Reply Evid. at I-3 to 14, I-57, I-71-72, III-C-1 to III-C-148 (Nov. 30, 2012).

that it is NS's responsibility to pay for such additional licenses and to reimburse Complainants for any costs they may incur in setting up the software tool and training their consultants to use it.³

In response to Complainants' demand that NS pay for them to use an enhanced version of MultiRail, and for training and other ancillary costs, NS filed a narrow Petition for Clarification, asking the Board to confirm that NS is not obligated to purchase for Complainants commercially available software that Complainants desire to use in preparing their Rebuttal Evidence. *See DuPont v. NS*, Docket No. 42125, *SunBelt v. NS*, Docket No. 42130, Norfolk Southern Railway Company's Petition for Clarification (Jan. 25, 2013) ("Petition"). On February 14, 2013, Complainants filed a Joint Reply to Defendant's Petition for Clarification ("Joint Reply").

II. ARGUMENT

Complainants' Joint Reply filing raises new issues and claims that are not responsive to NS's Clarification Petition. Further, the Joint Reply also seeks broad and unprecedented relief that is unrelated to NS's Clarification Petition and to which NS is entitled to respond. Moreover, the Joint Reply mischaracterizes important facts and law, and improperly accuses NS and the Board of unethical conduct. The Board generally has found good cause to allow replies under circumstances similar to each of those summarized above. Here, Complainants' multiple material errors and unfair claims and tactics are more than sufficient to establish good cause to grant NS leave to file a Reply.

The Joint Reply raises several issues and claims that are not responsive to NS's Clarification Petition, thereby inappropriately seeking to broaden the scope of the issues to be addressed by the Board. *First*, Complainants assert that "NS did not provide MultiRail with its Reply Evidence." Joint Reply at 4-5. Based upon that incomplete and misleading assertion,

³ Had Complainants met their burdens in their cases-in-chief, NS would not have been required to expend substantial time and resources to develop coherent, complete, and feasible SARR operating plans in these two cases. Perversely, Complainants now appear to claim that because NS did not purchase their preferred version of the commercially available MultiRail computer tool, the Board should reject the operating plans NS developed with the aid of that computer tool—the only workable and coherent operating plans available in either case.

Complainants then assert that the Board should refuse to use or consider the MultiRail computer tool to facilitate review of portions of NS's operating evidence, even though NS has arranged for the Board and the Complainants to have access to the tool for their use in these cases. Joint Reply at 31-35.

Second, Complainants simultaneously raise another request for further—wholly inconsistent—relief, that the Board “require NS to reimburse Complainants for the MultiRail training, set-up, and support costs.” Joint Reply at 35. Complainants thus seek to have their cake and eat it too, by asking the Board to preclude the use of a computer tool while simultaneously demanding that NS be forced to pay for Complainants' use of that same tool.

Third, the Joint Reply misrepresents case law regarding parties' rights to access modern computer tools used by litigation adversaries in the development and organization of data and evidence. See Joint Reply at 15-22. As NS's Reply explains, the cases cited by Complainants either do not stand for the propositions for which they are cited or are so distinguishable from the present facts and circumstances that they are inapplicable. The Board and its predecessor have granted parties leave to file responsive replies in similar circumstances where the opposing party's reply “seriously distorts the circumstances and import of” a prior decision. See, e.g., *Delaware and Hudson Ry. Co. v. Consol. Rail Corp.*, 9 I.C.C. 2d 989, 990 (1993) (internal quotation marks omitted). Here, at a minimum, the Board should allow NS the opportunity to respond.

Fourth, Complainants raise a far-fetched and groundless claim that “NS is acting in violation of the Board's rules concerning *ex parte* communications.” Joint Reply at 11. As NS demonstrates in the attached Reply, this reckless accusation against NS and the Board is false, improper, and belied by the very documents on which Complainants rely. NS should be granted leave to respond to Complainants' baseless claim.

