

ORIGINAL

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. FD 35943



**MASSACHUSETTS DEPARTMENT OF TRANSPORTATION
- ACQUISITION EXEMPTION - 239033
CERTAIN ASSETS OF PAN AM SOUTHERN LLC**

MOTION TO DISMISS

**ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record**

EXPEDITED CONSIDERATION REQUESTED

**Robert A. Wimbish
Thomas J. Litwiler
FLETCHER & SIPPEL LLC
29 North Wacker Drive
Suite 920
Chicago, IL 60606-2832
Phone: (312) 252-1504
Facsimile: (312) 252-2400**

**ATTORNEYS FOR MASSACHUSETTS
DEPARTMENT OF TRANSPORTATION**

Dated: August 14, 2015

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 35943

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION
– ACQUISITION EXEMPTION –
CERTAIN ASSETS OF PAN AM SOUTHERN LLC

239033

MOTION TO DISMISS

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record



LIST OF EXHIBITS

- Tab A** - Purchase and Sale Contract, dated as of June 26, 2015 [certain internal exhibits excluded]
- Tab B** - 2015 Operating Agreement, dated as of June 26, 2015
- Tab C** - Draft Release Deed
- Tab D** - Verified Statement of Andrew Jacobs

239033

ENTERED

Office of Proceedings

August 14, 2015

Part of

Public Record

THIS PAGE LEFT BLANK INTENTIONALLY

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 35943

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION
– ACQUISITION EXEMPTION –
CERTAIN ASSETS OF PAN AM SOUTHERN LLC 239033

MOTION TO DISMISS

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

I. OVERVIEW

In this proceeding, the Commonwealth of Massachusetts (the “Commonwealth”), acting by and through its Department of Transportation (“MassDOT”), has invoked the Board’s class exemption procedures at 49 C.F.R. part 1150, subpart E, to acquire certain assets of Pan Am Southern LLC (“PAS”). Specifically, MassDOT proposes to acquire the railroad-related assets (i.e., right-of-way, track railroad physical plant, and other assets related to this track segment) comprising the “Adams Branch” in western Massachusetts, extending from Engineering Station 739+20 in Adams, MA, to Engineering Station 981+45 in North Adams, MA, a distance of approximately 4.6 miles (collectively, the “Railroad Assets”). PAS, operator of the Adams Branch and current owner of the railroad physical plant, will retain for itself an exclusive, irrevocable, perpetual, assignable, divisible, licensable and transferable freight common carrier easement. MassDOT will acquire neither the right nor the ability to provide railroad common carrier service, and it will be

contractually precluded from unduly interfering with PAS's provision of freight common carrier service on the Adams Branch.¹

MassDOT's acquisition of the Railroad Assets is intended to facilitate the Commonwealth's economic development plans, thereby – (1) signaling to existing and prospective freight customers that the Adams Branch will remain a viable freight transportation resource well into the future by virtue of state ownership; (2) promoting the Adams Branch as a Commonwealth-supported transportation resource; and (3) developing local business by installing upon the Railroad Assets a passenger excursion operation (known as the Berkshire Scenic Railway) that will promote the Adams Branch as an important cultural asset in western Massachusetts, attracting tourism and tourist revenue to the region.

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

In accordance with Maine Department of Transportation – Acquisition and Operation Exemption – Maine Central Railroad, 8 I.C.C.2d 835 (1991) (“State of Maine”) and its progeny, MassDOT requests that its concurrently-filed verified notice of exemption (the “Notice”) in this proceeding be dismissed, because the Railroad Assets transaction, as structured, does not require Board authorization under 49 U.S.C. § 10902 or MassDOT's invocation of the otherwise applicable class exemption procedure at 49 C.F.R. part 1150, subpart E. Moreover, due to exigent circumstances discussed herein, MassDOT respectfully requests that the Board expeditiously review and act upon this Motion, so that the underlying transaction may be consummated as soon as possible, preferably on or after September 28, 2015.

¹ In that regard, MassDOT and PAS have executed an Operating Agreement (the “2015 Operating Agreement”), to become effective upon the closing of the conveyance, assuring that PAS will be able to fulfill all current and reasonably foreseeable rail freight service requirements without undue interference.

II. BACKGROUND

MassDOT is an instrumentality of the Commonwealth of Massachusetts, and is the Commonwealth's principal authority for developing and implementing state transportation planning, policy, and programs.² As referenced further below, MassDOT already holds the assets of several other rail lines in Massachusetts pursuant to prior State of Maine determinations, and in one instance the Board has found that MassDOT has non-operating passenger rail common carrier status with respect to unexercised interstate passenger service rights it possesses on a line.³ The Board previously has assessed State of Maine-style transactions presented under the class exemption from 49 U.S.C. § 10902 set forth at 49 C.F.R. § 1150.41, et seq., as is Public Record and has found in such cases that an appropriately-structured transaction will satisfy the State of Maine criteria such that the transaction would not require advance Board authorization.⁴

² See Norfolk Southern Railway Company, Pan Am Railways, Inc., et al. – Joint Control and Operating/Pooling Agreements – Pan Am Southern LLC, STB Finance Docket No. 35147, Comments of the Commonwealth of Massachusetts' Executive Office of Transportation and Public Works [MassDOT's predecessor agency] (filed August 11, 2008) at 3.

³ See Massachusetts Department of Transportation – Acquisition and Operation Exemption – Certain Assets of Housatonic Railroad Company, Inc., Docket No. FD 35866 (STB served May 22, 2015) (“MassDOT-Housatonic”).

⁴ See, e.g., Regional Transportation District – Acquisition Exemption – Union Pacific Railroad Company in Adams, Denver, and Jefferson Counties, Colo., Docket No. FD 35394 (STB served Dec. 21, 2010); Dallas Area Rapid Transit – Acquisition Exemption – Certain Assets of Regional Rail right of Way Company, Docket No. FD 34346 (STB served Nov. 12, 2003); State of Vermont – Acquisition Exemption – Certain Assets of Newport and Richford Railroad Company, Northern Vermont Railroad Company Incorporated, and Canadian American Railroad Company, Docket No. FD 34294 (STB served May 22, 2003); Cf. State of Vermont – Acquisition Exemption – Certain Assets of Boston and Maine Corporation, Docket No. 33830 (STB served Jun. 8, 2000) (State of Vermont invoked the 49 C.F.R. § 1150.31 noncarrier class exemption provisions, noting, however, that it might already possess a “residual common carrier obligation” on another rail line resulting from a previous rail asset transaction. The STB stated as follows in that proceeding, without directly ruling on the state's common carrier status: “Typically, the transfer of an active rail line and the related common carrier obligation require

PAS is a freight common carrier that possesses rights to operate approximately 437 miles of track (collectively, the “PAS Lines”) in New England. The PAS Lines consist of 238.3 miles of PAS-owned rail lines (including freight easement rights), and 198.4 miles of track over which PAS possesses trackage rights. The PAS Lines include an east-west aligned route, called the Patriot Corridor, which is comprised of 139.7 miles of PAS-owned track extending from Mechanicville, NY, to CPF-312, near Ayer, MA, and 15.8 miles of trackage rights over MBTA-owned track between Fitchburg and Willows, MA. An intersecting, north-south oriented component of the PAS Lines extends from White River Junction, VT, to New Haven, CT, consisting of: (1) 72.8 miles of trackage rights over the New England Central Railroad between White River Junction, VT, and East Northfield, MA; (2) 49.7 miles of PAS-held freight easement over MassDOT-owned track assets between East Northfield and Springfield, MA;⁵ and (3) 62.0 miles of trackage rights over an Amtrak-owned line between Springfield, MA, and New Haven, CT. The PAS Lines also include several branch lines.⁶

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

Board approval under 49 U.S.C. 10901, if the acquiring entity is a noncarrier, or under 49 U.S.C. 10902 or 11323, if the acquiring entity is a carrier. But we have no need to exercise jurisdiction over the transfer of just a right-of-way and fixed assets if the transferor retains an easement that allows it to comply fully with the common carrier obligation to provide rail freight service”).

⁵ See Massachusetts Department of Transportation – Acquisition Exemption – Certain Assets of Pan Am Southern, LLC, Docket No. FD 35863 (STB served Dec. 24, 2014) (“MassDOT-II”) (as modified, Mar. 27, 2015).

⁶ The branch lines are: (1) the Rotterdam Branch, which is approximately 30.5 miles between Rotterdam Junction and Mechanicville, NY (including 18.3 miles of trackage over Canadian Pacific Railway Company between Mohawk Yard in Schenectady, NY, and Mechanicville, NY); (2) the subject Adams Branch, which is approximately 4.6 miles between N. Adams and Adams, MA; (3) the Heywood Industrial Branch, which is approximately 1.2 miles between Gardner and Heywood, MA; (4) approximately 2.3 miles between Ayer and Harvard Station, MA; (5) the Groton Industrial, which consists of trackage rights over MBTA extending approximately 5 miles between Ayer, MA, and Groton, MA; (6) approximately 2.3 miles of

The PAS Lines are currently operated under contract by Springfield Terminal Railway Company (“ST”), which has been the common carrier freight service provider on the PAS Lines since well before consummation of the series of Board-approved transactions encompassed by the Board’s 2009 PAS-Joint Control decision.⁷

MassDOT has concluded that its near-term and long-term objectives for regional economic development are best served through public ownership of the Railroad Assets of the Adams Branch. The Adams Branch hosts modest freight traffic, but its continued existence and its role in promoting local industry is of critical importance to the Commonwealth. In contemplation of MassDOT’s ownership, the Commonwealth has committed to some \$2.8 million of infrastructure improvements, ranging from track rehabilitation to improve operating conditions to the installation of facilities to accommodate Berkshire Scenic passenger excursion operations. To give some context to MassDOT’s interest in this low-density track segment, one of the Adams Branch users is Specialty Minerals Inc. – the largest employer in the Town of Adams, MA. MassDOT ownership of the Adams Branch assets combined with Commonwealth-funded capital improvements will signal to this customer and others that the subject rail line is integral to the Commonwealth’s long-term plans for local economic development. But, as indicated, the Adams

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

trackage rights over MBTA between Willows, just east of Ayer and Littleton, MA; (7) approximately 42.9 miles between Berlin, CT, and Derby, CT (including 18.6 miles of trackage rights over Metro North Commuter Railroad between Waterbury and Derby, CT); (8) the Southington Industrial Branch, which is approximately 4.5 miles between Plainville and Southington, CT; and (9) approximately 3.7 miles of trackage rights over CSX Transportation, Inc. (CSXT) between North Haven and Cedar Hill, CT. Norfolk Southern Railway Company, Pan Am Railways, Inc., et al. – Joint Control and Operating/Pooling Agreements – Pan Am Southern LLC, __STB __, STB Finance Docket No. 35147, slip op. at 2 (STB served Mar. 10, 2009) (“PAS-Joint Control”).

⁷ See PAS-Joint Control, slip op. at 5-6 n. 10.

Branch is also valued as a cultural resource and prospective tourist attraction due to Berkshire Scenic excursion train operations that MassDOT intends to install on the property.

A. The Railroad Assets

The underlying Purchase and Sale Contract (“P&S Contract”)⁸ describes the subject Railroad Assets as consisting of the Adams Branch right-of-way, adjoining land, “included fixtures” (tracks, rails, ties, switches, ballast, etc.), other “tangible personal property,” and permits (as are described in the P&S Contract).⁹ In turn, PAS will retain an exclusive, irrevocable, perpetual, assignable, divisible, licensable and transferable freight rail operations easement (the “Freight Easement”)¹⁰ allowing PAS to serve current and future freight customers on or to the Adams Branch.

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

As relevant to this transaction, the parties have distinguished the portion of the Railroad Assets that are devoted specifically to train operations as the “Rail Operating Property.”¹¹ For ease of reference, this Motion also employs the term Rail Operating Property to encompass those elements of the Railroad Assets that are used for train operations, and to distinguish them from the portion of the Railroad Assets that may be used exclusively to support excursion operations or are not directly involved in the provision of actual train service of any sort.

⁸ Attached hereto as Exhibit A, with certain extraneous exhibits omitted. Since the execution of the Purchase Contract, additional title examinations have revealed that the Railroad Assets extend to Engineering Station 981+45 in North Adams, rather than Engineering Station 974+65 as specified in Recital A.1 of the the Purchase Contract. The release deed for the transaction (attached hereto as Exhibit C) reflects the correct terminus in North Adams.

⁹ P&S Contract, Recitals.

¹⁰ P&S Contract, § 3.1.

B. Closing/Consummation

MassDOT is mindful of the Board’s expectation that the proposed acquiror under a transaction intended to meet the agency’s State of Maine criteria would present the transaction to the Board prior to taking ownership of the targeted railroad assets, so that the Board may rule on the merits of the acquiror’s invocation of State of Maine. Indeed, MassDOT has honored the Board’s expectations in the four previous railroad asset transactions presented to the Board for the requisite State of Maine determination. Here, however, due to Commonwealth fiscal considerations, MassDOT must commit funding for the purchase of the Railroad Assets before the Board will rule on the subject motion to dismiss. In light of this funding constraint, and in the interest of not running afoul of the Board’s expectations, MassDOT and PAS have agreed that they will “close in escrow,” pending the outcome of the current proceeding. Under this arrangement, title to the railroad assets and the purchase price will formally be committed but not exchanged to the other party, pending a Board ruling on the present motion to dismiss. Upon a favorable Board ruling, PAS will shortly thereafter receive the escrowed purchase funds and MassDOT will take possession of the Railroad Assets.¹²

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

The parties intend to terminate escrow – which the parties agree is an appropriate interim arrangement in light of Board guidance on the issue of transactions proposed under the State of Maine legal construct – as soon as possible upon favorable Board action on the present motion to dismiss. In the interest of ending the provisional escrow period sooner rather than later, to avoid

¹¹ See Section 1 (Definitions) of the “2015 Operating Agreement Between the Massachusetts Department of Transportation and Pan Am Southern LLC for Adams Branch” (the “2015 Operating Agreement”) – attached hereto as Exhibit B.

¹² See P&S Contract, Article 4 (Closing).

any uncertainty about the proposed transaction resulting from prolonged pendency before the agency, and for other reasons important to the Commonwealth and to the local economy of western Massachusetts (explained below), MassDOT urges the Board to dismiss the subject Notice on or before September 28, 2015, to enable the parties to be able formally to close upon the Railroad Asset transaction as soon as practicable thereafter. In any event, MassDOT urges favorable action on the subject motion to dismiss no later than December 15, 2015.

239033

C. The PAS-Retained Easement

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

Section 3.1 of the P&S Contract states, in part, as follows:

The Land [a component of the Railroad Assets to be conveyed] shall be conveyed by released deed (the "**Deed**," which may consist of one or more individual deeds as [MassDOT] and [PAS] reasonably determine) . . . , which Deed includes an exclusive, retained and perpetual easement in gross for [PAS] to provide rail freight service itself or through its contractor, and which shall provide that [PAS] has the exclusive right to provide freight rail service (which right shall be perpetual, unless abandoned pursuant to applicable law by [PAS]) (the "**Retained Freight Easement**").

Similarly, the 2015 Operating Agreement defines the PAS-reserved "Freight Easement" in relevant part as follows:

the perpetual and exclusive easement to provide Freight Rail Service¹³ and such other rights . . . reserved and retained by PAS as are described in any deed or deeds transferring the [Railroad Assets] from PAS to MassDOT pursuant to the Purchase Contract, and any additional easements to provide freight rail service and such other rights . . . as may be added to this Agreement from time to time by mutual . . . agreement of the Parties."¹⁴

¹³ "Freight Rail Service" is defined as "the full range of services and activities performed in connection with the provision of current and future freight common carrier and contract carrier obligations . . . and other activities permitted or required under this Agreement. Freight Rail Service includes PAS's right to transport railroad material, equipment, ballast, rails and the like in support of Freight Rail Service." 2015 Operating Agreement, §1 (Definitions).

¹⁴ Id. (definition of "Freight Easement").

The terms of PAS's retained permanent, exclusive freight easement are set forth in the draft release deed (the "Deed") attached hereto as Exhibit C.

The Deed includes expansive definitions of the terms "Trackage," "Railroad Purposes," and "Rail Freight Service," thus guaranteeing to PAS the "right to use all Trackage on the Property for the exclusive provision of Rail Freight Service."¹⁵ In turn, "Rail Freight Service" is defined broadly as "[t]he transportation by rail of property and movable articles of every kind, character and description over the Property, including but not limited to rail freight transportation service to current and future industries, customers and facilities located along the Property, and supporting activities . . ."¹⁶

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

The exclusive freight easement that PAS will retain continues in perpetuity until "abandoned or terminated, as may be provided in the Operating Agreement herein referenced . . ."¹⁷ As discussed below, the 2015 Operating Agreement grants PAS considerable discretion over any future abandonment or discontinuance of rail freight service on the Railroad Assets, and it sets forth specific terms and conditions pursuant to which PAS's exclusive and permanent freight easement may be terminated pursuant to advance authority from the Board.¹⁸

D. Operations on the Railroad Assets

PAS is the exclusive provider of freight service on the Adams Branch. PAS typically operates a round-trip local freight train over the Adams Branch twice per week, currently on Tuesdays and Thursdays, although it may provide additional service on occasion to

¹⁵ Deed, §§ 6 and 6(c).

¹⁶ Id., § 6(d).

