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SERVICE DATE – FEBRUARY 12, 2016

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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35842

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

Digest:<sup>1</sup> The Board denies the request of New England Central Railroad, Inc. (NECR) for a preliminary determination as to the appropriate methodology to be used for one element in calculating the trackage rights compensation to be paid by Pan Am Southern LLC (PAS) under a trackage rights order governing PAS's operations over NECR's rail line.

Decided: February 9, 2016

By decision served December 23, 2014, the Board instituted a proceeding to establish new terms and conditions for the trackage rights of Pan Am Southern LLC (PAS) over a New England Central Railroad, Inc. (NECR) railroad line, extending approximately 72.8 miles, from White River Junction, Vt., to East Northfield, Mass.<sup>2</sup> In accordance with the procedural schedule set forth by the Board, as amended,<sup>3</sup> NECR filed its opening statement and evidence on June 4, 2015.<sup>4</sup>

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> By decision served March 12, 2015, the Board granted the parties' request to commence mediation to resolve issues regarding the terms and conditions for PAS's use of NECR's line and issued a procedural schedule to govern the proceeding should mediation be unsuccessful. Mediation ultimately was unsuccessful.

<sup>3</sup> The procedural schedule was extended by subsequent decisions served on April 17, 2015, and May 19, 2015.

<sup>4</sup> By decision served July 29, 2015, the Board held the deadlines for PAS's reply and NECR's rebuttal in abeyance pending further order of the Board so that it could address the issues raised in NECR's motion for preliminary determination of the appropriate valuation method and related discovery issues.

On July 16, 2015, NECR filed a motion requesting that the Board make a preliminary determination as to the appropriate valuation method to be used to calculate one element of the trackage rights compensation to be paid by PAS to NECR (Methodology Motion). For the reasons discussed below, NECR's Methodology Motion will be denied.

## BACKGROUND

In National Railroad Passenger Corp.—Conveyance of Boston & Maine Corp. Interests in Connecticut River Line in Vermont & New Hampshire (Amtrak I), 4 I.C.C.2d 761 (1988), aff'd sub nom. National Railroad Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992), the Interstate Commerce Commission (ICC) required Boston and Maine Corporation (B&M) to sell to Central Vermont Railway, Inc. (CV), a 48.8-mile portion of the subject line from Windsor, Vt., to Brattleboro, Vt., and CV to grant to B&M trackage rights over that portion of the line. In National Railroad Passenger Corp.—Conveyance of Boston & Maine Corp. Interests in Connecticut River Line in Vermont & New Hampshire (Amtrak II), 6 I.C.C.2d 539 (1990), the ICC imposed terms and conditions (referred to as the “trackage rights order” or TO) for the trackage rights for the 48.8-mile portion at issue in Amtrak I, as well as two adjoining CV-owned segments over which B&M previously had trackage rights (collectively, the subject line).<sup>5</sup> The rights associated with Amtrak I and Amtrak II have subsequently been acquired by other railroads; NECR has acquired CV's ownership rights, and PAS now holds the trackage rights originally assigned to B&M. (NECR Request to Set Trackage Rights Terms & Conditions 4.)

The TO allowed either party to reopen its terms and conditions 20 years after the conveyance date of September 9, 1988. Amtrak II, 6 I.C.C.2d at 545. NECR now seeks to have the Board reset the terms and conditions of the TO to reflect what it claims are the current standards for such agreements, the increased value of the line, and the higher costs of maintenance. (NECR Opening 5-6.) The Board has found, and both NECR and PAS agree, that the framework for setting compensation in trackage rights cases was set forth in St. Louis Southwestern Railway—Trackage Rights Compensation, 1 I.C.C.2d 776 (1984) and St. Louis Southwestern Railway Compensation—Trackage Rights, 4 I.C.C.2d 668 (1987) (collectively, SSW Compensation).<sup>6</sup> See Ark. & Mo. R.R. v. Mo. Pac. R.R., 6 I.C.C.2d 619 (1990) (applying SSW Compensation in trackage rights compensation cases). Under SSW Compensation, total compensation is the sum of three elements: (a) the variable cost incurred by the owning carrier due to the tenant carrier's operations over the owning carrier's track; (b) the tenant carrier's usage-proportionate share of the track's maintenance and operation expenses; and (c) an interest or rental component designed to compensate the owning carrier for the tenant carrier's use of its capital dedicated to the track. Ark. & Mo. R.R., 6 I.C.C.2d at 622.

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<sup>5</sup> B&M and CV agreed that the final trackage rights agreement should govern the entire subject line. Amtrak II, 6 I.C.C.2d at 542.