Finally, Complainants' “response” to the Petition asserts entirely new, unwarranted and unforeseeable requests for affirmative relief, which could be central to the resolution of this case. The Joint Reply effectively seeks to strike NS's Reply Evidence. See Joint Reply at 28-29, 31-

35. NS must be granted an opportunity to reply to what is essentially a new, affirmative motion to strike by the Complainants, rather than a proper, responsive reply to NS's narrow, procedural Petition. NS's Clarification Petition merely seeks a determination of whether NS is obliged to purchase a full "read-write" license for a commercially available software tool on behalf of Complainants in these cases, nothing more. NS could not reasonably anticipate that instead of responding to the Petition and the ruling it sought, Complainants would seek new and far-reaching relief. Where a movant could not have anticipated the arguments and claims of an opponent that could be central to the resolution of a case—as here—it has shown good cause for leave to file a reply. *See, e.g., Delaware and Hudson Ry.*, 9 I.C.C. 2d at 990 (finding good cause for reply to a reply where party "asserts that it could not have anticipated the arguments set out" in the reply when it filed motion and the issue "is central to the resolution of this proceeding.").

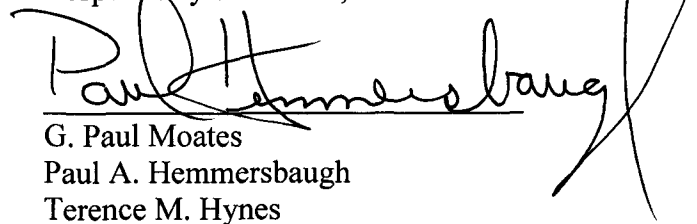
Affording NS an opportunity to respond to the Joint Reply will provide the Board with a more complete record without material delay, as NS's proffered Reply is included with this Motion. A fuller, more complete record (providing responses to the errors of fact and law, new claims, and new requests for relief raised by the Joint Reply) will facilitate the Board's decision-making process as it addresses the issues in NS's Clarification Petition and the Joint Reply. *See Tongue River R.R. Co., Inc. – Construction and Operation – Western Alignment*, STB Fin. Docket No. 30186 (Sub-No. 3), Decision at 4 (served June 15, 2011) ("In the interest of compiling a more complete record in this case, we will accept into the record the surreplies."); *Waterloo Ry. Co. – Adverse Abandonment – Lines of Bangor & Aroostook R.R. Co. and Van Buren Bridge Co. in Aroostook Cnty., ME*, STB Docket No. AB-124 (Sub-No. 2), Decision at 3 (served May 6, 2003) (accepting a reply "when additional information is necessary to develop a more complete record."); *Union Pac. R.R. – Abandonment – In Lancaster and Gage Cntys., NE, and Marshall Cnty., KS*, STB Docket No. AB-33 (Sub-No. 140), Corrected Decision and Certificate of Interim Trail Use or Abandonment at 1 (served Dec. 22, 1999) (replies accepted "where they will contribute to a complete record without prejudicing any party or delaying the proceeding.").

CONCLUSION

The Complainants' Joint Reply seeks to dramatically alter the scope of NS's original Clarification Petition, raising unresponsive claims and seeking sweeping, unrelated relief that could substantially affect the outcome of this case. Moreover, NS has shown multiple bases for finding good cause, each of which alone is sufficient to grant it leave to file a Reply.

Accordingly, NS respectfully requests that the Board grant its Motion for Leave to File a Reply.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul A. Hemmersbaugh", with a long, sweeping flourish extending to the right.

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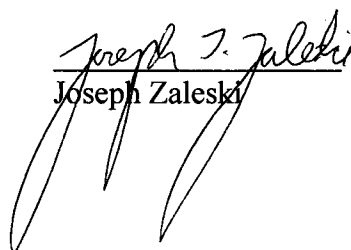
Counsel to Norfolk Southern Railway Company.

Dated: February 22, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February 2013, I caused a copy of the foregoing Norfolk Southern Railway Company's Motion for Leave to File a Reply to Complainants' Reply to Defendant's Petition for Clarification to be served by email and U.S. Mail upon:

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