¹⁷ Id., § 6(a).

accommodate shipper demand. MassDOT and PAS have entered into the aforementioned 2015 Operating Agreement, governing, among other things, maintenance, dispatching, and day-to-day railroad operations over the Rail Operating Property. This agreement contemplates that, following consummation, PAS will continue to hold the responsibility for maintaining the Rail Operating Property, and will continue to provide dispatching. PAS will maintain the subject trackage to FRA Class I safety standards,¹⁹ but either party is entitled to have the Rail Operating Property maintained at a higher level at that party's expense.²⁰

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

In addition, PAS will retain the exclusive right to operate freight trains itself or through the services of a designated contractor and, as indicated above, will continue to operate the Rail Operating Property post-closing. MassDOT, on the other hand, will acquire the exclusive right under the terms of the 2015 Operating Agreement to perform "Excursion Passenger Service"²¹ either directly or through the services of an operating contractor performing such Excursion Passenger Service on MassDOT's behalf.²²

Upon the commencement of Excursion Passenger Service, freight and excursion operations over the Railroad Assets will be accommodated under the following exclusive operating windows:

¹⁸ 2015 Operating Agreement, § 2.4(a).

¹⁹ Id., § 3.1(b).

²⁰ Id., §§ 3.1(d) and (e).

²¹ "Excursion Passenger Service" is defined as MassDOT's, or its operating contractor's, operation of tourist, recreational passenger, or special event trains exclusively between Adams and North Adams, Massachusetts. Excursion Passenger Service does not include the operation, in whole or in part, of any passenger trains connecting to any commuter or intercity passenger train service. See Id., §1 (Definitions).

²² Id., §2.2.

1. Freight Operating Window: PAS shall have the exclusive right to use the Rail Operating Property to provide Freight Rail Service between each Monday at 02:00 and each Friday at 14:00 Eastern Standard Time, with the exception of between 00:01 and 24:00 Eastern Standard Time on federal holidays recognized by PAS's collective bargaining agreements ("Holidays").

2. Excursion Operating Window: MassDOT has the exclusive right to use the Rail Operating Property to provide Excursion Passenger Service between each Friday at 14:00 and each Monday at 02:00 Eastern Standard Time, as well as between 00:01 and 24:00 Eastern Standard Time on Holidays.

239033

There are no limits on the number of trains that PAS or MassDOT may operate during their respective operating window.

ENTERED
Office of Proceedings
August 14, 2015

The Railroad Assets transaction will facilitate MassDOT's use of the Assets Branch for purposes of offering non-common carrier excursion passenger service on weekends and certain designated Holidays, while permitting PAS the freedom to provide local freight service on the Line at all other times at its sole discretion. This arrangement provides for strict temporal separation between freight and excursion train operation,²³ while keeping maintenance and dispatching responsibilities in the hands of the incumbent freight carrier.

Part of
Public Record

Finally, the 2015 Operating Agreement permits either party to undertake post-transaction infrastructure improvements subject to cost allocation principles set forth in that agreement (and subject also to the understanding that neither party may advance capacity improvements that would interfere with the provision of "PAS Freight Rail Service or MassDOT Excursion Passenger Service").²⁴ In addition, infrastructure improvements intended to facilitate

²³ MassDOT and PAS may agree on a case-by-case basis to allow exceptions to the above-described operating windows, but, in the event of such exceptions, the strict temporal restriction between freight and excursion operations will still apply, such that PAS freight operations and MassDOT excursion operations will not be conducted on the Line simultaneously. *Id.*, §2.3(c).

²⁴ *Id.*, §6.2.

excursion operations (such as passenger platforms) may not impair prescribed clearances necessary to permit the movement of freight traffic over the Line.²⁵

The strict temporal separation of freight and passenger operations might be adequate for this purpose by itself, but the 2015 Operating Agreement nevertheless provides that PAS, in dispatching the Rail Operating Property, “shall prioritize trains and resolve scheduling conflicts using best dispatching practices and in accordance with sound dispatching principles and this Agreement.”²⁶

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

III. DISCUSSION

State of Maine and the numerous Interstate Commerce Commission Board proceedings stemming from that decision establish and reinforce, respectively, the proposition that a public entity may under certain circumstances acquire railroad assets (such as track, signals, and right-of-way) and manage those assets going forward (including assuming responsibility for maintenance and dispatching) without the need for Board authority. In such cases where the seller or the seller’s third-party designee retains the common carrier obligation and is granted sufficient post-transaction rights to ensure its ability to conduct freight operations without undue interference, the acquiring public entity does not become a federally-regulated rail common carrier. For the reasons discussed below, the proposed Railroad Assets transaction does not involve MassDOT’s acquisition of a “rail line” under 49 U.S.C. § 10902. Accordingly, the transaction therefore does not require advance Board authorization, and the Notice filed in this proceeding should be dismissed.

²⁵ Id., §6.5.

²⁶ Id., §7.1 and see also id., §7.2 (Dispatching Protocol).

A. The Modern-Day *State of Maine* Legal Construct and Section 10902

As a general rule, the acquisition of a rail line by an existing carrier (albeit a non-operating rail passenger carrier in the present circumstances) would require Board approval under 49 U.S.C. § 10902, provided of course, that the acquiring entity is eligible to invoke the section 10902 process. Cf. Common Carrier Status of States and State Agencies, 363 I.C.C. 132, 133 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). However, a long line of firmly-established cases beginning with State of Maine distinguishes between (1) the acquisition of a “railroad line,” including the acquisition of the common carrier obligation related thereto, requiring advance Board approval under 49 U.S.C. § 10901/10902 or the acquisition of the applicable class exemption; and (2) the purchase of railroad right-of-way and track assets subject to the selling railroad’s retention of a permanent, exclusive freight common carrier service easement which requires advance Board examination, but for which the Board ultimately may determine that its authorization of the transaction is unnecessary because the transaction does not entail the conveyance of a “railroad line” under section 10901 or 10902. Transactions that fall within the latter category are commonly referred to as “State of Maine” transactions in view of the seminal ICC case from 1991. Over the years, in proceedings such as Massachusetts Department of Transportation – Acquisition Exemption – Certain Assets of CSX Transportation, Inc., FD 35312 (STB served May 3, 2010) (“MassDOT-I”) at 4-8, aff'd sub nom. Bhd. of R. Signalmen v. STB, 638 F.3d 807 (D.C. Cir. 2011), the Board has clarified what sort of transaction satisfies the State of Maine criteria.

The State of Maine legal construct, under which certain rail asset transactions are deemed to be outside of the scope of sections 10901 and 10902, is, at this juncture, hardly novel,

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

and transactions structured very much as this one is have consistently been found not to require Board authorization. As the Board has stated, “since 1991, the ICC and the Board have followed State of Maine in more than 60 cases . . . and regional, state and local agencies responsible for commuter transportation have come to rely on this precedent.” MassDOT-I at 6 (footnote omitted). Since issuance of the State of Maine decision, the agency repeatedly and consistently has explained that a railroad asset transaction does not involve the acquisition of a “railroad line” where – (1) a key element of the bundle of assets that are the subject of the railroad assets transaction – the freight carrier rights and obligations – are retained by the incumbent freight railroad (or its third party designee); and (2) the railroad retaining the common carrier rights (typically by way of a public record easement) cannot be forced to cease to offer common carrier service absent Board authorization. See, e.g., State of Maine at 837.

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

The mere acquisition of “a portion of a railroad” consisting of the “physical assets” divorced from the common carrier rights and obligations affixed to those assets can be found not to constitute the sale of a railroad line. Bhd. of R. Signalmen v. Surface Transp. Bd. 638 F.3d 807, 811-13 (D.C. Cir. 2011) (“Brotherhood of R. Signalmen”). In Brotherhood of R. Signalmen, the D.C. Court of Appeals affirmed a Board decision that MassDOT’s purchase of railroad track and other rail assets from CSXT did not entail the acquisition of a “railroad line” requiring Board authorization. Important here and in all transactions presented under the State of Maine construct is

that Brotherhood of R. Signalmen upheld the Board's interpretation of the term "rail(road) line" as it is used in 49 U.S.C. §§ 10901 and 10902.²⁷

Thus, for example, in Brotherhood of R. Signalmen, the D.C Circuit rejected the argument that section 10901(a)(4) requires in every case that the Board authorize a non-carrier's acquisition of railroad physical assets such that the acquirer becomes a regulated rail carrier. *Id.* at 812. The court accepted that the term "railroad line" is not "necessarily limited to a portion of a railroad's assets; it may refer to a railroad's entire railroad operation," adding that the Board reasonably applied the concept of a "railroad line" to "the interstate freight transportation authority attached to the physical property" rather than to the physical assets themselves. *Id.* (citation omitted). In addition, the court observed that focusing on the physical assets transaction in isolation "ignores the [acquirer's] intended use of the Railroad Assets, which is key to the determining whether" the transaction requires Board authorization. *Id.* at 813.

The Brotherhood of R. Signalmen court also acknowledged that in State of Maine transactions "the seller does not relinquish its rights and obligations with respect to providing rail freight transportation," so that the entity purchasing "the physical assets of a rail line does not thereby assume any common carrier obligation" over those assets, and so that the transaction is not subject to the authorization requirements of section 10901 (or, in this case, section 10902). *Id.* at 812 (internal citations omitted). The Board consistently has relied upon Brotherhood of R. Signalmen (and agency precedent effectively upheld by that case) in subsequent proceedings involving transactions intended to satisfy the agency's State of Maine criteria. *See, e.g., Wisconsin*

²⁷ MassDOT notes that 49 U.S.C. § 10901 employs the term "railroad line," while 49 U.S.C. § 10902 uses the term "rail line." MassDOT understands that the virtually identical terms have

Department of Transportation- Petition for Declaratory Order- Reedsburg Line Near Madison, Wis.,
FD 35854 (served Nov. 6, 2014); Central Puget Sound Regional Transit Authority- Acquisition
Exemption- Certain Assets of City of Tacoma In Pierce County, Wash, FD 35812 (served Oct. 27,
2014); Florida Department of Transportation – Petition for Declaratory Order- Rail Line of CSX
Transportation, Inc. Between Rivera Beach and Miami, Fla., FD 35783 (served Oct. 1, 2014)
(“FDOT – II”); New Jersey Transit Corporation- Acquisition Exemption-Norfolk Southern Railway
Company, FD 35638 (served Mar. 27, 2013); Santa Cruz County Regional Transportation
Commission- Petition For Declaratory Order, FD 35653 (served Sep. 27, 2012); Wisconsin
Department of Transportation- Petition for Declaratory order- Gibson Line in Milwaukee, WI, FD
35401 (served Aug. 15, 2012); State of Michigan Department of Transportation- Acquisition
Exemption- Certain Assets of Norfolk Southern Railway Company, FD 35606 (served May 8,
2012) (“State of Michigan”); Santa Cruz Regional Transportation Commission – Petition for
Declaratory Order, FD 35491 (served Dec. 15, 2011); Wisconsin Department of Transportation
Petition for Declaratory Order- Rail Lines in Almena, Cameron, and Rice Lake, Barron County,
WIS, FD 35455 (served November 20, 2011); and Virginia Port Authority – Acquisition Exemption
– Norfolk and Portsmouth Belt Line Railroad Company, FD 35532 (served Aug. 1, 2011).

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

B. The State of Maine Standard Generally

For a railroad assets transaction to pass muster under the Board’s State of Maine analysis, the agreements governing the sale and post-transaction operations must protect the selling carrier (or its designee, if the selling railroad contemplates conveying its retained common carrier rights and obligations to a third party) from undue interference in its provision of common carrier

identical meanings for Board purposes.

freight rail service. State of Michigan, slip op. at 2 (citing MassDOT-I). Once again, “the sale of the physical assets of a rail line by a carrier to a state or other public agency does not constitute the sale of a railroad line . . . *if certain conditions are met.*” Florida Department of Transportation – Acquisition Exemption – Certain Assets of CSX Transportation, Inc., FD 35110, slip op. at 3 (served Dec. 15, 2010) (“FDOT - I”) (citing State of Maine) (emphasis added). In practice, the “certain conditions” are that the asset-selling rail carrier must– (1) retain an exclusive, perpetual freight rail easement (or similar rights); and (2) possess the ability to carry out its common carrier obligations to all freight rail customers without undue interference from the purchaser. See The Port of Seattle – Acquisition Exemption – Certain Assets of BNSF Railway Company, FD 5128 (STB served Oct. 27, 2008), slip op. at 3 (“Port of Seattle”).

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

In such two-part analysis, the Board “looks to whether [the asset-selling railroad] would obtain a permanent, exclusive freight easement and would have sufficient interest in and control over the [rail line in question] to permit it to carry out its common carrier freight rail obligation” without unreasonable interference. State of Michigan at 3; and see also, e.g., Metro Regional Transit Authority – Acquisition Exemption – CSX Transportation, Inc., FD 33838 (STB served Oct. 10, 2003), slip op. at 4 (“Akron Metro”); New Jersey Transit – Acq. Exempt. – Certain Assets of Conrail, 4 S.T.B. 512, 514 (2000) (“NJT/Bordentown”). In certain recent State of Maine cases, the agreements governing post-transaction operations contained language that could be construed to enable the state subdivision to control (and terminate) the provision of freight service without Board authorization, despite language elsewhere purporting to grant the rail carrier a permanent and exclusive freight common carrier easement. But even in those proceedings, in the interest of facilitating the objectives of the acquiring state agency, the Board issued the requested

State of Maine finding by construing ambiguous contractual terms so as to permit the Board to make the requisite non-interference finding. See, e.g., Wisconsin Department of Transportation – Petition for Declaratory Order – Gibson Line in Milwaukee, Wis., FD 35401 (STB served Aug. 15, 2012); and Wisconsin Department of Transportation – Petition for Declaratory Order – Rail Lines in Almena, Cameron, and Rice Lake, Barron County, Wis., FD 35455 (STB served Nov. 10, 2011).

239033

C. The *State of Maine* Standard is Met Here

The parties to this transaction have carefully modeled it after those previously presented to the Board and found not to entail the sale of a rail line. The transaction follows the usual State of Maine railroad asset sale rules, and does not require the Board to depart or expand upon past precedent. PAS will retain the common carrier rights and obligations pursuant to its retention of an exclusive, irrevocable, perpetual, assignable, licensable, and transferable freight easement; MassDOT will not acquire the right to conduct freight common carrier service over the Railroad Assets, and thus will be contractually precluded from offering common carrier service.

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

Building off of the easement rights, the 2015 Operating Agreement contains various provisions protecting PAS’s post-transaction freight rail common carrier operations. These factors, taken together with the understanding that MassDOT will not (and, indeed cannot) hold itself out as a common carrier and will not acquire any common carrier rights, establish that MassDOT’s purchase of the Railroad Assets does not involve a transfer of a common carrier obligation and does not require Board authorization. See Central Puget Sound Regional Transit Authority – Acquisition Exemption – BNSF Railway Company, FD 34747 (STB served Nov. 18, 2005) at 2; Metro-North Commuter Railroad Company – Acquisition and Operation Exemption – Line of Norfolk Southern

Railway Company and Pennsylvania Lines LLC, FD 34293 (STB served May 13, 2003) (“Metro-North”) at 2, 3.

The 2015 Operating Agreement accounts for PAS’s current operations, and makes generous provision for freight traffic growth by allowing for 5-day-per-week service (Monday-Friday), where, today, freight service typically is provided two days per week. As is the case here, prospective freight-passenger excursion “shared use” arrangements can be structured to enable the asset-acquiring public entity to avail itself of the State of Maine construct, as MassDOT has done before,²⁸ to secure a Board finding (frequently essential to consummation) that – (1) the transaction does not require agency approval, and (2) the transaction, as structured, would not require the asset-acquiring public entity becoming a rail common carrier with respect to the assets to be acquired. The Board has on numerous occasions found that the State of Maine construct can and does apply to properly-structured transactions involving existing and prospective shared freight and passenger use²⁹ (as it has done, in similar circumstances, in earlier proceedings initiated by MassDOT),³⁰ and it should render such a determination here.

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

²⁸ See, e.g., Massachusetts Department of Transportation – Acquisition Exemption – Certain Assets of CSX Transportation, Inc., Docket No. FD 35892 (STB served Mar. 19, 2015) (“MassDOT-IV”); MassDOT-II; and MassDOT-I.

²⁹ The Board’s evaluation processes in shared use State of Maine-style transactions have been spelled out as follows:

To balance the development of [passenger rail transportation] with the retention of freight rail service, the freight carrier need not necessarily retain full control. Instead, the Board examines in each case whether the agreements between the parties continue to give the freight carrier the ability to conduct its existing and reasonably foreseeable freight operations so that it can satisfy its common carrier obligation.

While the freight carrier must continue to have a permanent easement or its equivalent to provide freight service, the public agency acquiring the right-of-way and track may negotiate terms and conditions with the freight carrier necessary to provide reliable

Finally, MassDOT is engaging in the subject transaction for purposes of establishing and promoting a new (and entirely intra-state) passenger train excursion service over the Railroad Assets, among other reasons. However, “[u]nder established Board precedent, such wholly intrastate passenger excursion operations do not constitute rail operations as ‘part of the interstate rail network,’ and as a result the operations are outside the Board’s jurisdiction.” Denver & Rio Grande Railway Historical Foundation – Petition for Declaratory Order, Docket No. FD 35496 (STB served Aug. 18, 2014), slip op. at 10 (citations omitted).

