

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 35842

**NEW ENGLAND CENTRAL RAILROAD, INC.
- TRACKAGE RIGHTS ORDER -
PAN AM SOUTHERN LLC**

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**NEW ENGLAND CENTRAL RAILROAD, INC.
MOTION FOR SUPPLEMENTAL PROTECTIVE ORDER
IN PARTIAL RESPONSE TO MOTION TO COMPEL**

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This proceeding primarily involves a dispute over the proper compensation to be paid by Pan Am Southern LLC (“PAS”) to New England Central Railroad, Inc. (“NECR”) for certain trackage rights originally imposed by the Interstate Commerce Commission (“ICC”) in 1990. NECR filed its Opening Statement and Evidence (“NECR Opening Statement”) with the Board on June 4, 2015. In response, PAS served NECR with overly broad discovery requests seeking confidential and proprietary information related to a number of issues. NECR served responses and objections to the discovery requests on July 17, 2015, and its privilege/redaction log on July 23, 2015.¹ NECR also filed with the Board a Motion for Preliminary Determination of Appropriate Methodology and for Protective Order (the “Methodology Motion”) which requested that the Board determine the appropriate methodologies for determining trackage rights compensation under the circumstances presented in this proceeding, limit the discovery to information that would be relevant or potentially relevant only to appropriate methodologies, and protect NECR from the burden of responding to requests seeking detailed highly confidential,

¹ Counsel for the parties agreed that the responses would be considered as having been made on July 23rd when the log was provided.

proprietary and customer-sensitive traffic, revenue, earnings and profitability information that is outside the scope of this proceeding.

Following discussions between counsel to attempt to resolve the objections and reduce the scope of discovery disputes, PAS filed a Motion to Compel on August 3, 2015, and a Reply to the Methodology Motion on August 5, 2015. The Board has placed the deadlines for the filing of reply and rebuttal evidence in abeyance until the Methodology Motion has been decided and pending further order of the Board. *See* Decision of the Director of Proceedings served July 29, 2015. Simultaneously with this Motion for Supplemental Protective Order, NECR is filing a Reply to the Motion to Compel to address issues not covered by this Motion.

At the heart of a number of the remaining disputed requests for information, is PAS's claim that it is entitled to discovery on every conceivable method for calculating a value for the trackage rights segments that forms the basis for the interest rental component of trackage rights compensation. As argued generally in the Methodology Motion, NECR disagrees and believes that the Board has the power to and should make an initial determination of the valuation methodology or methodologies that would appropriate given the facts and circumstances of this proceeding, and that the Board should limit the discovery, and the burden of responding to such discovery, only to such appropriate methodologies. In the Methodology Motion, NECR argued specifically that the capitalized earnings ("CE") methodology was not appropriate in this proceeding and asked for an order that would protect NECR from having to respond to discovery requests seeking traffic, revenue, earnings and profitability information and details that relate only to the CE methodology. NECR limited its arguments in the Methodology Motion to the inappropriateness of the CE methodology because in the discussions between counsel, the CE methodology was the only alternative methodology that counsel for PAS indicated was being

considered and for which it needed the discovery of the traffic, revenue, earnings and profitability information. In the Motion to Compel, PAS now argues that it is also considering use of the “comparable line segments” or the “stand-alone approach” (“S-A”) methodologies, and that it is entitled to discovery of information to support the use of the methodologies. Because NECR believes the use of the “comparable line segments” methodology is not appropriate, and because the use of the S-A methodology, if permitted by the Board, would not require the disputed revenue-related information, NECR is filing this motion for protective order to supplement the protective order sought in the Methodology Motion.

Discussion

1. Relief requested.

In the Methodology Motion, NECR sought a protective order generally prohibiting PAS from seeking related to the CE method, and particularly finding that NECR does not need to respond to certain specified document requests for detailed traffic, revenue, earnings and profitability information that might be necessary to support the use of the CE methodology. *See* Methodology Motion at Sections 3 and 4, pp. 8-14.² In this Motion, NECR supplements the request for the protective order sought in the Methodology Motion by demonstrating that (a) the RCNLD/VIP methodology is the most appropriate methodology for this proceeding, (b) the comparable line segment methodology is not appropriate, and (c) the disputed revenue-related and traffic information would not be relevant to or necessary for the use of the S-A methodology, even if the Board were to allow its use. Accordingly, the mere existence of these alternative methodologies does not provide grounds for denial of the protective order. In this Motion,

² As noted in the Methodology Motion, PAS also believe that these requests go well beyond merely seeking information regarding NECR’s revenues, and should be found to be overbroad and burdensome even if the Methodology Motion and this Motion were to be denied. Those objections are explained more fully in the Reply to the Motion to Compel.