<sup>6</sup> See NECR Opening 6-7; NECR Methodology Motion 4; PAS Reply to Methodology Motion 3 n.2.

NECR's Methodology Motion pertains only to the third element: the methodology used to calculate the interest rental component, which is determined by multiplying: (i) the value of the assets that comprise the trackage rights line by (ii) a rate of return equal to the current pre-tax nominal cost of capital. Ark. & Mo. R.R., 6 I.C.C.2d at 622 n.8. The resulting product is then apportioned to the tenant carrier according to its percentage of cars traversing the line. Id. In trackage rights compensation cases, the Board has generally discussed four possible methods for determining the appropriate valuation base: (1) capitalized earnings (CE); (2) comparable line segments; (3) reproduction cost new less depreciation (RCNLD); and (4) stand alone cost (SAC). See Toledo, Peoria & W. Ry.—Trackage Rights Compensation—Peoria & Pekin Union Ry., FD 26476 (Sub-No. 1) (ICC served Sept. 20, 1994); Atchison, Topeka & Santa Fe Ry.—Operating Agreement—S. Pac. Transp., 8 I.C.C.2d 297, 304-305 (1992).

In its Methodology Motion, NECR raises issues over the methodology for calculating the value of the trackage rights line. In its opening, NECR relied on a modified RCNLD methodology for this element. However, NECR states in its Methodology Motion that PAS intends to use the CE methodology for this element of the trackage rights compensation, and that a significant portion of PAS's discovery requests relates to its proposed use of the CE method. (NECR Methodology Motion 2.) NECR argues that the CE method is not an appropriate valuation method in this proceeding and therefore requests that the Board find that PAS may not use it here. NECR asserts that a preliminary determination of the proper valuation method would save parties the time and expense required to respond to discovery requests pertaining to irrelevant methodologies. As a corollary to a determination that the CE method is not the appropriate method, NECR requests an order under 49 C.F.R. § 1114.21(c)(2) to protect NECR from having to respond to discovery related to the CE approach, particularly certain document requests for detailed traffic, revenue, earnings and profitability information that might be necessary to support the use of the CE methodology.

Shortly prior to filing its reply to NECR's Methodology Motion, on August 3, 2015, PAS filed a motion to compel responses to its first round of discovery requests directed to NECR.<sup>7</sup> PAS states in that motion that NECR has refused to produce any information regarding the CE, comparable line segments, and SAC approaches, effectively denying PAS the opportunity to examine all relevant evidence and make a determination as to which of the four Board-approved methodologies it will put forth in its reply. PAS further asserts that the documents that NECR has produced are inadequate.

PAS replied to NECR's Methodology Motion on August 5, 2015, arguing that discovery should be allowed on all SSW Compensation methodologies and noting that it had not yet

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<sup>7</sup> By letter filed July 23, 2015, PAS asserted that, in addition to deadlines for reply and rebuttal being held in abeyance, discovery should also be held in abeyance to allow time for a Board decision on NECR's motion, which would have a significant impact on the relevance of, and scope of, PAS's discovery. If discovery were not held in abeyance, PAS indicated that it would file a motion to compel. By letter filed on July 27, 2015, NECR stated that discovery should not be suspended except as subject to its motion.

determined which of the four compensation methodologies it intends to use.<sup>8</sup> PAS asserts that it is entitled to gather information and data relevant to any of the elements of the SSW Compensation methodologies, evaluate the evidence, make its case for application of its chosen methodology, and critically address the method advocated by NECR. (PAS Reply to Methodology Motion 4.) Accordingly, PAS maintains that the Board should determine the methodology only after all relevant evidence is submitted. Id.

On August 24, 2015, NECR filed a motion for a supplemental protective order (Supplemental Motion) in response to PAS's motion to compel, requesting that the Board find that the CE and comparable line segment methodologies are not appropriate in this proceeding. Additionally, NECR argues that the Board should find that NECR's variation of the RCNLD methodology,<sup>9</sup> as well as the SAC 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.

Also on August 24, 2015, NECR filed a reply to PAS's motion to compel, asserting that the Board should address the issues raised by the Methodology Motion and the Supplemental Motion before deciding whether to compel responses to the discovery requests that would be protected under the requested protective order. NECR also asserts that it has provided substantial replies to PAS's discovery requests, except to requests pertaining to methodologies that NECR has argued are not appropriate in this proceeding.

On September 14, 2015, PAS replied to NECR's Supplemental Motion, asserting that the Board should deny NECR's request and that PAS is entitled to information in NECR's possession pertaining to valuation methodologies other than NECR's variation of RCNLD.