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

1. The Freight Easement

In keeping with the usual State of Maine transaction structure, PAS will receive a permanent and exclusive easement to conduct rail freight operations on the Line. Under the terms of the 2015 Operating Agreement, the subject freight easement would terminate with respect to a given portion of the Railroad Assets only if PAS at its discretion were to obtain regulatory authority to abandon or discontinue service over any portion of the Railroad Assets.³¹ Accordingly, because this is not a case where the freight easement is subject to periodic renewal at the state’s discretion, or where the state agency has the contractual right to compel the carrier’s abandonment of freight

[passenger rail service] or protect the agency’s investment so long as such terms and conditions do not unreasonably interfere with freight rail service. Thus, the easement or the operating agreement may restrict freight operations to specific parts of the day, provided that the window for exclusive freight operations is adequate to satisfy the service needs of freight shippers.

Maryland Transit Administration – Petition for Declaratory Order, FD 34975 (STB served Sep. 19, 2008), slip op. at 4-5 (“MTA-II”) (footnotes citing to various other State of Maine-style decisions supporting the subject propositions omitted).

³⁰ See MassDOT-IV, MassDOT-II, and MassDOT-I.

service, MassDOT’s motion to dismiss should be granted in keeping with State of Maine precedent. Cf. Wisconsin Department of Transportation – Petition for Declaratory Order, FD 34764 (STB served Dec. 2, 2005) at 2; Southern Pac. Transp. Co. – Aban. – L.A. County, CA, 8 I.C.C.2d 495 (1992), recons. denied, 9 I.C.C. 2d 385 (1993); see Sacramento-Placerville Transportation Corridor Joint Powers Authority – Acquisition Exemption – Certain Assets of Southern Pacific Transportation Company, FD 33046 (STB served Oct. 28, 1996) (“Sacramento-Placerville”) at 2 (the customary State of Maine determination warranted where public agency “has no power to require [carrier] to discontinue or curtail its freight service on the line.”).

239033
 ENTERED
 Office of Proceedings
 August 14, 2015
 Part of
 Public Record

MassDOT may only assign its rights, interests or obligations under the 2015 Operating Agreement to another state agency or authority upon 60 days prior written notice, provided that any such assignment “does not in any way impair or adversely affect any rights of PAS.”³² On the other hand, PAS may transfer its freight easement on 60 day’s advance notice, subject to the requirements that transferee “assume, by written agreement reasonably acceptable to MassDOT, all of PAS’s obligations under” the 2015 Operating Agreement³³ and that the transferee meet minimum standards of transportation, financial and legal capacity.³⁴ Such minimal restrictions on post-transaction freight easement transfers are permissible under the State of Maine construct,³⁵

³¹ Id., § 2.4(a). MassDOT is precluded under the terms of the 2015 Operating Agreement from seeking to remove PAS from the Railroad Assets by way of an adverse abandonment proceeding. Id., § 2.4(c).

³² Id., § 17.3.

³³ Id., § 17.1.

³⁴ Deed, § 5 and Exhibit E.

³⁵ Restrictions on the assignment of the freight easement holder’s rights are not inconsistent with State of Maine principles. The Board has stated previously that “[i]t is not uncommon for a public entity . . . that seeks to acquire the physical assets of a rail line to use or preserve for rail

particularly where, as here, the provisions governing potential future freight easement transfers do not unreasonably interfere with PAS's ability to fulfill its common carrier obligations.

2. Contractual Protections against Undue Interference with the Provision of Freight Common Carrier Service

MassDOT's proposed acquisition of the Railroad Assets strikes an appropriate balance between the sometimes competing interests of freight operations and the use of the Railroad Assets as part of a recreational and historic resource. The transaction is an example of a successful public-private partnership designed to accomplish two important objectives – (1) to preserve and promote freight common carrier service on a lower-density branch line; (2) to provide state-sponsored excursion train operation that will draw attention to railroading history and promote tourism to the benefit of the local economy.

MassDOT's Railroad Assets acquisition will not adversely affect PAS freight operations. The parties anticipate no significant post-transaction changes in freight service demand on the Railroad Assets, and they expect that PAS will be able to meet the existing and reasonably foreseeable needs of freight customers. Under the 2015 Operating Agreement, PAS trains will have unfettered access to the Railroad Assets on all weekdays (except for certain designated Holidays), and PAS will continue to perform dispatching and maintenance, all of which is designed to prevent undue freight service disruption.³⁶ In short, PAS's freight service obligations can and will easily be accommodated now and into the future under the shared-use arrangements contained in the 2015 Operating Agreement. Indeed, as the verified statement of PAS General Manager Andrew Jacobs

freight and commuter service [] to play a role in the subsequent assignment of the freight easement..." Port of Seattle at 4.

³⁶ 2015 Operating Agreement, § 2.3.

conveys, PAS is confident that the subject transaction has been so structured so as to safely ensure that PAS will be able to continue to fulfill its common carrier obligations.³⁷

MassDOT takes very seriously its commitment to PAS and its assurance as set forth herein that it will not unduly interfere with the provision of rail freight service. Moreover, MassDOT anticipates that the Board may hold the Commonwealth to the assurances it has extended in this motion, consistent with the stated objectives and outcomes of the transaction as set forth in the agreements governing this transaction. See Port of Seattle, slip op. at 5 (the Board “will hold the parties to their assurances to refrain from interfering materially with the third-party operator’s right and obligation to provide rail freight service”).

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

1. Key 2015 Operating Agreement Provisions

In keeping with the usual State of Maine transaction structure, PAS will retain a permanent and exclusive easement to conduct rail freight operations on the Rail Operating Property. The terms of the 2015 Operating Agreement would not subject PAS freight service to any material restrictions or impairment, and the subject freight easement would terminate with respect to a given portion of the Rail Operating Property (or all of it) only if PAS, in its sole discretion, were to seek and obtain appropriate Board abandonment authority.³⁸

a. Maintenance

PAS shall be responsible for maintaining and inspecting the Rail Operating Property, subject to agreed-upon track upkeep standards and compensation scheme under which MassDOT will compensate PAS for a portion of the costs of PAS’s maintenance service (subject to an annual

³⁷ Verified Statement of Andrew Jacobs (“V.S. Jacobs”), attached hereto as Exhibit D.

³⁸ 2015 Operating Agreement, § 2.4(a).

“maintenance credit” that PAS will extend to MassDOT, reflecting and accounting for PAS’s continued use of the Rail Operating Property).³⁹ To the extent that either MassDOT or PAS may require that the Rail Operating Property be maintained to levels exceeding FRA Class I condition, the party requiring such increased maintenance may, in its respective sole and absolute discretion and at its sole cost and expense, request and/or provide such additional maintenance.⁴⁰

239033

Such a maintenance regime is consistent with the Board’s State of Maine precedent. The Board generally views transactions which keep track maintenance in the freight carrier (such as is the case here) favorably. See State of Maine – Petition for Declaratory Order, FD 35440, slip op. at 5 (“State of Maine-II”) (in assessing a similarly-structured asset sale under the State of Maine construct – and finding that the proposed transaction would not require Board approval – the Board made no issue of, and indeed did not even mention in the merits analysis of its decision, the incumbent freight carrier’s retention of maintenance responsibilities), and State of Maine, 8 I.C.C.2d at 836-37 (state agency’s acquisition of the physical assets of a rail line owned by a common carrier railroad did not require Board approval where the existing carrier retained, among other things, the right to maintain the line). As such, the Board should determine that the maintenance arrangements in place here support the requested finding that the Railroad Assets transaction does not require the agency’s authorization, just as it had done in State of Maine and State of Maine-II.

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

³⁹ Id., §§ 3 (entire), 4.1 and 4.4.

⁴⁰ Id., §§ 3.1(d) and (e).

b. Dispatching

The 2015 Operating Agreement provides for PAS to continue to dispatch operations over the Rail Operating Property post-transaction.⁴¹ In so doing, “PAS shall prioritize trains and resolve scheduling conflicts using best dispatching practices and in accordance with sound dispatching principles and [the 2015 Operating Agreement].”⁴² Because PAS freight operations and MassDOT excursion operations will at all times be separated temporally pursuant to clearly-prescribed operating windows, MassDOT believes that dispatching conflicts affecting either operation would be extremely unlikely.

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

This arrangement is in keeping with many of the earliest cases in Public Record of Maine construct, where similar dispatching arrangements were approved. See, e.g., Metro-North; Centex Rural Rail Transportation District – Acquisition Exemption – Certain Assets of Cen-Tex Rail Link, Ltd., Docket No. FD 32496 (ICC served Aug 1, 1994); and City of Oshkosh, WI, and Wisconsin Central Ltd. – Petition for Declaratory Order, Docket No. 32452 (ICC served Jun. 8, 1994).

c. Operating Windows

As discussed above, Section 2.3 of the 2015 Operating Agreement provides for two distinct operating windows – (1) a Freight Operating Window granting PAS exclusive access to the Rail Operating Property between each Monday at 02:00 and each Friday at 14:00 Eastern Standard Time, with the exception of between 00:01 and 24:00 Eastern Standard Time on federal holidays recognized by PAS’s collective bargaining agreements (“Holidays”), during which window PAS

⁴¹ Id., § 7.1.

⁴² Id.

may, in its sole and absolute discretion, operate as many freight trains as it deems reasonable or necessary; and (2) an Excursion Operating Window granting MassDOT exclusive access to the Rail Operating Property between each Friday at 14:00 and each Monday at 02:00 Eastern Standard Time, as well as between 00:01 and 24:00 Eastern Standard Time on Holidays, during which window MassDOT may, in its sole and absolute discretion, operate as many excursion trains as it deems reasonable or necessary.⁴³

239033

Joint use accommodated via “freight only” and “passenger only” windows satisfies the State of Maine criteria, provided the Board is satisfied that the limitations placed upon the freight operator do not unduly restrict the provision of common carrier service in light of existing and anticipated service demand. Cf., e.g., MassDOT at 12; MTA II at 5; New Mexico Department of Transportation – Acquisition Exemption – Certain Assets of BNSF Railway Company, FD 34793 (STB served Feb. 6, 2006) (“New Mexico DOT”) at 2 (preferential operating windows not prohibited where carrier retains ability to provide freight service and passenger service is provided “in accordance with statutory and contractual standards”); Akron Metro at 4; NJT/Bordentown, 4 S.T.B. at 515. In that regard, the V.S. Jacobs reflects PAS’s confidence that it can meet existing

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

⁴³ Id., §§ 2.3(a)-(b). Section 2.3(c), however, provides a limited exception to these exclusive operating windows as follows (which nevertheless retains temporal separation between freight and excursion service operations):

Should PAS or MassDOT desire to provide service outside of its exclusive operating window specified in Section 2.3(a) or (b), respectively, the Parties shall mutually agree to such exceptions on an individual basis, such agreement not to be unreasonably withheld, conditioned, or delayed. In no instances will either (i) MassDOT provide Excursion Passenger Service over the Rail Operating Property at the same time that PAS is providing Freight Service or (ii) PAS provide Freight Service over the Rail Operating Property at the same time that MassDOT is providing Excursion Passenger Service.

and foreseeable common carrier service demand on the Rail Operating Assets under the service windows set forth at Section 2.3 of the 2015 Operating Agreement. For these reasons, the Board should find that the proposed operating arrangements satisfy the State of Maine criteria.

d. Spur Tracks and Capacity Improvements

The 2015 Operating Agreement does not mandate the removal of spur track or switches connecting the Railroad Assets main trackage to siding or spur track serving freight customers. Instead, the 2015 Operating Agreement contemplates growth, and provides for expanding on-line traffic opportunities. Thus, PAS, at its own cost and expense (and subject to advance consultation and coordination with MassDOT), may at all times post track order the installation of switches and sidings to access shippers located (or to be located) along the Railroad Assets.⁴⁴

These arrangements for spur trackage and freight capacity, like others bearing on train service over the Rail Operating Property, are in keeping with State of Maine principles and past precedent where the Board has determined that the transaction parties adequately protected the easement-holder's future ability to provide rail common carrier service into the future. See State of Maine-II, slip op. 4 (finding the transaction consistent with State of Maine where the freight carrier maintained the right to construct changes or additions such as turnouts, sidetracks, industrial spur tracks or other facilities related to carrier's freight operations). The subject elements of the transaction support the requested finding that MassDOT's acquisition of the Railroad Assets does not require advance Board approval under § 10902 or the related class exemption.

⁴⁴ Id., § 6.1.

e. Labor Considerations

As is reflected in the agreements underlying the subject transaction, PAS will provide freight service, and will retain dispatching and maintenance responsibilities. As such, MassDOT understands that the railroad employees who are today provide dispatching, track maintenance, and freight train and engine service should not be adversely affected by the sale of the Railroad Assets. If anything, the transaction is intended to serve as a catalyst for regional economic development which could result in new railroad employment opportunities in the region.

239033

ENTERED

Office of Proceedings

August 14, 2015

Part of

Public Record

EXPEDITED CONSIDERATION

For reasons set forth herein, MassDOT respectfully requests that the Board grant the subject motion to dismiss by or before September 28, 2015, but in no event any later than December 15, 2015. MassDOT is unequivocally committed to the completion of the proposed Rail Assets transaction, and it believes that it has presented a strong case warranting a routine Board finding that the proposed transaction (as structured) does not require Board authorization in keeping with a host of prior agency decisions that have found transactions such as this one outside of the scope of the Board's regulatory oversight. However, such a Board finding, as important as that obviously would be for purposes of the proposed transaction, represents only part of the story. The timing of such a Board decision is crucial.

A major driving force behind the transaction is MassDOT's desire to deploy the Railroad Assets to host passenger excursion operations under the Berkshire Scenic name. MassDOT considers the excursion operation to be an important cultural and recreational resource, and believes that the excursion trains will attract tourism (and tourist revenue) to western Massachusetts, particularly during these passing summer and fall seasons. MassDOT would be

willing to commence Berkshire Scenic operations while the Railroad Assets are held in escrow pending further Board action,⁴⁵ but PAS will not agree to the commencement of such excursion operations unless and until the subject motion to dismiss is granted and takes effect, and MassDOT secures title to the Railroad Assets out of escrow.

Negotiations for the sale of the Railroad Assets were completed only recently, and MassDOT did not wish to present its transaction to the STB until the governing agreements were substantially complete and mutually agreed upon by the parties. Accordingly, MassDOT was not in a position confidently to present its filings and the relevant transaction agreements to the Board until now. In the meantime, the crucial summer season (the height of tourist activity) is passing by. While it recognizes that the Board is under no obligation to act as expeditiously as is requested herein, MassDOT nevertheless appeals to the Board to enable fall season excursion operations by allowing the proposed transaction to occur in time for Berkshire Scenic to commence operations as soon as possible following a favorable Board decision on September 28, 2015.

MassDOT recognizes that its request is ambitious, but it is not unprecedented or unjustified. Under appropriate showing, the Board has in the past issued favorable State of Maine findings on an even shorter time frame. See State of Michigan (decision granting motion to dismiss “effective on its service date” issued 39 days after motion to dismiss was filed). But in the event

⁴⁵ Again, MassDOT has resorted to the use of an intermediate escrow vehicle here in observance of the fact that, although it was required for state budget and fiscal considerations to commit to funding the Railroad Assets now, MassDOT should not assume ownership and control of the Railroad Assets unless and until the Board rules favorably on the subject motion to dismiss. In fact, the official closing and transfer of the Railroad Assets to MassDOT is precluded under the terms of the transaction agreements unless or until the Board issues the requested State of Maine finding. This is another reason why MassDOT prays for expedited consideration – it would prefer to break escrow as soon as the Board will allow for that to happen.

that the Board is unable to process this case that quickly, MassDOT urges the Board to dismiss the subject Notice as soon as is practicable, but certainly no later than December 15, 2015, to enable closing to occur before year's end.

CONCLUSION

For the foregoing reasons, MassDOT respectfully requests that the Board dismiss
MassDOT's concurrently-filed notice of exemption in this docket as not involving a transaction
requiring Board approval under section 10902 (or under the corresponding class exemption) and
urges the Board so act in order to enable formal closing on this transaction as soon as possible after
a requested Board decision on September 28, 2015, but no later than December 15, 2015

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

Respectfully Submitted,



Robert A. Wimbish
Thomas J. Litwiler
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, IL 60606-2832
Phone: (312) 252-1504
Facsimile: (312) 252-2400

**ATTORNEYS FOR MASSACHUSETTS
DEPARTMENT OF TRANSPORTATION**

Dated: August 14, 2015

COMPLIANCE WITH MASSACHUSETTS ENVIRONMENTAL POLICY

The Commonwealth of Massachusetts has established a strong policy of minimizing the environmental impacts associated with documents prepared by or on behalf of the Commonwealth. Specifically, the Commonwealth encourages greater use of recycled and environmentally preferable products to minimize waste and to promote further recycling. To the extent practicable in light of STB filing requirements, this Motion to Dismiss filing adheres to the Commonwealth's policies by using recycled paper with a minimum post-consumer content of 30%, recyclable and/or re-usable binding materials, and other products that contain recycled content.