NECR requests that the Board enter a protective order prohibiting PAS from seeking documents or other discovery, including without limitation and as requested in the Methodology Motion, of documents showing NECR traffic details, revenue and earnings information as requested in Document Request Nos. 3, 5 (as it relates to revenues), 7, 10, 11, 15, 17 and 22.³

2. Effect of pending motion for protective order.

The Board's regulations make clear that a motion for a protective order is a proper response to a motion to compel discovery requests, and that the party from whom discovery is being sought can seek relief including that the discovery not be had, that discovery be limited to certain matters and/or that certain matters not be inquired into. 49 C.F.R. 1114.21(c). PAS is simply not correct in asserting that until the motion for protective order is granted, a party must respond to the discovery requests from which it is seeking protection. *See, for example*, Motion to Compel at pp. 4-5. The very point of a motion for protective order is to prevent a party from having to incur the undue burden and expense of reviewing its files and responding to discovery that the Board may determine is outside the scope of what is permissible. The regulations provide that if the motion is denied, then Board enter an order requiring the party to permit the discovery. 49 C.F.R. 1114.21(c). However, until such time as the Board has ruled on the motion for protective order, clearly the party seeking protection is not required to respond.

3. The Board has the power to limit the scope of discovery, and it should exercise that power in this proceeding in the interest of judicial economy.

While PAS may theoretically have the right to seek discovery on any conceivable theory or valuation methodology, it is clear that the Board has the authority and power to find that discovery not be had, that certain matters not be inquired into and/or that the scope of discovery

³ To the extent the Board deems necessary, NECR incorporates the Methodology Motion herein and requests that the relief requested under the Methodology Motion be supplemented by the relief requested herein.

be limited to certain matters. 49 C.F.R. 1114.22(c)(1),(5). By making a preliminary determination that certain of the methodologies suggested by PAS are inappropriate for this proceeding, and by determining that certain discovery is not necessary for the use of those methodologies that it does find appropriate, the Board will save the parties the needless time and expense that would be required to respond to irrelevant and inappropriate discovery (as well as the raising of inappropriate issues). As noted in the Methodology Motion, the Board's predecessor the Interstate Commerce Commission (the "ICC") used this approach to eliminate undue burdens in trackage rights compensation cases. *See Toledo, Peoria & Western Railway Corp. – Trackage Rights Compensation – Peoria and Pekin Union Railway Company*, ICC Finance Docket No. 26476 (Sub-No. 1) (served September 20, 1994) ("*TPW*"), 1994 ICC LEXIS 175, at *8 (finding, based on previous experience, that the appropriate methodology should be determined early in the proceeding); *Atchison, Topeka & Santa Fe Railway Company – Operating Agreement – Southern Pacific Transportation Co.*, 8 ICC 2d 297 ("*ATSF*"), 1992 ICC LEXIS 43, at *14-15 (finding it less burdensome to all concerned to resolve any disputes as to proper methodology before data is submitted to determine the valuation base and interest rental rate).⁴

⁴ PAS argues that the *TPW* decision, because it allowed comment on certain valuation methodologies, or any others that the parties would suggest, implies that discovery would be permitted on all or any of such theories. However, that is clearly not the impact of the decision. The ICC was seeking comments on the appropriate methodology early in the proceeding specifically to avoid unrestrained discovery. *See TPW*, 1994 ICC LEXIS 175, at *8 (a preliminary decision on the appropriate methodology will help the parties narrow their focus and conduct more meaningful discovery). *See also ATSF*, 1992 ICC LEXIS 43, at *14-15 (inviting comments on appropriate methodology in a preliminary round, followed by procedural schedule for evidentiary round).