#### DISCUSSION AND CONCLUSIONS

We find that PAS should have an opportunity to build a record through discovery and obtain the data it needs to make its case on the appropriate valuation method for the Board to use in determining trackage rights compensation. We will therefore deny NECR's request to make a preliminary determination of the appropriate valuation methodology at this stage of the proceeding and will permit discovery pertaining to the SSW Compensation methodologies discussed above. See Toledo, Peoria & W. Ry., FD 26476 (Sub-No. 1), slip op. at 4 n.9 (recognizing need for discovery before submission of opening statements on appropriate methodology).

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<sup>8</sup> PAS also argues that, while NECR claims to have employed the RCNLD approach, NECR has modified the RCNLD approach with a newly created, judicially untested "value-in-place" methodology or "VIP approach." (PAS Reply to Methodology Motion 4.)

<sup>9</sup> See NECR Supplemental Motion 8 (distinguishing the VIP approach from the RCNLD approach).

As discussed, this agency has generally recognized four possible methods for determining the valuation base in trackage rights compensation cases.

NECR has already submitted its opening argument and evidence, arguing that the CE methodology is not appropriate in this proceeding, and instead advocating for a variation of RCNLD as the valuation methodology and calculating the final compensation that it argues should be paid by PAS. Through its Methodology Motion and Supplemental Motion, NECR is now asking us to select its proposed methodology, without permitting PAS an opportunity to access information that is needed for it to fully assess the four methodologies, including the feasibility of the CE method. Forcing PAS to choose a methodology without an opportunity to make such an assessment would be unfair. As such, PAS must be allowed to obtain relevant evidence through discovery and present arguments based on that evidence. Because NECR is the only source for some of this information, PAS could only obtain it through discovery. The possible burden on NECR of producing evidence related to these methods is not a reason to preclude all discovery by PAS on these subjects.

NECR also proposes to bifurcate the proceeding into separate phases, with a preliminary determination on the choice of valuation methodology in the first phase, and a second phase addressing the application of the chosen methodology. In some cases, this agency has conducted a preliminary proceeding regarding the choice of methodology. However, we will decline to do so here. Given that NECR has already submitted its opening argument and evidence based on its preferred methodology, and in light of the fact that we are allowing PAS to obtain relevant evidence through discovery, the Board is not convinced that conducting a preliminary proceeding would enhance efficiency in this case. Although bifurcating the proceeding possibly would allow the evidentiary presentations on the methodology for the interest/rental component to be more focused at the merits phase, it would also add a further round of evidence and argument, reply submissions, and an interlocutory decision from the Board. Instead, the parties can present arguments and evidence in support of their methodology, while alternatively presenting arguments and evidence regarding application of the other side's methodology, in the same pleadings. Such an evidentiary process is used in other contexts, such as rate reasonableness cases and the "set terms" phase of Offers of Financial Assistance.

Here, after the completion of discovery, PAS will have the opportunity to file its reply evidence and argument concerning the valuation methodology and the resulting final compensation to be paid to NECR. PAS's reply should also include any evidence and arguments regarding application of NECR's methodology. On rebuttal, NECR may then respond to the criticisms raised by PAS about the application of NECR's methodology, and should also address application of the methodology advocated by PAS. Because PAS must be allowed an opportunity to defend its chosen methodology against the critiques raised by NECR, we will alter the procedural schedule to permit PAS to submit a surrebuttal. The Board will then compare the methodologies put forth by each party, evaluate the parties' respective calculations, and then set the terms and conditions of the TO based on the full evidentiary record.

In a separate decision, the Board's Director of Proceedings will assign and authorize an Administrative Law Judge (ALJ) from the Federal Energy Regulatory Committee (FERC) to hear and decide discovery matters and to resolve all disputes concerning discovery in this

proceeding, including PAS's motion to compel. Discovery disputes currently pending are not limited to NECR's request to limit discovery on other methodologies, but also include disputes over general access to documents, protection of confidential information, and the scope and relevance of information sought by PAS.

The deadlines for PAS's reply evidence and argument and NECR's rebuttal evidence and argument will remain in abeyance pending further order of the Board so that discovery issues may be resolved by the FERC ALJ. Within 10 days of service of the ALJ's notice that discovery disputes have been resolved, the parties will jointly submit a proposed procedural schedule to the Board that will govern the deadlines for these filings, including a deadline for PAS's surrebuttal evidence and argument.

It is ordered:

1. NECR's Methodology Motion is denied.
2. NECR's request for a protective order and Supplemental Motion are denied.
3. Within 10 days of service of the ALJ's notice that discovery disputes have been resolved, the parties shall jointly submit a proposed procedural schedule to the Board that will govern the deadlines for PAS's reply evidence and argument, NECR's rebuttal evidence and argument, and PAS's surrebuttal evidence and argument.
4. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.