239033

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

239033

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. FD 35943

**MASSACHUSETTS DEPARTMENT OF TRANSPORTATION
– ACQUISITION EXEMPTION –
CERTAIN ASSETS OF PAN AM SOUTHERN LLC**

239033

MOTION TO DISMISS

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

EXHIBIT A

**PURCHASE AND SALE CONTRACT
DATED AS OF JUNE 26, 2015
[CERTAIN INTERNAL EXHIBITS EXCLUDED]**

PURCHASE AND SALE CONTRACT

between

THE MASSACHUSETTS DEPARTMENT OF TRANSPORTATION, as Buyer

and

239033

PAN AM SOUTHERN LLC, as Seller

ENTERED

Office of Proceedings

THE RIGHT OF WAY KNOWN GENERALLY AS THE ADAMS BRANCH
NORTH ADAMS, MASSACHUSETTS TO ADAMS, MASSACHUSETTS

August 14, 2015

Part of

Public Record

as of June 26, 2015

Table of Contents

ARTICLE 1. Agreement to Sell. 2

ARTICLE 2. Purchase Price and Payment. 2

ARTICLE 3. Conveyance of Title. 3

ARTICLE 4. Closing. 5

ARTICLE 5. Investigations by Buyer. 2390337

ARTICLE 6. AS IS, WHERE IS. ENTERED⁸

ARTICLE 7. Conditions to Closing; Extensions to Satisfy. Office of Proceedings

ARTICLE 8. Default. August 14, 2015

ARTICLE 9. Damage or Destruction. Part of¹¹

ARTICLE 10. Representations and Warranties of Seller. Public Record

ARTICLE 11. Seller's Covenants Prior to Closing. 13

ARTICLE 12. Apportionment of Taxes and Other Charges. 16

ARTICLE 13. Closing Costs. 17

ARTICLE 14. Broker. 18

ARTICLE 15. Representations and Warranties of Buyer. 18

ARTICLE 16. Eminent Domain. 19

ARTICLE 17. Further Assurances. 19

ARTICLE 18. Notices. 20

ARTICLE 19. Miscellaneous. 21

Exhibits [Update List]

- EXHIBIT A Description of Real Property
- EXHIBIT B Deed
- EXHIBIT C Bill of Sale
- EXHIBIT D Assignment and Assumption Agreement
- EXHIBIT E Buyer's Title Objections
- [ADDITIONAL EXHIBITS TO BE ADDED]

- EXHIBIT Form of Certification of Non-Foreign Status 239033
- EXHIBIT G Certification of Seller's Representations and Warranties
- EXHIBIT H Form of Designation of Person Responsible for Tax Reporting
- EXHIBIT Disclosure Statement under Chapter 7C of Section 38 ENTERED
- EXHIBIT J Certification of Buyer's Representations and Warranties Office of Proceedings
- EXHIBIT K Executed Operating Agreement August 14, 2015
- EXHIBIT L Intangibles and Permits Part of
- EXHIBIT L-1 Excluded Intangibles Public Record
- EXHIBIT M Environmental Reports
- EXHIBIT N Litigation

DEFINITIONS

TERM	SECTION
Access Agreement	5.3
Assignment and Assumption Agreement	3.3
Bill of Sale	3.2
Buyer	Preamble
Buyer's Title Notice	3.5
Buyer's Title Objections	3.5
Claims	5.2
Closing	4.1
Closing Date	4.1
Closing Statement	4.7.9
Contract	Preamble
Deed	3.1.1
Environmental Laws	10.1.8
Environmental Reports	10.1.8
Escrow Agent	2.1
Hazardous Materials	10.1.8
Included Fixtures	Recitals
Included Tangible Personal Property	3.2
Intangibles	Recitals
Labor Protection	2.3
Land	Recitals
New Encumbrance	3.7
Operating Agreement	7.1.3
Permits	Recitals
Permitted Exceptions	3.1.1
Property	Recitals
Purchase Price	ARTICLE 2
Railroad Line Plans	Recitals
Retained Freight Easement	3.1.1
Right of Way	Recitals
Seller	Preamble
Seller's Business Property	3.2

ENTERED
 Office of Proceedings
 August 14, 2015
 Part of
 Public Record

TERM	SECTION
Seller's Title Notice	3.7
STB	7.1.1
STB Decision	7.1.1
Tangible Personal Property	Recitals
Voluntary Monetary Encumbrance	3.5

239033

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

PURCHASE AND SALE CONTRACT

THIS AGREEMENT (the "**Contract**") is made as of this 26 day of June, 2015, by and between PAN AM SOUTHERN LLC, a Delaware limited liability company, having an address of 1700 Iron Horse Park, Billerica, Massachusetts (hereinafter referred to as "**Seller**"), and THE MASSACHUSETTS DEPARTMENT OF TRANSPORTATION, having an address of 10 Park Plaza, Boston, Massachusetts (hereinafter referred to as "**Buyer**").

RECITALS

239033

A. Seller is the owner of or has certain interests in the following real and personal property, which, taken together, is herein collectively called the "**Property**":

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

1. The right of way known generally as the Adams Branch from North Adams, Massachusetts to Adams, Massachusetts (the "**Right of Way**") consisting of Seller's right and interest in the Right of Way between Engineering Station 739+20 in Adams, Massachusetts and Engineering Station 974+65 in North Adams, Massachusetts and all adjoining property (the "**Land**") but excepting the Retained Freight Easement (defined below). The Land generally described on EXHIBIT A attached hereto and incorporated herein by reference is shown more specifically in a set of plans attached to the Deed (the "**Railroad Line Plans**").

2. The tracks, rails, ties, switches, ballast, crossings, bridges, trestles, culverts, buildings, structures, facilities, crossing protection devices, communication lines, poles, radio masts and signals which are affixed or located on or in the Land or, with respect to the Right of Way as of the date hereof (the "**Included Fixtures**").

3. All items of personal property, supplies and other materials primarily used in, or primarily relating to, the operation of the Property, including those needed to properly operate and maintain the signal systems and grade crossing systems (the "**Tangible Personal Property**").

4. All permits, licenses, certificates of occupancy, approvals, consents, variances and other authorizations that are used or necessary in connection with, the ownership or operation or other use of any of the Land (but excluding those reasonably necessary for the operation by Seller of the rail freight operations over the Retained Freight Easement (as defined below) (all such permits and the like, the "**Permits**").

5. All real property interests of Seller in the Property including, without limitation, benefits which are appurtenant to the Land, together with all improvements, structures and fixtures thereon, and all easements, leases, privileges, rights-of-way, the interest of Seller in all land underlying any adjacent public streets or roads which streets and roads exist by reason of an easement over the Land, appurtenances, occupancy agreements, and other rights belonging to Seller pertaining to, or accruing to the benefit of, the Property, subject, however, to the Retained Freight Easement.

6. All of Seller's right, title and interest in any contracts, agreements, guaranties, warranties, leases, licenses, occupancy agreements and easements now or hereafter relating to the ownership, use or operation of the Property, but excluding any contracts pursuant to which Seller provides freight rail transportation services for customers and other freight carriers and also excluding those certain side track agreements listed on EXHIBIT L-1 hereto (the "Intangibles").

B. Buyer and Seller desire that Seller retain and reserve, and not transfer to Buyer, the Retained Freight Easement, it being the intention of Buyer and Seller that Seller remain, and Buyer not become, a common carrier subject to any federal law relating to the provision of freight railroad transportation on such properties.

AGREEMENT

ENTERED

In consideration of the mutual covenants and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound hereby, the parties hereto agree as follows:

Office of Proceedings
August 14, 2015
Part of
Public Record

ARTICLE 1. Agreement to Sell.

Subject to the terms and conditions hereinafter set forth and specifically excluding the Retained Freight Easement, Seller agrees to sell and Buyer agrees to buy, the Property.

ARTICLE 2. Purchase Price and Payment.

The total purchase price (the "Purchase Price") for the Property is **One Million Five Hundred Thousand and 00/100 Dollars (\$1,500,000.00)**. Subject to the terms and conditions of this Contract, the Purchase Price shall be paid as follows:

2.1 Within seven (7) business days of the execution of this Contract, (i) Buyer and Seller shall mutually agree upon an individual to serve as escrow agent (the "Escrow Agent") for purposes of this Contract.

2.2 [reserved].

2.3 Subject to Seller's rights pursuant to Section 7.1.1 herein, Seller shall be responsible for Labor Protection costs, if any, occasioned by the transactions contemplated in this Contract. As used herein, "Labor Protection" shall mean the costs, if any, incurred by Seller as a result of the sale of the Property, which costs may be incurred pursuant to the provisions of a collective bargaining agreement bargained by Seller as a result of the sale of the Property or pursuant to a rule, decision, or final order of any governmental agency having jurisdiction over the event. Except as provided in the immediately preceding sentence, the Parties agree that each shall be solely responsible for its risks and costs associated with any challenge to the transactions contemplated in this Contract brought pursuant to law, a collective bargaining agreement, or otherwise.

ARTICLE 3. Conveyance of Title.

3.1 The Deed.

1. The Land shall be conveyed by release deed (the "Deed," which may consist of one or more individual deeds as Buyer and Seller reasonably determine) in the form attached hereto as EXHIBIT B, which Deed includes an exclusive, retained and perpetual easement in gross for Seller to provide rail freight service itself or through its contractor, and which shall provide that Seller has the exclusive right to provide freight rail service (which right shall be perpetual, unless abandoned pursuant to applicable law by Seller) (the "Retained Freight Easement"). Pursuant to Article 6 hereof, Seller makes no representations or warranties about the state of title to the Property. The following matters shall be deemed to be "Permitted Exceptions"

209033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

1. the Retained Freight Easement;
2. the lien of all ad valorem real estate taxes and assessments not yet due and payable as of the date of Closing (as hereinafter defined), subject to adjustment as herein provided;
3. local, state and federal laws, ordinances or governmental regulations, including but not limited to, building and zoning laws, ordinances and regulations, now or hereafter in effect relating to the Land;
4. all encumbrances, liens, survey matters, and other matters affecting or encumbering the Property which are deemed Permitted Exceptions as described in this Section 3.1 and Section 3.7.

2. Buyer shall cause Escrow Agent to record the Deed in the public records of the counties in which the Land lies, in accordance with the provisions of Sections 4.2.3 and 4.3 below. In the event that the description of the Land contained in the Deed and/or the Retained Freight Easement is deemed inadequate for recordation or filing purposes by any Registry of Deeds or any Registry District of the Land Court, as applicable, Buyer, with the reasonable cooperation of Seller but at Buyer's cost and expense, and as promptly as is reasonably practicable, shall make such changes and revisions as may be required by said Registry of Deeds or Registry District of the Land Court such that the Deed will be accepted by said Registry of Deeds or Registry District of the Land Court for recording or filing. In the event that, after Closing, a metes and bounds description for the Property is desired by Buyer and furnished to Seller by Buyer, at Buyer's sole cost and expense, then Seller shall execute

and deliver such further deeds or easements or confirmatory or corrective deeds and/or confirmatory or corrective easements, containing a description of the Land based on such metes and bounds description as may be acceptable to Buyer, Seller and to the Registries of Deeds or Registry Districts of the Land Court so involved. In the event that the preparation of such further or confirmatory deeds and/or easements requires any survey of the Land, or any portion thereof, or any search or examination of title with respect to the Property, or any portion thereof, Buyer shall pay any and all costs and expenses arising out of or connected with such survey, search or examination. The obligations of Buyer and Seller set forth in this Section 3.1.2 shall survive the Closing.

239033

3.2 The Included Fixtures and the Included Tangible Personal Property (as defined) shall be conveyed by a bill of sale (the "**Bill of Sale**") in the form attached hereto as EXHIBIT C. As used in this Contract, the term "**Included Tangible Personal Property**" shall mean all of the Tangible Personal Property except the following items of personal property that are or may be located on or in the Land on the Closing Date: railroad rolling stock, locomotives, automobiles, trucks, automotive equipment, machinery, office and computer equipment, and radio control equipment, furniture, tools, inventories, materials and supplies (collectively, "**Seller's Business Property**"). Any personal property located on the Land on the Closing Date other than Seller's Business Property shall be deemed to be Included Tangible Personal Property.

ENTERED

Office of Proceedings

August 14, 2015

Part of

Public Record

3.3 At the Closing, Seller shall assign to Buyer all of Seller's rights and interests in and to the Permits and the Intangibles and Buyer shall assume all of Seller's obligations and liabilities first arising on and after the Closing Date under or connected with the Intangibles by an assignment and assumption agreement (the "**Assignment and Assumption Agreement**") in the form attached hereto as EXHIBIT D. The conveyance or retention of any of the Permits or Intangibles shall carry with it the right to renew, modify, alter, amend and terminate the same; provided, however, that Buyer's rights under the Permits and Intangibles shall be subject to the Retained Freight Easement; and provided further that Seller shall not renew, modify, alter, or amend the Permits or Intangibles in such a way as to interfere with Buyer's reasonable utilization of the Property for its intended use for passenger rail service.

3.4 In the event that any subdivision approval is necessary for the completion of the sale, transfer and conveyance contemplated by this Contract, said approval shall be obtained by Seller and Buyer jointly, but at Buyer's cost and expense, including, without limitation, any and all fees, costs and expenses arising out of or connected with the obtaining of subdivision plans, the filing of the same with governmental body(ies), recordation thereof and legal fees, but excluding Seller's attorney's fees which shall be the sole responsibility of Seller.

3.5 Except as to any matters objected to by Buyer as set forth in the list of title objections ("**Buyer's Title Objections**") set forth in EXHIBIT E hereof, Buyer shall be deemed to have accepted any matter affecting the Property and the state of title (and to have waived any objections thereto). Seller has elected to cure Buyer's Title Objections and such matter shall be cured by Seller prior to Closing, and Buyer shall be given a reasonable opportunity prior to Closing to verify that such matter has in Buyer's sole discretion been cured to Buyer's satisfaction. Notwithstanding the foregoing or anything contained herein to the contrary, Seller

shall cause to be released or bonded over any and all mortgages or encumbrances securing the payment of money which Seller has caused or permitted to be recorded against the Property (each, a "**Voluntary Monetary Encumbrance**").

3.6 Seller shall be entitled to use such portion of the Purchase Price as is necessary to pay off all such Voluntary Monetary Encumbrances and Buyer's Title Objections. Buyer hereby acknowledges that any instruments evidencing the release or discharge of any Voluntary Monetary Encumbrances may be recorded at or after the Closing in accordance with standard conveyancing practice.

3.7 Seller will not voluntarily grant any mortgages, liens or other encumbrances affecting the Real Property prior to Closing; provided, however, that in the ordinary course of business Seller may enter into contracts pursuant to which Seller provides shipping services to customers and other freight carriers and/or side track agreements similar to those listed on EXHIBIT L-1 hereto. If a new encumbrance or survey matter affecting the Property arises prior to Closing which (i) encumbers or affects title to the Property, and (ii) as of the date of this Contract was not of record or did not encumber or affect title to the Property (each, a "**New Encumbrance**"), Buyer may, prior to Closing, notify Seller in writing of any such New Encumbrance. If Buyer does not object to any New Encumbrance as herein provided, such New Encumbrance shall be deemed a Permitted Exception. In the event that Buyer gives written notice ("**Buyer's Title Notice**") of objection to any New Encumbrance, Seller shall have two (2) business days following receipt of such Buyer's Title Notice to notify Buyer by written notice ("**Seller's Title Notice**") as to whether or not Seller has elected to cure the matter or matters objected to by Buyer in such Buyer's Title Notice. Failure of Seller to give the Seller's Title Notice shall be deemed an election by Seller not to cure such objection(s). If Seller elects or is deemed to have elected not to cure any matter objected to in such Buyer's Title Notice, Buyer shall elect within three (3) business days following the date of such election or deemed election either (i) to waive its objection or objections to the matter or matters not being cured by Seller, without reduction of the Purchase Price in which case such matter shall become a Permitted Exception; or (ii) to terminate this Contract by written notice to Seller, in which case neither Party shall have any further liability or obligation to the other hereunder, except as otherwise specifically provided for herein. The Closing Date shall be extended for a period up to forty-five (45) days in order to accommodate the process described in this Section 3.7. If any New Encumbrance is a Voluntary Monetary Encumbrance, Seller must satisfy the same on or before the Closing in the manner outlined in Section 3.5.

ARTICLE 4. Closing.

4.1 Unless extended pursuant to the terms of this Contract, the closing of the transactions contemplated hereunder (the "**Closing**") shall take place at 10 a.m. on the date that is fifteen (15) business days after the date of the STB Decision, as defined in Section 7.1.1 hereof (as such date may be extended pursuant to the terms hereof, the "**Closing Date**"). If the Closing does not occur by December 31, 2015, either Party may elect to terminate this Contract by written notice to the other Party, in which event: (i) except as otherwise provided herein, all other rights and obligations of the Parties hereto shall cease and, (ii) except as provided for herein, including but not limited to Section 5.2 and Article 14, this Contract shall be void and without recourse to the Parties hereto. The Closing shall occur through an escrow established with

239033

ENTERED

Office of Proceedings

August 14, 2015

Part of

Public Record

Escrow Agent (as defined herein). Simultaneously with the execution of this Contract, each of the Parties has delivered to Escrow Agent duly executed original copies of the Operating Agreement, as hereinafter defined (together with any closing documents contemplated under this Contract subsequently delivered to Escrow Agent prior to Closing, the "Escrowed Documents").