4. **Trackage rights compensation methodologies.**

The underlying question driving the disputed discovery and the request for protective order is the proper methodology to be used for determining the value of the trackage rights segments which will be the base upon which the interest rental component of compensation will be determined. While many of the cases discuss four basic valuation methodologies – “replacement cost new less depreciation” (“RCNLD”), CE, comparable line sales and S-A, the ICC recognized that these are only some of the possible choices. *ATSF*, 1992 ICC LEXIS 43, at *15. In *ATSF*, the ICC held: “As to the valuation procedure to be employed, *we believe it desirable that the procedure ultimately selected produce a valuation reflecting the current depreciated value of the line. Some of the possible methodological choices* [the four listed above] are discussed briefly below. While *the parties are also free to comment on other approaches*, we specifically would like comments as to whether any of the methods discussed below would be appropriate and, if not, supporting reasons.” *Id.* (emphasis added).

In the Methodology Motion, NECR argued that RCNLD would be an appropriate method to apply in this proceeding to determine the value of the line segments, but that because the case involves a short line railroad, it does not keep its records in a way that would allow the formal calculation required under RCNLD. See Methodology Motion at p.7-8. Accordingly, NECR believes that the “value-in-place” (“VIP”) variation that NECR used in its Opening Statement was the most appropriate method for calculating the value of the trackage rights line segments. *Id.* The RCNLD methodology attempts to determine the cost to rebuild the trackage line segments as they exist today in their current configuration with similar service and capacity. *TPW*, 1994 ICC LEXIS 175, at *12. To make the calculation, one would look at present day materials, prices and labor costs, and adjust for the line segments’ current depreciation. An

RCNLD calculation would include installation and construction costs including administrative, transportation (mobilization) and engineering costs, grading and roadbed. The VIP methodology similarly attempts to provide the current value of the trackage line segments in their current configuration, by looking at the current values of the materials currently installed, depreciated as appropriate to reflect wear and tear on the assets over their useful lives in the field.⁵ In this way, VIP mirrors the RCNLD goal of valuing the assets comprising the line segments in their current configuration, albeit without the costs of construction. While PAS argues that VIP is not a variation of RCNLD (Motion to Compel at pp. 4-5 and fn.4) and is not a recognized methodology to compute value, that position is not be consistent with the *ATSF* decision cited above. Even if the VIP methodology were considered as a distinct methodology from RCNLD instead of a variation, it clearly is one that provides the Board with a valuation “reflecting the current depreciated value of the line” and should be considered appropriate for this proceeding.⁶ Significantly, because RCNLD (and VIP if considered separately) looks at the cost of the land and assets necessary for the line in its current configuration, the use of the methodology does not require information regarding revenues or earnings, or traffic details in order to be applied. Because the RCNLD/VIP methodology established value for the trackage rights lines in the configuration that they have been used by both NECR and PAS under the existing trackage rights order, NECR believes that such methodology is the most appropriate one for use in this proceeding.

⁵ The specifics of the VIP methodology as applied by NECR in this proceeding are set forth in the RLBA Verified Statement submitted as Volume 3 of NECR’s Opening Statement.

⁶ Indeed, because the VIP methodology does not include the engineering and construction costs that would be included in determining the replacement costs of building the line in its current configuration, it should produce a lower valuation than RCNLD would, a result that would result in a calculation of a lower interest rental component, a result that would be beneficial to PAS.

The S-A methodology similarly relies on the cost of the land and assets necessary to construct a replacement line and does not require the disputed revenue, earnings and traffic information that NECR is seeking to protect from disclosure. As described in the *ATSF* decision, the S-A methodology determines the lowest construction costs for the line that would satisfy the needs of the carriers using the line (here NECR, PAS and Amtrak). *ATSF*, 1992 ICC LEXIS 43, at *17-18. However, instead of appraising the line as is, or determining the cost of reconstructing the line in its current configuration, the value under the S-A approach could be less if “unnecessary frills” can be identified and eliminated. *Id.* See also, *TPW*, 1994 ICC LEXIS 175, at *12-13 (the S-A approach is based on the cost of materials and land needed to construct the line segment in the most efficient configuration; if the current configuration is the most efficient and cost effective one, then the RCNLD and S-A valuations would be essentially the same); *Arkansas and Missouri Railroad Company v. Missouri Pacific Railroad Company*, 6 ICC 2d 619 (1990) (“*A&M-F*”), 1990 ICC LEXIS 110, at *17.⁷ Because NECR believes that the current configuration of the line segments accurately reflects the needs of all of the carriers operating over them, NECR believes that the S-A methodology should not be accepted by the Board over the RCNLD/VIP methodology. However, even if the Board were to accept S-A as an acceptable methodology, since the S-A methodology only looks at the line’s land and material requirements, engineering needs and construction costs, its use would not justify any of the discovery requests for revenue, earnings or traffic information.

