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July 23, 2015

VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: New England Central Railroad, Inc. - Trackage Rights Order - Pan Am Southern LLC, STB Docket No. FD 35842

EXPEDITED CONSIDERATION REQUESTED

EXHIBITS HAVE BEEN FILED UNDER SEAL IN ACCORDANCE WITH THE PROTECTIVE ORDER ISSUED ON JUNE 3, 2015

Dear Ms. Brown:

As the Board is aware, on June 4, 2015, New England Central Railroad, Inc. ("NECR") filed its Opening Statement and Evidence ("NECR's Opening") in the above captioned proceeding. On June 11, 2015, Pan Am Southern LLC ("PAS") served PAS's First Discovery Requests ("PAS's First Requests") upon NECR seeking workpapers and documents related to NECR's Opening and seeking material to assist PAS in conducting its analysis for its reply. Although responses to PAS's First Requests were due June 26, 2015, in an attempt to resolve any discovery disputes or issues of interpretation informally and expeditiously, counsel for PAS and NECR participated in several discussions concerning the scope and breadth of discovery and PAS extended the response deadline several times.

On July 16, 2015, NECR partially responded to PAS's discovery requests and filed its "Motion for Preliminary Determination of Appropriate Methodology And For Protective Order." ("Motion"). As for the Motion, PAS is currently in the process of preparing its reply to that Motion and intends to file its reply no later than August 5, 2015 (20 days after receipt of NECR's

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Motion).¹ However, unless the procedural schedule is held in abeyance PAS's reply to NECR's Opening is due on August 3.

Having reviewed the Motion, PAS believes the Motion should be decided before resolving any discovery issues and before PAS's reply is filed. As such, PAS agrees with NECR's statement that resolution of the issues raised by the Motion "will likely require the current procedural schedule to be suspended."² Accordingly, for the reasons explained herein, and until such time that the Board can review PAS's reply to the Motion and resolve the underlying issues set forth in that Motion, PAS agrees with NECR that the Board should immediately suspend the procedural schedule with respect to the due date for PAS's reply to NECR's Opening and the due date for any NECR rebuttal. Based upon the Motion and discussions with NECR counsel, PAS believes the parties are in agreement on this issue.

However, where NECR and PAS do not agree is on whether discovery, and the corresponding discovery motions deadlines, should continue during the suspension period. Due to PAS's significant concerns over NECR's lack of adequate discovery responses, PAS believes that not only should the schedule for the reply and the rebuttal be suspended pending a ruling on the Motion, as suggested by NECR as well, but that discovery should also be held in abeyance. Doing so will allow the parties to discuss, and hopefully resolve, or at least narrow, any differences without the need for Board involvement. It will also allow time for ruling on the Motion, which ruling, will have a significant impact on the relevancy of, and scope of, PAS's discovery.

If discovery is not also held in abeyance pending a ruling on the Motion, PAS intends to file a motion to compel. NECR's responses, unfortunately, necessitate such an action. For example, unless and until the Motion is resolved, NECR is refusing to provide certain requested documents that are crucial to the development of PAS's own SSW Compensation analysis, even though NECR itself admits that such material would be relevant to those methodologies. NECR also failed to provide the workpapers and underlying data as necessary to enable PAS's experts to understand and analyze NECR's own purported RCNLD approach. Indeed, NECR extensively redacted numerous documents it actually produced,³ even documents designated Highly Confidential, and produced over 2,000 pages of Excel spreadsheets in PDF format, rather

¹ PAS believes that the Motion, at its core, is an attempt to limit PAS's ability to put forth methodologies that have been previously fully adopted and applied by the Board and ultimately should be rejected.

² See NECR's Motion, Page 3, n. 3.

³ For example, NECR produced ICC Reports, a public document, but designated them as "Confidential." An example is set forth in Exhibit A, filed under seal, because NECR designated it as a Confidential document. PAS is bewildered about how an ICC report could be a Confidential document. Numerous other documents have also been redacted without any explanation. See Exhibit B as an example of such further redactions.

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than in native format. As a result, almost all of those pages had the lines, columns, and cells from the spreadsheets broken up over several pages so that the pages reflected a few words at most and were basically incomprehensible.⁴ Clearly, refusal to produce relevant material, producing fragmented tables, and using extensive redactions, even of public documents, will necessitate the filing of a motion to compel unless discovery is held in abeyance pending resolution of the Motion.

In conclusion, PAS hereby agrees with NECR's comments in its Motion that the schedule for the reply and rebuttal should be suspended until such time as the Board rules on the Motion, but such a suspension should toll all procedural deadlines including the time periods contained within the Board's discovery rules, except PAS's deadline to reply to the Motion, which is August 5, 2015, should not be tolled. After a ruling on the Motion, the procedural schedule, including discovery motions practice, can resume and any motion to compel can be tailored to fit the circumstances of any ruling on the Motion and NECR's and PAS's discussions during the suspension period. If there are any questions, I can be reached by phone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins
Attorney for Pan Am Southern LLC

cc: Parties of Record (subject to Protective Order)
Robert B. Culliford

⁴ An example is included in Exhibit C, which is also being filed under seal because NECR designated the pages as Highly Confidential. While NECR is likely to set forth the time-worn rebuttal that it has produced many thousands of pages in discovery, this notion should be rejected because as Exhibit C demonstrates, quantity does not reflect quality. Given the current status of the case and discovery, it is evident that this proceeding can only be expected to be an extended one, with a prolonged and high level of uncertainty which itself throws into question the efficacy of the application of retroactivity and whether that supports – or as evidenced, hinders – an efficient, fair and balanced proceeding that is in the public interest.