4.2 Escrow Agent hereby agrees to hold, administer, and release the Escrowed Documents pursuant to the terms of the Contract, and shall conduct the Closing and carry out the duties of Escrow Agent, in accordance with this Contract. Without limiting the foregoing and notwithstanding anything herein to the contrary, Escrow Agent shall conduct the Closing to the satisfaction of the following conditions:

1. Escrow Agent shall have received from Seller each of the documents, duly executed by Seller, and other items described in Section 4.7 herein;
2. Escrow Agent shall have received from Buyer the Purchase Price and each of the documents, duly executed by Buyer, and other items described in Section 4.8 herein;
3. Escrow Agent shall have received written closing instructions signed by authorized representatives of Seller and Buyer (the "Closing Instructions"), which Closing Instructions shall confirm that the conditions to Closing set forth in this Contract have either been satisfied or waived by Seller and/or Buyer, as appropriate, and directing the release of the Purchase Price to Seller and the release, and, as appropriate, the recording of certain of the documents listed in Section 4.7 and Section 4.8.

4.3 Upon the satisfaction of the requirements enumerated in Section 4.2 above, Escrow Agent shall, in the manner set forth in accordance with the Closing Instructions and closing statement signed by Seller and Buyer, release the Purchase Price to Seller and record the Deed and release each of the documents received from Buyer and Seller pursuant to this Contract, all consistent with the Closing Instructions.

4.4 In the event that the Escrow Agent has not received the Closing Instructions on or before December 31, 2015, Escrow Agent shall return any and all documents received pursuant to this Contract to the party that originally delivered the same, and the escrow established by this Contract shall terminate.

4.5 In performing any of its duties hereunder, Escrow Agent shall not incur any liability to anyone for any damages, losses, or expenses, except for gross negligence, willful misconduct, and it shall accordingly not incur any such liability with respect to (i) any action taken or omitted in good faith upon advice of its legal counsel given with respect to any questions relating to the duties and responsibilities of Escrow Agent under this Contract, including, but not limited to, the failure of the documents to be accepted for recording, or (ii) any action taken or omitted in reliance upon any instrument, including any written notice or instruction provided for in this Contract, not only as to its due execution and the validity and effectiveness of its provisions, but also as to the truth and accuracy of any information contained

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

289033

therein, which Escrow Agent shall in good faith believe to be genuine, to have been signed or presented by a proper person or persons, and to conform with the provisions of this Contract.

4.6 By joining and signing this Contract, Escrow Agent hereby agrees to be bound by the terms of this Contract, subject to each of the following conditions:

1. Escrow Agent shall not be liable to anyone for damages, losses or expenses arising out of this Contract or any action or failure to act by Escrow Agent hereunder so long as such action or failure to act is pursuant to a good faith interpretation of its obligations under this Contract.
2. Escrow Agent shall not be responsible for the acts or omissions of any other parties hereto.
3. Escrow Agent shall be entitled to assume in good faith the authenticity, validity and effectiveness of any notices delivered to it, and Escrow Agent shall not be obligated to make any investigation or determination of the truth and accuracy of any information contained therein.
4. Buyer and Seller jointly and severally agree to defend, indemnify and hold Escrow Agent harmless from any suits, actions, charges, liabilities, debts, claims or expenses arising from or out of or in connection with Escrow Agent's act or failure to act hereunder, except for any suits, actions, charges, liabilities, debts, claims or expenses arising from or out of the bad faith, gross negligence or willful misconduct of Escrow Agent. Escrow Agent shall be entitled to reimbursement by Buyer and Seller jointly and severally, for its reasonable costs and expenses incurred in the performance of its duties hereunder, including without limitation reasonable attorneys' fees of counsel retained by Escrow Agent. No amount owed by Buyer under this Section 4.6.4 shall be deemed a valid allowance or proration of the Purchase Price.

4.7 At the Closing, Seller shall have delivered to Escrow Agent, and Escrow Agent shall release in accordance with the terms hereof, the following:

1. The Deed, duly executed by Seller and acknowledged as required;
2. The Assignment and Assumption Agreement duly executed by Seller;
3. The Bill(s) of Sale, duly executed by Seller;
4. Originals of all Permits and Intangibles requested by Buyer not less than thirty (30) days prior to the Closing Date, to the extent the same are in Seller's possession or control, any renewals thereof, all amendments thereto, guarantees thereof and all material files, records and correspondence relating thereto;

239033

ENTERED

Office of Proceedings

August 14, 2015

Part of

Public Record

5. The Operating Agreement (as hereinafter defined) duly executed by Seller;

6. A certification of non-foreign status in the form attached hereto as EXHIBIT F, duly executed by Seller;

7. Evidence satisfactory to Buyer that all necessary approvals and/or consents by Seller and any constituent person of Seller otherwise required under Seller's organizational documents, have been delivered and such other evidence reasonably satisfactory to Buyer of Seller's good standing and authority and the authority of the signatory on behalf of Seller to convey the Property pursuant to this Contract;

8. A certificate, in the form attached hereto as EXHIBIT G, duly executed by Seller restating as of the Closing Date all of Seller's representations and warranties set forth in Article 10 and Article 14;

9. An original of a closing statement setting forth the Purchase Price and the closing adjustments and prorrations in form and substance satisfactory to Buyer and Seller (the "Closing Statement"), duly executed by Seller;

10. An original 1099 B Certification, duly executed by Seller;

11. A Designation of Person Responsible for Tax Reporting under Internal Revenue Code Section 6045 in the form of EXHIBIT H, attached hereto designating Seller as the party responsible for making the returns required under Internal Revenue Code Section 6045;

12. A disclosure statement submitted in compliance with the requirements of Mass. Gen. Laws, Chapter 7C, Section 38 in the form attached hereto as EXHIBIT I;

13. Keys to all locks at the Property;

14. The Closing Instructions, in a form mutually agreed to by the Parties; and

15. All other documents reasonably required to effectuate this Contract and the transactions contemplated hereby.

4.8 At the Closing, Buyer shall have delivered to Escrow Agent, and Escrow Agent shall release in accordance with terms hereof, the following:

1. The Purchase Price as adjusted in accordance with the terms hereof;
2. The Assignment and Assumption Agreement duly executed by Buyer;
3. The Operating Agreement duly executed by Buyer;
4. A duplicate original of the Closing Statement, duly executed by Buyer;
5. A certificate, in the form attached hereto as EXHIBIT J, duly executed by Buyer restating as of the Closing Date all of Buyer's representations and warranties contained herein;
6. The Closing Instructions, in a form mutually agreed to by the Parties; and
7. All other documents reasonably required to effectuate this Contract and the transactions contemplated hereby.

239033

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

ARTICLE 5. Investigations by Buyer.

5.1 Prior to the Closing, Seller shall provide to Buyer each of the following documents and information to Buyer:

1. copies of applicable Valuation Maps, track charts, surveys, plans and specifications for the Property in Seller's possession or control;
2. all title information in Seller's possession or control pertaining to each parcel in the Property;
3. copies of all Permits and Intangibles, any renewals thereof, all amendments thereto, guarantees thereof and all material files, records and correspondence relating thereto in Seller's possession or control;
4. without representation, and solely for informational purposes, copies of all reports and information materially related to the physical and environmental condition of all or any portion of the Property in Seller's possession or control, including but not limited to track maintenance reports, bridge reports, culvert reports, and similar records; and

5. copies of real estate tax bills and personal property bills relating to the Property for the current tax period in Seller's possession or control.

5.2 Whether or not the Closing occurs, Buyer hereby releases all rights or claims of Buyer against Seller for loss, cost or damage to the Property to the extent arising out of actions taken by Buyer or its agents, engineers or consultants at the Property between May 11, 2015, and the Closing, including the release by Buyer of Hazardous Materials on the Property, but expressly excluding claims, loss, cost or damage arising out of the discovery of pre-existing conditions (the "Claims"). Notwithstanding the foregoing, Buyer does not release, and ~~2015~~ be obligated to cause its contractors to release, Claims against Seller that arise because of Seller's gross negligence or willful misconduct (it being agreed that it shall not be "grossly negligent" for Seller to allow access to the Premises in its "as is" condition). In the event that the Closing occurs, and not otherwise, Buyer releases all rights or claims of Buyer against Seller relating to pre-existing conditions or for any costs of remediation of such conditions incurred by Buyer. The obligations of Buyer set forth in this Section 5.2 shall survive the Closing.

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

5.3 The terms under which Buyer will be permitted to access the Property at the Closing will be governed by that certain Access Agreement by and between Buyer and Seller dated this same June __, 2015 (the "Access Agreement").

ARTICLE 6. AS IS, WHERE IS.

Except for the representations and warranties contained in Article 10 and Article 14 herein, the Property is being acquired by Buyer in an "AS IS", "WHERE IS" condition, "WITH ALL DEFECTS" and "WITH ALL FAULTS". Buyer acknowledges that it will be acquiring the Property on the basis of its own investigations. Except as expressly set forth in Article 10 and Article 14 of this Contract, no representations or warranties, whether express, implied or statutory, have been made or are made and no responsibility has been or is assumed by Seller or by any officer, person, firm, agent or representative acting or purporting to act on behalf of Seller as to condition or repair of the Property or the value, expense of operation, or income potential thereof, the reliability of any information furnished to Buyer or as to any other fact or condition which has or might affect the Property or the condition, repair, value, expense of operation or income potential of the Property or any portion thereof.

The parties agree that all understandings and agreements heretofore made between them or their respective agents or representatives are merged in this Contract and the Exhibits hereto annexed, which alone fully and completely express their agreement, and that this Contract has been entered into after full investigation, or with the parties satisfied with the opportunity afforded for investigation, neither party relying upon any statement or representation by the other unless such statement or representation is expressly set forth in this Contract or the Exhibits annexed hereto. Buyer acknowledges that Seller has given Buyer the opportunity to inspect fully the Property and investigate all matters relevant thereto, and, to rely solely upon the results of Buyer's own inspections or other information obtained or otherwise available to Buyer, provided that the foregoing shall not diminish Buyer's rights with respect to any representations or warranties expressly made by Seller in this Contract. The provisions hereof shall survive Closing.

ARTICLE 7. Conditions to Closing; Extensions to Satisfy.

7.1 Mutual Contingencies. Without limiting any of the other conditions to Buyer's or Seller's obligations to close set forth in this Contract, the obligations of Buyer and Seller under this Contract are subject to the satisfaction at or prior to the time of Closing of each of the following conditions:

1. Notwithstanding anything to the contrary herein, neither Seller nor Buyer shall be obligated to close unless and until Buyer has obtained a determination (the "**STB Decision**") from the Surface Transportation Board ("**STB**") that, pursuant to the so-called "State of Maine" precedent, no STB approvals or exemptions from the need to receive such approvals are necessary for the consummation of a transaction covered by this Contract and the transactions contemplated hereby and hereunder. Buyer agrees that Buyer will promptly, on Buyer's and Seller's behalf, at Buyer's sole cost and expense, prepare and (after providing and receiving comments and consent from Seller for the same) file with the STB, all applications, petitions, requests, notices and necessary filings, in order to seek such STB determination for the transaction covered by this Contract and the Operating Agreement. In addition, it is a condition to Seller's and Buyer's obligation to close that any STB order or other action not contain or be subject to any condition that Seller or Buyer determine to be unacceptable, including but not limited to the imposition of labor protective conditions, which shall be deemed unacceptable without the need to provide notice thereof. Any other conditions imposed by the STB shall be presumed to be acceptable unless Seller or Buyer (as the case may be) gives the other notice within five (5) business days of the service date of the STB order or other written action that the condition is unacceptable, and the reason therefor. If the STB order or other action imposes labor protective or other conditions or either party does give such notice of unacceptability, then (i) the provisions of this Contract concerning the time for Closing shall not be effective, and (ii) this Contract shall be terminated and the Parties shall have no further liability to each other, except for any liability or indemnity pursuant to any provision hereof that, by its terms, survives any termination of this Contract.

2. Buyer and Seller shall have executed and delivered to Escrow Agent, the Deed, the Bill of Sale, the Assignment and Assumption Agreement, and any other documents that are reasonably required to carry out the transactions that are contemplated hereby;

3. Buyer and Seller shall have executed the operating agreement attached hereto as EXHIBIT K with respect to Seller's freight railroad operations on the Property on and after the Closing Date (the "**Operating Agreement**").

239033

ENTERED

Office of Proceedings

August 14, 2015

Part of

Public Record

7.2 Failure of Mutual Contingency. If any condition to Closing set forth in Section 7.1 is not satisfied at Closing (as the same may be extended), other than as a result of a default by Buyer or Seller (the remedies for which are provided in ARTICLE 8 below), (a) either Buyer or Seller may terminate this Contract by delivering written notice to the other party on the Closing Date, whereupon all obligations of the parties under this Contract shall terminate, except as otherwise provided for herein, or (b) Buyer and Seller may elect to close, notwithstanding the non-satisfaction of such condition, in which event each party shall be deemed to have waived any such condition.

7.3 Buyer's Conditions. Without limiting any of the other conditions to Buyer's obligations to close set forth in this Contract, the obligations of Buyer under this Contract are subject to the satisfaction at the time of Closing of each of the following conditions (any one of which may be waived in whole or in part by Buyer at or prior to Closing):

1. All of the representations and warranties by Seller set forth in Article 10 or Article 14 of this Contract shall be true and correct in all material respects when made and shall be true and correct in all material respects as of the Closing;
2. Subject to the provisions of ARTICLE 9 hereof, and except as may result from the performance of the Access Agreement, the Property shall be in substantially the same condition as the date hereof, reasonable use and wear excepted;
3. Seller shall have performed, observed, and complied in all material respects with all covenants and agreements required by this Contract to be performed by Seller at or prior to Closing;
4. There shall be no outstanding notices of violation with respect to the Property from any governmental authorities, except as may result from the performance of the Access Agreement; and
5. There shall have been no material adverse change, in Buyer's reasonable determination, in the information or items received and approved by Buyer from and after the date hereof, except as may result from the performance of the Access Agreement.

7.4 Failure of Buyer's Condition; Extension of Closing Date. If on the Closing Date, any condition to Buyer's obligation to close set forth in Section 7.3 has not been satisfied, Buyer shall have the right to either (a) terminate this Contract by delivering written notice to Seller, whereupon all obligations of the parties under this Contract shall terminate, except as otherwise provided for herein, or (b) direct Seller to use reasonable and good faith efforts to satisfy any such unsatisfied condition and, if Buyer so directs, the Closing Date shall be extended by written notice from Buyer to Seller for a period of up to thirty (30) days as specified in said notice and Seller shall thereafter use its good faith efforts to cure any such failure or default. If Buyer elects to extend the Closing Date pursuant to clause (b) of the immediately preceding sentence and any condition to Buyer's obligation to close set forth in Section 7.3 remains unsatisfied as of such

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

extended Closing Date, then Buyer shall have the right to terminate this Contract by delivering written notice to Seller on the Closing Date, whereupon all obligations of the parties under this Contract shall terminate, except as otherwise provided for herein. Notwithstanding any provision of this Contract to the contrary, the failure of Seller to satisfy any condition to Buyer's obligation to close set forth in Sections 7.3.1, 7.3.2, 7.3.4, or 7.3.5 shall not constitute a breach or default by Seller hereunder.

7.5 Seller's Conditions. Without limiting any of the other conditions to Seller's obligations to close set forth in this Contract, the obligations of Seller under this Contract are subject to the satisfaction at the time of Closing of each of the following conditions (any of which may be waived in whole or in part by Seller at or prior to Closing):

1. All of the representations and warranties by Buyer set forth in this Contract or any Exhibit attached hereto shall be true and correct in all material respects when made and shall be true and correct in all material respects as of the Closing; and
2. The Construction Project, as defined in the Access Agreement, is completed;
3. Buyer has paid to Seller the amounts of all liabilities owed to Seller pursuant to Section 4(b) of the Access Agreement; and
4. Buyer shall have performed, observed, and complied in all material respects with all covenants and agreements required by this Contract to be performed by Buyer at or prior to Closing.

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

7.6 Failure of Seller's Condition. If on the Closing Date any condition to Seller's obligations to close set forth in Section 7.5 has not been satisfied, Seller shall have the right to either (a) terminate this Contract by delivering written notice to Buyer on the Closing Date, whereupon (all obligations of the parties under this Contract shall terminate, except as otherwise provided for herein, or (b) elect to close, notwithstanding the non-satisfaction of such condition, in which event Seller shall be deemed to have waived any such condition. Notwithstanding any provision of this Contract to the contrary, the failure of Buyer to satisfy the condition to Seller's obligation to close set forth in Sections 7.5.1 shall not constitute a breach or default by Buyer hereunder.

ARTICLE 8. Default.

8.1 Seller Default. In the event of a breach or default by Seller of any of the representations or warranties described in Article 10 or Article 14 herein, or in the certificate to be delivered by Seller pursuant to Section 4.7.8 hereof, or any breach or default of Seller of any covenants or obligations hereunder on or before the Closing Date, Buyer's sole and exclusive remedy shall be the right to elect any one of the following rights and remedies:

1. Buyer shall have the right to terminate this Contract by notice to Seller, in which event all obligations of the parties

under this Contract shall terminate, except as otherwise provided for herein.

2. Buyer shall have the right to waive the default or failure of conditions and proceed to Closing in accordance with the provisions of this Contract.
3. Buyer may seek and obtain specific performance for conveyance of the Property on the terms and conditions set forth in this Contract.