The Methodology Motion addressed why the CE methodology is not appropriate in this proceeding, and NECR will not address that issue again here. In this Motion, however, NECR is

⁷ As described by the ICC, when used in a trackage rights compensation case, the S-A methodology does not require the creation of a theoretical operating railroad based on the traffic handled, the calculation of revenue or earnings needs, or the establishment of rates for the handling of traffic, as might be presented in a rate case.

requesting that the Board also find that the comparable line segment approach would not be appropriate in this proceeding. The comparable line segment approach assumes that the sales price for comparable line segments sold as a unit, without liquidation, in an arm's length market transaction can be identified, and then used as a surrogate of the value of the line in question. *A&M-I*, 1990 ICC LEXIS 110, at *17. As noted in *ATSF*, 1992 ICC LEXIS 43, at *17, the major drawback of this approach is the determination of comparability. *See also*, *TPW*, 1994 ICC LEXIS 175, at *12 ("the determination of what is comparable has proven to be difficult or impossible in the past"). PAS certainly has not suggested what would constitute comparable line segments, and NECR believes, similar to the ICC's past experience, that identifying comparable lines segments would be just as difficult in this proceeding. Moreover, given the length of the trackage rights segments (or even of NECR as a whole), it is difficult to imagine that there would be much public information available regarding such sales even if comparable line segments or railroads could be identified.

PAS generally claims in its Motion to Compel that it needs all of the disputed discovery to look at all of the possible valuation methodologies; however, it does not go through the elements of the methodologies to specifically identify which ones might require the disputed information. However, PAS has not set forth any reasonable explanation for why the Board should find either the comparable line segment or CE approach appropriate in this proceeding. Nor has PAS adequately explained in its Motion to Compel why it would require revenue information (let alone detailed information on traffic and earnings) in order to pursue the RCNLD/VIP methodology that NECR believes the Board should find is the preferred valuation methodology, or even the S-A methodology if the Board were to allow evidence on that basis.

5. The Board should issue a protective order to protect NECR from discovery of revenue, earnings and traffic information that is not related to the application of any appropriate valuation methodology.

As noted in the Methodology Motion, under 49 C.F.R. 1114.21(c) a party from whom discovery is sought, “for good cause shown,” can seek an order to protect the party “from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent the raising of issues untimely or inappropriate to the proceeding.” Relief may include one or more of the following:

(1) That the discovery not be had;

* * *

(5) That certain matters not be inquired into or that the scope of discovery be limited to certain matters; ...

49 C.F.R. 1114.21(c).

As demonstrated by NECR above (and in the Methodology Motion), both the CE and comparable line segment methodologies are inappropriate for this proceeding, and those methodologies that may be appropriate do not require the disputed information for their application. Given those showings, and given the highly confidential and proprietary nature of the detailed revenue, earnings and traffic information sought, there is “good cause” for the Board to enter a protective order generally prohibiting PAS from seeking discovery related to the disputed information, and particularly finding that NECR does not need to respond to Document Request Nos. 3, 5 (as it relates to revenues), 7, 10, 11, 15, 17 and 22.⁸

⁸ As noted in the Methodology Motion, PAS’s document requests go well beyond merely seeking information regarding NECR’s total earnings, and line-specific earnings. As such, even if the Board were to allow some discovery related to revenues or earnings, as set forth in the Reply to Motion to Compel, NECR objects that PAS’s requests should still be found to be overbroad and burdensome, irrelevant and not likely to lead to the production of relevant evidence.

Conclusion

For the foregoing reasons, NECR requests that the Board find that the use of the CE and the comparable sale methodologies are not appropriate in this proceeding. Additionally, the Board should find that the appropriate methodology RCNLD/VIP, and S-A methodology if found appropriate by the Board, do not require the production of information relating to revenue, earnings or profitability or detailed traffic information, to calculate value of the trackage line segments, and accordingly, that such information is not relevant in this proceeding. As a corollary to those determinations, NECR requests that the Board enter a protective order prohibiting PAS from seeking documents or other discovery related revenue, earnings, profitability or traffic details, including without limitation as requested in Document Request Nos. 3, 5 (as it relates to revenues), 7, 10, 11, 15, 17 and 22, and holding that NECR shall not be required to respond thereto.

Respectfully submitted,



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Dated: August 24, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was served on this date by the method indicated below:

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