239033

8.2 Buyer Default. In the event of a default by Buyer of any of its representations or warranties described in Article 14 or Article 15 herein, or in the certificate to be delivered by Buyer pursuant to Section 4.8.5 hereof, or any default by Buyer of any of its covenants or obligations hereunder, it would be extremely impracticable and difficult to estimate the damage and harm which Seller would suffer, and because a reasonable estimate of the total net detriment that Seller would suffer in the event of Buyer's failure to duly complete the acquisition hereunder is Ten Percent (10%) of the amount of the Purchase Price, Buyer shall pay to Seller a deemed amount of One Hundred Fifty Thousand Dollars (\$150,000.00), which payment shall be Seller's sole and exclusive remedy for damages arising from Buyer's failure to complete the acquisition in accordance with the terms hereof, and Seller shall have no further recourse or remedy at law or in equity for any such breach by Buyer hereunder; provided, however that, notwithstanding anything herein to the contrary, in addition to such deemed payment, Seller shall also have the right to enforce Buyer's obligations as specifically provided for herein, including but not limited to those obligations provided under Section 5. 2 and ARTICLE 14 hereof.

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

8.3 No Indirect Damages. Under no circumstances shall Seller or Buyer have the right to any indirect, consequential or punitive damages, "overhead" or similar charges, or any damages relating to lost profits or lost opportunities with respect to any such default by the other party hereto, it being understood that Seller and Buyer hereby waive their right to collect all other damages and all of their rights and remedies on account of a default hereunder by the other party hereto, and agree that the remedies described in this ARTICLE 8 shall be their sole and exclusive remedies in the event of any such default.

ARTICLE 9. Damage or Destruction.

9.1 Except pursuant to the Access Agreement, the risk of loss, damage or destruction to the Property by fire or other casualty or the taking of all or part of the Property by condemnation or eminent domain or by an agreement in lieu thereof until the Closing is assumed by Seller, provided, however, that Seller shall have no risk under this Section 9.1 with respect to any condemnation or eminent domain action taken by Buyer.

9.2 In the event of any damage or destruction of the Property of a type which, in Buyer's reasonable determination, will not materially impair Buyer's intended use of the Property for passenger rail service and that is fully covered by insurance subject to commercially reasonable insurance deductibles, then Buyer shall (unless such damage has been repaired by Seller in a good and workmanlike manner prior to Closing), accept title to the Property in its

destroyed or damaged condition. Buyer shall pay the full Purchase Price at Closing without reduction, and Seller shall pay over or assign to Buyer all rights to any proceeds of insurance payable with respect to such destruction or damage (less amounts reasonably expended by Seller in repairing the damage prior to the Closing Date) and Buyer shall have a credit against the Purchase Price in the amount of any deductible.

9.3 In the event of any damage or destruction of the Property of a type which, in Buyer's reasonable determination, materially impairs Buyer's intended use of the Property for excursion train service, or, in Buyer's reasonable determination, does not materially impair Buyer's intended use of the Property for excursion train service but is not fully covered by insurance subject to commercially reasonable insurance deductibles, then, if and only if the damage or destruction did not arise out of or under the Access Agreement and the work performed thereto, at Buyer's election, unless Seller has previously repaired or restored the Property to its former condition, (a) Buyer shall terminate this Contract by delivering notice to Seller, in which case all other obligations of the parties hereto shall cease except as otherwise specifically provided for herein, and this Contract shall be void and without recourse to the parties hereto, or (b) Seller shall pay over or assign to Buyer all rights to any proceeds of insurance payable with respect to such destruction or damage (less amounts reasonably expended by Seller in repairing the damage prior to the Closing Date) and Buyer shall have a credit against the Purchase Price in the amount of any deductible.

9.4 Seller shall promptly notify Buyer of any material damage or destruction to the Property or any notice received by it or information or awareness acquired by it regarding the threatening of or commencement of condemnation or similar proceedings.

ARTICLE 10. Representations and Warranties of Seller.

10.1 In order to induce Buyer to enter into this Contract and to consummate the purchase of the Property, Seller hereby represents and warrants to Buyer as of the date of this Contract as follows:

1. Authority. Seller is, and on the Closing Date shall be, a limited liability company duly and validly organized and existing and governed by the laws of the State of Delaware and registered to do business in the Commonwealth of Massachusetts. This Contract and all documents executed by Seller that are to be delivered to Buyer at the Closing are, or at the time of Closing will be, duly authorized, executed and delivered by Seller, and all consents required under Seller's organizational documents or by law will have been obtained. Except as otherwise specifically provided herein, all necessary third party or governmental consents and approvals to the transactions contemplated hereby have been obtained. This Contract and such documents are, or at the Closing will be, legal, valid, and binding obligations of Buyer enforceable in accordance with their terms, and do not, and at the time of Closing will not, violate any provisions of any agreement or judicial order to which Seller is a party or to which Seller or the Property is subject.

2. Condemnation. There are no condemnation, zoning, environmental or other land use regulation proceedings, either instituted or to Seller's knowledge planned to be instituted, that would materially and detrimentally affect the use, occupancy and operation of the Property for Buyer's intended purpose as a passenger rail line, or the value of the Property.

3. Intangibles and Permits. To Seller's knowledge, Seller has delivered to Buyer true and complete copies of (a) all Intangibles and Permits, and (b) all extensions, renewals and amendments thereto; and the Intangibles and Permits are in full force and effect. To Seller's knowledge, the list of Intangibles and Permits set forth on EXHIBIT L is true, correct and complete in all respects.

4. Abandonment. None of the Property has been abandoned or discontinued, and Seller has not filed a request for any such abandonment or discontinuance with the STB or otherwise.

5. Violations of Law. To Seller's knowledge, except as may be the result of the Access Agreement, the Property is not in violation of any law, ordinance, rule or regulation applicable to the Property to the extent that such violation would materially and detrimentally affect the use, occupancy and operation of the Property for Buyer's intended purpose as a passenger rail line, or the value of the Property. To Seller's knowledge, all Permits required for the ownership, use or operation of the Property have been duly and validly issued by the appropriate authority and are in full force and effect. Seller has not received any written notice of proceedings relating to the revocation or modification of any such Permits which would have an adverse effect on the Property.

6. Special Assessments. There are no special assessments filed, pending or, to the best of Seller's knowledge, proposed, against the Property or any portion thereof, including, without limitation, any street improvement or special district assessments.

7. Bankruptcy. Seller has not filed any petition, nor has been the party against whom a petition has been filed, in relation to any bankruptcy, including, requests for reorganization, for the appointment of a receiver or trustee, or for the arrangement of debt, nor to the best of Seller's knowledge, is any such action threatened or contemplated.

8. Environmental Matters. To Seller's knowledge, Seller has delivered to Buyer complete copies of all reports prepared for Seller or are in Seller's possession or control related to Hazardous Materials, asbestos, lead paint, radon, lead in drinking water, mold, oil, urea-formaldehyde and other similar substances, a list of which is attached

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

hereto as EXHIBIT M and incorporated herein by reference (the "Environmental Reports"). For purposes of this paragraph, the term "Environmental Laws" shall mean all existing applicable federal, state, or local laws, rules or regulations and any judicial or administrative interpretation thereof, including any judicial or administrative orders or judgments, relating to the protection of human health, safety and the environment; and the term "Hazardous Materials" shall include any substance, chemical, compound, product, solid, gas, liquid, waste, byproduct, pollutant, contaminant or material which is hazardous, toxic, ignitable, corrosive, carcinogenic or otherwise dangerous to human health or animal life or the environment or which are defined, determined or identified as such in any Environmental Laws or which are regulated or subject to clean-up authority under any Environmental Laws, including, but not limited to materials defined as (A) "hazardous waste" under the Federal Resource Conservation and Recovery Act; (B) "hazardous substances" under the Federal Comprehensive Environmental Response, Compensation and Liability Act, (C) "pollutants" under the Federal Clean Water Act; (D) "toxic substances" under the Toxic Substances Control Act; and (E) "oil or hazardous materials" under state law, including, without limitation, M.G.L. ch. 21E and the Massachusetts Contingency Plan (310 C.M.R. 40.00). Notwithstanding the foregoing, Buyer shall not in any way rely upon any statement or representation contained in the Environmental Reports, and in conducting this transaction, Buyer shall rely solely upon the results of Buyer's own inspections or other information obtained or otherwise available to Buyer. Seller expressly makes no representations or warranties as to the completeness, accuracy or any other aspect of the Environmental Reports.

9. Litigation. Except as set forth on EXHIBIT N attached hereto and incorporated herein by reference, there is not now pending nor, to Seller's knowledge, has there been threatened any legal action, suit or proceeding against Seller or the Property before any federal or state court, commission, regulatory body, administrative agency or other governmental body, domestic or foreign that would affect Seller's ability to perform under this Contract.
10. No Employees. Except as may be detailed in the Operating Agreement, Buyer shall have no obligation, liability or responsibility with respect to charges, salaries, vacation pay, fringe benefits or like items subsequent to Closing, nor with respect to any management or employment agreements with respect to the Property.
11. Section 1445. Seller is not a "foreign person" as defined by the Internal Revenue Code (the "Code"), Section 1445, Seller's Taxpayer or Employer I.D. Number is _____, and Seller will execute and deliver to Buyer at Closing an affidavit or certification in compliance with Code Section 1445.

12. Patriot Act/Executive Order 13224. Seller is not in violation of any legal requirements, now or hereafter in effect, relating to money laundering, anti-terrorism, trade embargoes and economic sanctions, including, without limitation, Executive Order 13224 (as defined below) and the Patriot Act (as defined below). Seller (i) is not (a) a Blocked Person (as defined below) or (b) owned, in whole or in part, directly or indirectly, by any Blocked Person; and (ii) does not (a) conduct any business or engage in any transaction or dealing with a Blocked Person or (b) deal in, or otherwise engage in, any transaction or dealing relating to any property, or interests in property, blocked pursuant to Executive Order 13224. 289033

As used herein, (i) "Blocked Person" is defined as any individuals or entities which (a) are owned or controlled by, or acting on behalf of the governments of countries currently listed under section 6(j) of the Executive Order Administration Act as supporting international terrorism, or (b) are owned or controlled by, are acting on behalf of, or are associated with international terrorism, as indicated by their listing on the Treasury Department's Specially Designated Nationals and Blocked Persons, as updated from time to time; (ii) "Executive Order 13224" is defined as Executive Order Number 13224, "Blocking Property Transactions with Persons who Commit, Threaten to Commit, or Support Terrorism," 66 Fed. Reg. 49079 (Sept. 23, 2001); and (iii) "Patriot Act" is defined as the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

13. Cross-Representations. Seller further represents and warrants that any provision specifically identified as a representation or warranty in the Deed, the Assignment and Assumption Agreement, the Bill(s) of Sale, the Operating Agreement, and any specifically identified representation or warranty contained in an agreement entered into at Closing by Seller and Buyer pursuant to Section 4.7.8 and Section 4.8.5 is true and correct.

10.2 The representations and warranties of Seller contained herein shall survive the Closing and delivery of the Deed for a period of five (5) years after Closing, and with respect to any written claim made within such period, until final unappealable adjudication or settlement thereof.

ARTICLE 11. Seller's Covenants Prior to Closing. Between the date hereof and the Closing:

11.1 Operation of Property. Subject to the provisions of this ARTICLE 11 hereof, Seller shall operate the Property or cause the Property to be operated in the ordinary course of business and consistent with past procedures heretofore followed by it in connection with such operation, including, without limitation, maintaining Seller's existing insurance coverage with respect to the Property provided, however, that Seller shall not cause or permit, other than that

anticipated by the Access Agreement, a change to all or any portion of the Property sufficient to interfere with Buyer's ability to provide passenger rail service on the Land.

11.2 Removal of Fixtures and Personal Property. Except pursuant to the Access Agreement, Seller shall not permit the removal of any item of the Included Fixtures or the Included Tangible Personal Property, from the Property unless the same is obsolete and is replaced by tangible personal property of equal or greater utility and value.

11.3 Contracts and Intangibles. Except as otherwise permitted by Section 3.7 hereof, Seller shall not (i) enter into any contract, agreement, lease, license, occupancy agreement relating to the ownership, use or operation of the Property, (ii) amend, modify or cancel any of the Intangibles (or any guaranty thereof) or (iii) grant any consents under, or waive any provisions of, any of the Intangibles, in each case without the prior written consent of Buyer, which consent shall not be unreasonably withheld, conditioned or delayed.

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

ARTICLE 12. Apportionment of Taxes and Other Charges.

12.1 Prorations. All normal and customarily proratable items, including limitation, real estate and personal property taxes and assessments, utility bills (except as hereinafter provided), collected rents and other income received in connection with any Intangibles, and Operating Contract payments (under Operating Contracts assumed by Buyer), shall be prorated as of the Closing Date, Seller being charged and credited for all of the same relating to the period up to the Closing Date and Buyer being charged and credited for all of the same relating to the period on and after the Closing Date, in all cases except to the extent the same has been affected by the work performed pursuant to the Access Agreement, which shall be allocated to Buyer to the extent of such effect, if any. If the amount of any such item is not known at the time of the delivery of the Deed, such item shall be apportioned on the basis of the comparable period of the prior year with a reapportionment within ninety (90) days of the Closing Date or as soon thereafter as the amount of the item is actually determined. All street, drainage, betterment and like assessments (or portions thereof) assessed against the Property prior to Closing relating to periods prior to Closing, shall be paid by Seller at Closing.

12.2 Utilities. Final readings and final billings for utilities will be made if possible as of the Closing Date, in which event no proration shall be made at the Closing with respect to utility bills, except to the extent the same has been affected by the work performed pursuant to the Access Agreement, which shall be allocated to Buyer to the extent of such effect, if any. Otherwise a proration shall be made based upon the parties' reasonable good faith estimate and a readjustment made within thirty (30) days after Closing or such later date as shall be necessary so that such readjustment may be based upon actual bills for such utilities. Seller shall be entitled to receive a return of all deposits presently in effect with the utility providers, and Buyer shall be obligated to make its own arrangements for deposits with the utility providers. The costs of charges for utilities incurred after the Closing shall be allocated as set forth in the Operating Agreement.

12.3 Survival. The provisions of this ARTICLE 12 shall survive the Closing for a period of one (1) year, and in the event of any error in performing the prorations contemplated by this Contract or if information becomes available subsequent to the Closing indicating that the

prorations performed at Closing were not accurate the parties hereto shall be obligated promptly to re-prorate the closing adjustments to correct such errors and to reflect such new information. A detailed statement shall be prepared at the Closing setting forth the manner of computation of the aforesaid proration adjustments.

ARTICLE 13. Closing Costs.

Except as hereinafter specifically provided, Seller and Buyer shall allocate all closing costs between them in accordance with standard practice in Boston, Massachusetts. Each of Seller and Buyer shall be responsible for preparing such documents as it is obligated to deliver pursuant to ARTICLE 4 hereof and for its own legal expenses. Seller and Buyer agree to allocate closing costs as follows:

13.1 Transfer taxes, deed taxes, or the like, if any, shall be paid by Buyer.

13.2 The cost of Buyer's inspections, if any, including, without limitation, costs for the updating of existing surveys or obtaining new surveys, environmental diligence, proper reviews and the like shall be paid by Buyer.

13.3 The cost of preparation and recordation of any releases and termination statements required to clear title to the Property shall be paid by Seller.

13.4 The cost of recordation of the Deed shall be paid by Buyer.

ARTICLE 14. Broker.

14.1 Each party represents hereby to the other that it dealt with no broker in the consummation of this Contract. Seller shall indemnify and save Buyer harmless from and against any claim, loss, cost, damage, liabilities and expense (including, without limitation, reasonable counsel fees and court costs) arising from the breach of such representation by Seller. Buyer shall save Seller harmless from and against any claim, loss, cost, damage, liabilities and expense (including, without limitation, reasonable counsel fees and court costs) arising from the breach of such representation by Buyer.

14.2 The provisions of this ARTICLE 14 shall survive Closing or the termination of this Contract.

ARTICLE 15. Representations and Warranties of Buyer.

Buyer hereby represents and warrants to Seller as of the date hereof as follows:

15.1 This Contract and all documents executed by Buyer that are to be delivered to Seller at the Closing are, or at the time of Closing will be, duly authorized, executed and delivered by Buyer, and all consents required under Buyer's organizational documents or by law will have been obtained. Except as otherwise specifically provided herein, all necessary third party consents and approvals to the transactions contemplated hereby have been obtained. This Contract and such documents are, or at the Closing will be, legal, valid, and binding obligations of Buyer enforceable in accordance with their terms, and do not, and, at the time of Closing will

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

not, violate any provisions of any agreement or judicial order to which Buyer is a party or to which it is subject.

15.2 There are no proceedings pending or, to Buyer's knowledge, threatened against it in any court or before any governmental authority or any tribunal which, if adversely determined, would have an adverse effect on its ability to purchase the Property or to carry out its obligations under this Contract.

15.3 Buyer is not in violation of any legal requirements, now or hereafter in effect, relating to money laundering, anti-terrorism, trade embargoes and economic sanctions, including, without limitation, Executive Order 13224 and the Patriot Act. Buyer (i) is not (a) a Blocked Person or (b) owned, in whole or in part, directly or indirectly, by any Blocked Person; and (ii) does not (a) conduct any business or engage in any transaction or dealing with a Blocked Person or (b) deal in, or otherwise engage in, any transaction or dealing relating to any property or interests in property, blocked pursuant to Executive Order 13224.

15.4 Buyer further represents and warrants that any provision specifically identified as a representation or warranty in the Deed, the Assignment and Assumption Agreement, the Bill(s) of Sale, or the Operating Agreement, and any specifically identified representation or warranty contained in an agreement entered into at Closing by Seller and Buyer pursuant to Section 4.7.8 and Section 4.8.5 is true and correct.

15.5 Buyer shall hold Seller harmless from any and all losses, costs, damages, liabilities and expenses (including, without limitation, reasonable counsel fees) arising out of any breach by Buyer of its representations and warranties hereunder.

15.6 The representations and warranties of Buyer contained herein shall survive the Closing and delivery of the Deed for a period of five (5) years after Closing, and with respect to any written claim made within such period, until final unappealable adjudication or settlement thereof.

ARTICLE 16. Eminent Domain.

16.1 Nothing contained herein shall preclude Buyer's ability to record a "Confirmatory Order of Taking" for the Property; provided, however, that such exercise shall not modify, amend, limit or restrict the Retained Freight Easement or the rights and obligations of the parties hereto under this Contract, nor reduce the Purchase Price.

16.2 If prior the Closing Date, all or a material portion of the Property is taken by condemnation, eminent domain or by agreement in lieu thereof by any governmental entity other than Buyer, or any proceeding to acquire, take or condemn all or a material portion of the Property is threatened or commenced by any governmental entity other than Buyer, Buyer may either terminate this Contract (in which event all other obligations of the parties hereto shall cease, except as otherwise specifically provided for herein) or purchase the Property in accordance with the terms hereof, without reduction in the Purchase Price, together with an assignment of Seller's rights to any award paid or payable by or on behalf of the condemning authority. If Seller has received payments from the condemning authority and if Buyer elects to purchase the Property, Seller shall credit the amount of said payments against the Purchase Price

at the Closing (less amounts reasonably expended by Seller in repairing the damage prior to the Closing Date).

16.3 The provisions of this ARTICLE 16 shall survive the Closing.

ARTICLE 17. Further Assurances.

Seller and Buyer shall cooperate with one another at reasonable times and on reasonable conditions and shall execute and deliver such instruments and documents as may be necessary in order fully to carry out the intent and purposes of the transactions contemplated hereby. Except for such instruments and documents as the parties were originally obligated to deliver by terms of this Contract, such cooperation shall be without additional cost or liability. The provisions of this ARTICLE 17 shall survive the Closing.

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

ARTICLE 18. Notices.

Any notice, consent or approval required or permitted to be given under this Contract shall be in writing and shall be deemed to have been given upon (i) hand delivery, (ii) one business day after being deposited with Federal Express or another reliable overnight courier service for next day delivery, or (iii) three business days after being deposited in the United States mail, registered or certified mail, postage prepaid, return receipt required, and addressed as follows:

To Seller: General Manager
 Pan Am Southern LLC
 1700 Iron Horse Park
 North Billerica, MA 01862

with a copy to:

Law Department
Pan Am Southern LLC
1700 Iron Horse Park
North Billerica, MA 01862

with a copy to:

Vice President Law
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

To Buyer:

Deputy Rail Administrator
Massachusetts Department of Transportation
10 Park Plaza
Boston, MA 02116
Attention: John D. Ray

with a copy to:

Goulston & Storrs
400 Atlantic Avenue
Boston, MA 02110
Attention: Peter N. Kochansky

239033

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

To Escrow
Agent:

Robinson & Cole LLP
One Boston Place
Twenty-Fifth Floor
Boston, MA 02108
Attention: Christopher S. Pitt, Esq.

or such other address as either party may from time to time specify in writing to the other. Any notice, consent, approval or extension of time hereunder may be given on behalf of a party by its attorney in accordance with the terms of this ARTICLE 18.

ARTICLE 19. Miscellaneous.

19.1 Cooperation. Buyer and Seller shall cooperate in providing such information as may be required by governmental authorities to approve the transactions contemplated by this Contract.

19.2 Assignment by Buyer; Successors and Assigns. Without the prior written consent of Seller, which consent may be withheld in Seller's sole discretion, Buyer shall not, directly or indirectly, assign this Contract or any of its rights hereunder. Subject to the terms of this paragraph, this Contract shall be binding upon, and inure to the benefit of, the parties hereto and their respective successors, heirs, administrators and assigns.

19.3 Entire Agreement; Amendment. The parties understand and agree that their entire agreement is contained herein and that no warranties, guarantees, statements, or representations shall be valid or binding on a party unless set forth in this Contract. It is further understood and agreed that all prior understandings and agreements heretofore had between the parties are merged in this Contract which alone fully and completely expresses their agreement and that the same is entered into after full investigation, neither party relying on any statement or representation not embodied in this Contract. This Contract may be changed, modified, altered or terminated only by a written agreement signed by Buyer and Seller.

19.4 Governing Law. This Contract shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts without regard to principles of choice of law or conflicts of law. For purposes of any suit, action or proceeding involving this Contract, Buyer and Seller hereby expressly submit to the jurisdiction of all federal and state courts sitting in the Commonwealth of Massachusetts and consent that any order, process, notice of motion or application to or by any such court or a judge thereof may be served within or without such court's jurisdiction by registered mail or by personal service, provided that a reasonable time for appearance is allowed, and the parties agree that such courts shall have exclusive jurisdiction over any such suit, action or proceeding commenced by either or both of said parties. In furtherance of such agreement, the parties agree upon the request of the other to discontinue (or agree to the discontinuance of) any such suit, action or proceeding pending in any other jurisdiction. Each party hereby irrevocably waives any objection that it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to this Contract brought in any federal or state court sitting in the Commonwealth of Massachusetts, and hereby further irrevocably waives any claim that such suit, action or proceeding brought in such court has been brought in an inconvenient form.

200033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

19.5 Waiver of Trial by Jury. In recognition of the benefits of having any disputes with respect to this Contract resolved by an experienced and expert person, Buyer and Seller hereby agree that any suit, action or proceeding, whether claim or counterclaim, brought or instituted by any party hereto on or with respect to this Contract or which in any way relates, directly or indirectly, to this Contract or any event, transaction, or occurrence arising out of or in any way connected with this Contract or the Property, or the dealings of the parties with respect thereto, shall be tried only by a court and not by a jury. EACH PARTY HEREBY KNOWINGLY, VOLUNTARILY, EXPRESSLY AND INTENTIONALLY WAIVES ANY RIGHT TO A TRIAL BY JURY IN ANY SUCH SUIT, ACTION, OR PROCEEDING.

19.6 No Waiver. No delay in exercising any right or remedy shall constitute a waiver thereof, and no waiver by Seller or Buyer of the breach of any covenant of this Contract shall be construed as a waiver of any preceding or succeeding breach of the same or any other covenant or condition of this Contract.

19.7 Time of the Essence; Time Periods. Time is of the essence of this Contract. Any reference in this Contract to the time for the performance of obligations or elapsed time shall mean consecutive calendar or business days, months, or years, as applicable. As used in this Contract, the term "business day" shall mean any day other than a Saturday, Sunday, recognized federal holiday or a recognized state holiday in the Commonwealth of Massachusetts. If the last date for performance by either party under this Contract occurs on a day which is not a business day, then the last date for such performance shall be extended to the next occurring business day.

19.8 Severability. If any term, provision, covenant, or condition of this Contract, or the application thereof to any person or any circumstance, is held to be unenforceable, invalid or illegal (in whole or in part) for any reason (in any relevant jurisdiction), the remaining terms, provisions, covenants, and conditions of this Contract, modified by the deletion of the unenforceable, invalid or illegal portion (in any relevant jurisdiction), will continue in full force and effect, and such unenforceability, invalidity, or illegality will not otherwise affect the enforceability, validity or legality of the remaining terms, provisions, covenants and conditions

of this Contract so long as this Contract as so modified continues to express, without material change, the original intentions of the parties as to the subject matter hereof and the deletion of such portion of this Contract will not substantially impair the respective expectations of the parties or the practical realization of the benefits that would otherwise be enforced upon the parties. The parties will endeavor in good faith negotiations to replace the prohibited or unenforceable provision with a valid provision, the economic effect of which comes as close as possible to that of the prohibited or unenforceable provision.

19.9 Counterparts. This Contract may be executed in any number of counterparts, each of which shall be deemed to be an original, but any number of which, taken together, shall be deemed to constitute one and the same instrument. 239033

19.10 Construction of Agreement. This Contract shall not be construed more strictly against one party than against the other merely by virtue of the fact that it may have been prepared primarily by counsel for one of the parties, it being recognized that both Buyer and Seller have contributed substantially and materially to the preparation of this Contract. ENTERED Office of Proceedings August 14, 2015 Part of Public Record

19.11 No Personal Liability. Buyer acknowledges and agrees that no general or limited partner, officer, director, equity owner, employee, agent, member, manager or representative of Seller (or any partner, member or manager of such a partner, member or manager) shall ever have any personal liability under this Contract. Seller acknowledges and agrees that no general or limited partner, officer, director, member, manager, equity owner, employee or representative of Buyer (or any partner, member or manager of such a partner, member or manager) shall ever have any personal liability under this Contract.

19.12 Merger. Except as otherwise specifically provided herein or in any closing document, the acceptance of the deed and the recordation thereof shall be deemed to be a full and complete performance and discharge of every agreement and obligation of Seller herein contained.

19.13 No Third Party Beneficiaries. Nothing in this Contract is intended, nor will be deemed, to confer rights or remedies upon any person or legal entity not a party to this Contract.

19.14 Captions. The captions in this Contract are inserted only for the purpose of convenient reference and in no way define, limit or prescribe the scope or intent of this Contract or any part hereof.

19.15 Recording. It is agreed hereby that neither this Contract nor any notice or memorandum hereof shall be recorded or filed with any Registry of Deeds or Registry District of the Land Court.

19.16 Marketing. During the term of this Contract, Seller agrees not to market the Property to any other prospective purchasers or accept any offers for the Property (whether or not subordinate to this Contract) from any other prospective purchasers.

19.17 No Offer. The submission of this Contract for review and execution shall not be deemed an offer by Seller to sell the Property nor a reservation or option for the Property on

behalf of Buyer. This Contract shall become effective and binding only upon the execution and delivery hereof by both Buyer and Seller.

19.18 Escrow Agent. Escrow Agent is a party to this Contract only for the purposes of Article 4 and this Section 19.18 (the "Escrow Provisions") and for no other purpose. Escrow Agent specifically is not a third party beneficiary of any of the provisions of this Contract except for the Escrow Provisions.

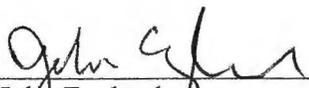
[Signatures to follow on next page]

239033

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

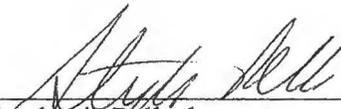
IN WITNESS WHEREOF, the parties hereto have executed this Contract as an instrument under seal as of the day and date first written above.

APPROVAL AS TO FORM

By: 
John Englander
General Counsel
Massachusetts Department of
Transportation

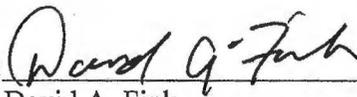
Buyer:

**MASSACHUSETTS DEPARTMENT OF
TRANSPORTATION 239033**

By:  **ENTERED**
Stephanie Pollack **Office of Proceedings**
Secretary and Chief Executive Officer **August 14, 2015**
Part of
Public Record

Seller:

PAN AM SOUTHERN LLC

By: 
David A. Fink
President

Escrow Agent:

[ESCROW AGENT]

By: _____
Name:
Title:

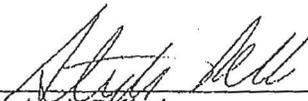
IN WITNESS WHEREOF, the parties hereto have executed this Contract as an instrument under seal as of the day and date first written above.

APPROVAL AS TO FORM

Buyer:

**MASSACHUSETTS DEPARTMENT OF
TRANSPORTATION** 239033

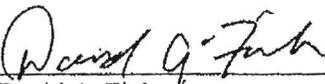
By: 
John Englander
General Counsel
Massachusetts Department of
Transportation

By: 
Stephanie Pollack
Secretary and Chief Executive Officer

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

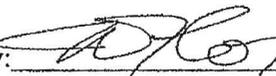
Seller:

PAN AM SOUTHERN LLC

By: 
David A. Fink
President

Escrow Agent:

[ESCROW AGENT] ROBINSON & COLE LLP

By: 
Name: MATTHEW J. LAWLOR
Title: PARTNER

[Purchase Contract Signature Page]

EXHIBIT A
DESCRIPTION OF PROPERTY

[INSERT LEGAL DISCRIPTION]

239033

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

EXHIBIT A-1
PLANS AND VALUATION MAPS

239033

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

[ADDITIONAL EXHIBITS TO BE ADDED]
EXHIBIT F

CERTIFICATION OF NON-FOREIGN STATUS

Section 1445 of the Internal Revenue Code provides that a transferee (or buyer) of a U.S. real property interest must withhold tax if the transferor is a foreign person. For U.S. tax purposes (including section 1445), the owner of a disregarded entity (which has legal title to a U.S. real property interest under local law) will be the transferor of the property and not the disregarded entity. To inform the transferee that withholding of tax is not required upon the disposition of a U.S. real property interest by _____ ("Transferor"), the undersigned being duly authorized hereby certifies the following on behalf of Transferor:

1. Transferor is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);

2. Transferor is not a disregarded entity as defined in §1.1445-2(b)(2) *Transferor is a disregarded entity and _____ is its sole member*];

3. Transferor's U.S. employer identification number is _____; and

4. Transferor's office address is 1700 Iron Horse Park, North Billerica, Massachusetts, 01862.

Transferor understands that this certification may be disclosed to the Internal Revenue Service by transferee and that any false statement contained herein could be punished by fine, imprisonment or both.

Under penalties of perjury, the undersigned declares that he/she has examined this certification, and to the best of his/her knowledge and belief it is true, correct, and complete.

By: _____
Name:
Title:

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

EXHIBIT H

DESIGNATION OF PERSON RESPONSIBLE FOR
TAX REPORTING UNDER INTERNAL REVENUE CODE SECTION 6045

The undersigned is hereby designated as the person who will make the information return and furnish the statement to the transferor as required under Section 6045 of the Internal Revenue Code of 1986, as amended.

The undersigned hereby acknowledges that he, she, or it is responsible for making and furnishing such return and statement and agrees to do so and agrees to retain this document for four years following the close of the calendar year during which the closing of the transaction described below occurs.

239033

The undersigned hereby acknowledges that he, she, or it is either the person responsible for closing the transaction, the attorney for the transferee, the attorney for the transferor, the title or escrow company, or the mortgage lender, in each case within the meaning of any applicable regulations under Internal Revenue Code Section 6045.

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

Name and Address of the Transferor:

Pan Am Southern LLC
1700 Iron Horse Park
North Billerica, MA 01862

Name and Address of the Transferee:

Massachusetts Department of Transportation
10 Park Plaza 02116

Address and Other Information Necessary to Identify the Property:

[INSERT LEGAL DISCRPTION]

DESIGNATED PERSON

Print Name

Date

Signature

Title (if signing for entity)

239033

Address

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

Taxpayer ID Number

Telephone Number

EXHIBIT I

DISCLOSURE STATEMENT UNDER SECTION 38
OF CHAPTER 7C OF THE MASSACHUSETTS GENERAL LAWS

1. Location: See Exhibit A attached hereto.
2. Grantor: Pan Am Southern LLC
3. Grantee: Massachusetts Department of Transportation

239033

4. I hereby state, under the pains and penalties of perjury, that the true names and addresses of all persons who have or will have a direct or indirect beneficial interest in the above listed property are listed below in compliance with the provisions of Section 40I of Chapter 7.

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

NAMES AND ADDRESSES OF ALL PERSONS WITH SAID BENEFICIAL INTEREST:

5. The undersigned also acknowledges and states that none of the above listed individuals is an official elected to public office in the Commonwealth of Massachusetts, nor is an employee of the State Department of Capital Asset Management and Maintenance.

SIGNED under the penalties of perjury.

PAN AM SOUTHERN LLC

By: _____

Name:

Title:

Date: As of _____, 2014

Exhibit A to Disclosure Statement Under Section 38
of Chapter 7C of the Massachusetts General Laws

239033

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

EXHIBIT L

LIST OF INTANGIBLES AND PERMITS

239033

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

EXHIBIT L-1
EXCLUDED INTANGIBLES

239033

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

EXHIBIT M
ENVIRONMENTAL REPORTS

239033

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

EXHIBIT N
LITIGATION

239033

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

239033

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. FD 35943

**MASSACHUSETTS DEPARTMENT OF TRANSPORTATION
– ACQUISITION EXEMPTION –
CERTAIN ASSETS OF PAN AM SOUTHERN LLC**

239033

MOTION TO DISMISS

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

EXHIBIT B

**2015 OPERATING AGREEMENT
DATED AS OF JUNE 26, 2015**

2015 OPERATING AGREEMENT

BETWEEN

THE MASSACHUSETTS DEPARTMENT OF TRANSPORTATION

AND

PAN AM SOUTHERN LLC

239033

FOR ADAMS BRANCH

ENTERED

Office of Proceedings

August 14, 2015

Part of

Public Record

INTRODUCTION AND RECITALS

This agreement (the "Agreement") is made this ___ day of _____, 2015, by and between the Massachusetts Department of Transportation, a body politic and corporate created by and acting pursuant to Chapter 6C of the General Laws of the Commonwealth of Massachusetts, as amended, having an address of 10 Park Plaza, Boston, Massachusetts ("MassDOT"), and Pan Am Southern LLC, a Delaware limited liability company, having an address of 1700 Iron Horse Park, Billerica, Massachusetts ("PAS") (hereinafter the "Parties," or each a "Party"), in order to memorialize their mutual understanding with regard to certain rights to conduct passenger and freight services on certain property owned by MassDOT, and for the purpose of defining their respective rights and obligations with respect to the same.

WHEREAS, MassDOT and PAS entered into that certain Purchase and Sale Contract dated as of _____, 2015 (the "Purchase Contract"), pursuant to which PAS has agreed to convey to MassDOT certain real property and railroad assets that comprise a section of railroad line known as the Adams Branch, between Engineering Station 739+20 in Adams, Massachusetts, and Engineering Station 974+65 in North Adams, Massachusetts, all as described in Exhibit A attached hereto, to MassDOT (the "Property") and, as set forth in the Purchase Contract, PAS shall retain the Freight Easement (as hereinafter defined); and

WHEREAS, the transfer of the Property from PAS to MassDOT is contingent upon, among other things, the execution and delivery by MassDOT and PAS of an operating agreement setting forth the rights and obligations of the Parties with respect to the Property.

NOW, THEREFORE, the Parties agree as follows:

SECTION 1. DEFINITIONS.

"Access Agreement" shall have the meaning ascribed thereto in Section 3.3.

“Additional MassDOT Maintenance” shall have the meaning ascribed thereto in Section 3.1(d).

“Additional PAS Maintenance” shall have the meaning ascribed thereto in Section 3.1(e).

“Agreement” shall have the meaning ascribed in the Introduction to this Agreement.

“Annual Credit” shall have the meaning ascribed in Section 4.4.

“Appropriate Statutory and Regulatory Authority” means 49 U.S.C. § 10903, 23903a and 49 C.F.R. part 1152, and the STB’s interpretations thereof.

“Clearances” shall have the meaning ascribed thereto in Section 6.5.

“Effective Date” means the date on which PAS conveys the Property to MassDOT.

“Effective Interest Rate” means the then applicable late payment interest rate established by the Office of the Comptroller of the Commonwealth of Massachusetts pursuant to Section 4.00.

“Excursion Operating Window” shall have the meaning ascribed in Section 2.3(b).

“Excursion Passenger Service” means MassDOT’s, or its Operating Contractor’s, operation of tourist, recreational passenger, or special event trains exclusively between Adams, Massachusetts, and North Adams, Massachusetts, over the Rail Operating Property. Excursion Passenger Service does not include the operation, in whole or in part, of any passenger trains connecting to any commuter or intercity passenger train service.

“Excursion Passenger Service Commencement Date” shall have the meaning ascribed in Section 2.3(e).

“Excursion Passenger Service Equipment” means rail cars and locomotive power used to provide Excursion Passenger Service.

“Excursion Passenger Service Commencement Notice” shall have the meaning ascribed in Section 2.3(e).

“Excursion Passenger Service Support” means any maintenance of any Passenger Facilities located on the Property.

“Event of Default” shall have the meaning ascribed in Section 11.1(a).

“Force Account Work” shall have the meaning ascribed in Section 5 hereof.

“FRA” means the Federal Railroad Administration.

“Freight Easement” means the perpetual and exclusive easement to provide Freight Rail Service and such other rights over the Rail Operating Property reserved and retained by PAS as

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

are described in any deed or deeds transferring the Property from PAS to MassDOT pursuant to the Purchase Contract, and any additional easements to provide freight rail service and such other rights over the Rail Operating Property as may be added to this Agreement from time to time by mutual agreement of the Parties.

“Freight Operating Window” shall have the meaning ascribed in Section 2.3(a).

“Freight Rail Service” means the full range of services and activities performed in connection with the provision of current and future freight common carrier and contract carrier obligations on the Rail Operating Property and other activities permitted or required under this Agreement. Freight Rail Service includes PAS’s right to transport railroad material, equipment, ballast, rails and the like in support of Freight Rail Service.

“Holidays” shall have the meaning ascribed in Section 2.3(a).

“Maintenance Services” means all actions necessary or required for the maintenance, renewal, and repair of the rights-of-way, tracks, bridges, signals, communications equipment of any relevant section of the Rail Operating Property in accordance with the Maintenance Standard. Maintenance Services shall not include any actions necessary or required for the maintenance of Passenger Facilities. Maintenance Services shall include actions necessary or required for the maintenance of portions of the Rail Operating Property used solely in connection with Freight Rail Service.

“Maintenance Standard” means the standards to be set from time to time by MassDOT, which in all instances shall be appropriate for freight rail operations and which shall always meet or exceed the standard required by FRA rules and regulations for the applicable class of track provided for in this Agreement.

“MassDOT” shall have the meaning set forth in the recitals of this Agreement.

“MassDOT Employees” shall mean the employees and agents of MassDOT, MassDOT’s operating contractors and said contractors’ employees, and any contractors, employees, or persons performing Excursion Passenger Service Support, or any other maintenance, sales, or other support services at the Property or related to the Excursion Passenger Service.

“MassDOT Equipment” shall have the meaning set forth in Section 9.9.

“MassDOT Passenger” means: (i) any person who is on board, or getting on or alighting from, a train providing Excursion Passenger Service; (ii) any person who is not on board any train who (x) has purchased or is purchasing a ticket valid on a train providing Excursion Passenger Service; (y) holds or otherwise is acquiring a pass document reflecting personal pass privileges granted by a party providing Excursion Passenger Service that is valid for travel on a train providing Excursion Passenger Service, or (z) is acquiring or preparing to acquire information or otherwise visit the site of the Excursion Passenger Service; or (iii) any person who is on the Property for the purpose of accompanying or meeting any person described in (i) or (ii) of this sentence.

239033
ENTERED
Office of Proceedings
August 14, 2015

Part of
Public Record

“MassDOT Property” shall have the meaning set forth in Section 9.5.

“MassDOT Trains” means all trains operated by or on behalf of MassDOT on the Rail Operating Property, including but not limited to any Excursion Passenger Service.

“Northern Switch” means the northernmost switch located on the Rail Operating Property no fewer than fifty (50) feet before the switch connecting to the freight main line.

“Operating Contractor” means any entity contracted with by MassDOT to provide Excursion Passenger Service on behalf of MassDOT.

“Party” and “Parties” shall have the meaning set forth in the Recitals to this Agreement.

“PAS” shall have the meaning set forth in the Recitals to this Agreement.

“PAS Employees” shall mean the employees and agents of PAS, and PAS’s operating contractors and said contractors’ employees.

“PAS Equipment” shall have the meaning set forth in Section 9.9.

“PAS Operating Contractor” shall have the meaning set forth in Section 2.1.

“PAS Property” shall have the meaning set forth in Section 9.4.

“PAS Trains” means all trains operated by or on behalf of PAS on the Rail Operating Property.

“Passenger Facilities” means the non-operating portions of the Property exclusively used for and related to Excursion Passenger Service, including but not limited to stations, platforms, on ground boarding and detraining areas, parking areas and passenger service amenity facilities, which shall be owned, controlled, and/or used by MassDOT and third parties.

“Person” means any individual, corporation, partnership, association, trust or any other entity or organization, including, without limitation, a government, a public agency, political instrumentality or political subdivision or authority.

“Property” shall have the meaning set forth in the Recitals to this Agreement, and shall include but not be limited to the Rail Operating Property.

“Purchase Contract” shall have the meaning set forth in the recitals to this Agreement.

“PTC” shall have the meaning set forth in Section 4.6.

“Rail Operating Property” means those portions of the Property used by any Party hereto for the provision of rail services and excludes Passenger Facilities and all other non-operating portions of the Property.

239033

ENTERED

Office of Proceedings

August 14, 2015

Part of

Public Record

“Service Suspension” means the suspension of Freight Rail Service and/or Excursion Passenger Service in connection with the Maintenance Services.

“STB” means the Surface Transportation Board of the United States Federal Government.

“Wreck Clearing” shall have the meaning set forth in Section 17.4(c)

SECTION 2. GENERAL OPERATING RIGHTS

239033

2.1 PAS Freight Rail Service.

Consistent with the Freight Easement and subject to this Agreement, PAS, and only PAS, has the exclusive right to perform Freight Rail Service on the Rail Operating Property. PAS may elect to perform Freight Rail Service through the services of a designated contractor (**Operating Contractor**). PAS shall at all times provide Freight Rail Service over the Rail Operating Property in accordance with FRA regulations and the terms of this Agreement and the terms of the Freight Easement. Subject to this Agreement, PAS in its sole discretion has the unilateral right to determine the levels of Freight Rail Service.

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

2.2 MassDOT Excursion Passenger Service.

MassDOT, and only MassDOT, has the exclusive right to perform Excursion Passenger Service on the Rail Operating Property. MassDOT may elect to perform Excursion Passenger Service in only one of two ways: (i) directly or (ii) through the services of its Operating Contractor performing such Excursion Passenger Service on behalf of MassDOT. MassDOT shall at all times provide Excursion Passenger Service over the Rail Operating Property in accordance with FRA regulations and the terms of this Agreement. Subject to this Agreement, MassDOT in its sole discretion has the unilateral right to determine the levels of Excursion Passenger Service. In performing Excursion Passenger Service, MassDOT and/or its Operating Contractor shall:

(a) Ensure that all Excursion Passenger Service Equipment is in good working order and complies with all applicable federal and state safety rules, orders, laws and regulations, including without limitation all applicable FRA and AAR rules, orders and regulations.

(b) Ensure that all public and private at grade crossings and operations thereover comply with: (i) the applicable regulations and orders of any state or federal agency with jurisdiction over such grade crossings, if any, including but not limited to the extent such regulations and orders are associated with providing adequate protection for vehicular, pedestrian and rail traffic, and (ii) PAS’s operating rules.

(c) Each week, prior to operating the first Excursion Passenger Service during an Excursion Operating Window, physically inspect the Rail Operating Property to ensure no PAS Equipment or train cars are fouling the track.

(d) Prior to running the first train each day, confirm with the dispatcher that no other operations are being performed on the Rail Operating Property that could pose a safety risk to Excursion Passenger Service. Subsequent to the final operation each day, confirm to the dispatcher that the Excursion Passenger Service is safely clear of the Rail Operating Property.

(e) In no case shall MassDOT or its Operating Contractor operate any Excursion Passenger Service past the Northern Switch of the Rail Operating Property or within fifty feet of the freight main line.

239033

(f) The Parties hereby acknowledge and agree that MassDOT and/or its contractors may have access to the Property for inspection purposes and all other purposes related to train operations on the Property.

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

2.3 Operations over the Property.

(a) Freight Operating Window.

PAS has the exclusive right to use the Rail Operating Property between each Monday at 02:00 and each Friday at 14:00 Eastern Standard Time, with the exception of between 00:01 and 24:00 Eastern Standard Time on federal holidays recognized by PAS's collective bargaining agreements ("Holidays"), to provide Freight Rail Service ("Freight Operating Window"). Prior to January 1 of each year, PAS shall provide MassDOT with a list setting forth the date of all Holidays in such calendar year. During any Freight Operating Window, PAS may, in its sole and absolute discretion and without compensation, operate as many Freight Rail Service train round trips as it deems reasonable or necessary.

(b) Excursion Operating Window.

MassDOT has the exclusive right to use the Rail Operating Property between each Friday at 14:00 and each Monday at 02:00 Eastern Standard Time, as well as between 00:01 and 24:00 Eastern Standard Time on Holidays, to provide Excursion Passenger Service ("Excursion Operating Window"). During any Excursion Operating Window, MassDOT or its Operating Contractor may, in its sole and absolute discretion, operate as many Excursion Passenger Service train round trips as it deems reasonable or necessary.

(c) Scheduling.

Should PAS or MassDOT desire to provide service outside of its exclusive operating window specified in Section 2.3(a) or (b), respectively, the Parties shall mutually agree to such exceptions on an individual basis, such agreement not to be unreasonably withheld, conditioned, or delayed. In no instances will either (i) MassDOT provide Excursion Passenger Service over the Rail Operating Property at the same time that PAS is providing Freight Service or (ii) PAS provide Freight Service over the Rail Operating Property at the same time that MassDOT is providing Excursion Passenger Service.

(d) Other MassDOT Use.

MassDOT has the right to periodically run trains over the Rail Operating Property for the purpose of (x) inspecting the Property and (y) transporting railroad material and equipment, ballast, rails, and the like owned by MassDOT or its contractors (but not common or contract carriage of freight). The right described in the foregoing sentence shall only be exercised during an Excursion Operating Window, in an intermittent, but not regularly scheduled, manner.

(e) Excursion Passenger Service Commencement

239033

MassDOT shall provide (or cause its Operating Contractor to provide) “Excursion Passenger Service Commencement Notice” to PAS advising PAS of the date on which MassDOT or its Operating Contractor intends to commence Excursion Passenger Service on the Rail Operating Property (such date, an “Excursion Passenger Service Commencement Date”) at least sixty (60) days prior to such Excursion Passenger Service Commencement Date. MassDOT shall enter into an Operating Agreement with its Operating Contractor.

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

(f) No Additional Passenger Service.

MassDOT or its contractors shall not provide any commuter or intercity passenger service over the Rail Operating Property. With the exception of its Operating Contractor providing Excursion Passenger Service in accordance with Section 2.2, MassDOT shall not permit any other entity to provide any form of passenger service over the Rail Operating Property.

2.4 Discontinuance of Freight Rail Operations.

(a) PAS-Initiated Abandonment or Discontinuance.

In the event that PAS ceases to have current use, or, in PAS's sole and absolute determination, reasonably foreseeable future use, of any segment of the Rail Operating Property, or, if in PAS's sole and absolute discretion it determines that it no longer wishes to continue the use of any such segment for Freight Rail Service, PAS will have the option to seek from the STB approval pursuant to Appropriate Statutory and Regulatory Authority, which approval may come in the form of an exemption from the requirement to obtain such approval, to abandon and/or discontinue Freight Rail Service over all or any portion of such segment of the Rail Operating Property. MassDOT shall not oppose any such request by PAS to abandon and/or discontinue Freight Rail Service. Should PAS receive such approval for abandonment, or exemption from such approval for abandonment, PAS shall promptly notify MassDOT, which notification shall designate a specific date upon which such authority to abandon is to be consummated. Upon such consummation, PAS shall no longer have the right to operate Freight Rail Service over such abandoned portions of the Rail Operating Property, but otherwise the property shall continue to be subject to the terms of this Agreement. Upon the consummation, any

discontinued portions of the Rail Operating Property shall continue to be subject to the terms of this Agreement and the Interstate Commerce Act as amended from time to time.

(b) Termination of Agreement upon Total Abandonment.

This Agreement will terminate if PAS abandons its right to provide Freight Rail Service over all of the Rail Operating Property under Sections 2.4(a).

(c) Limitations on Adverse Abandonment.

MassDOT hereby agrees that it will not commence or otherwise seek or pursue any adverse abandonment proceedings with the STB.

2.5 Discontinuance and Restoration of Excursion Passenger Service

In the event that MassDOT discontinues all Excursion Passenger Service on the Rail Operating Property, MassDOT shall have the right to restore Excursion Passenger Service on the Rail Operating Property upon rehabilitation of the Rail Operating Property to a condition suitable for Excursion Passenger Service and delivery of an Excursion Passenger Service Commencement Notice pursuant to Section 2.3(e).

2.6 Third Party Operations on the Rail Operating Property

The Parties shall ensure that their respective contractors and subcontractors performing work or services on the Rail Operating Property perform and complete their respective work or services in accordance with this Agreement.

SECTION 3. MAINTENANCE SERVICES AND ACCESS

3.1 Maintenance Services. Maintenance Services for the Property shall be performed as follows:

(a) Except for so long as the placement of temporary speed restrictions is reasonable or necessary, the Rail Operating Property shall be maintained as provided for in this Section 3.1.

(b) PAS shall maintain the Rail Operating Property in FRA Class I condition.

(c) At any time, PAS may choose not to perform, or have performed, any maintenance on portions of any industrial sidings and assets required solely in relation to Freight Rail Service, based upon lack of freight demand or otherwise.

(d) MassDOT, in its sole and absolute discretion and at its sole cost and expense, may request and/or provide maintenance in excess of what is required pursuant to Section 3.1(b) ("Additional MassDOT Maintenance").

239033

ENTERED

Office of Proceedings

August 14, 2015

Part of
Public Record

(e) PAS, in its sole and absolute discretion and at its sole cost and expense, may request and/or provide maintenance in excess of what is required pursuant to Section 3.1(b) ("**Additional PAS Maintenance**").

(f) Should a PTC system (but not including any PTC equipment installed on PAS locomotives) be installed, the maintenance and renewal of that PTC system shall be an element of the Maintenance Services.

(g) All Maintenance Services, whether performed by PAS or by MassDOT or its contractor, shall be undertaken in a manner so as to minimize interference with train operations. In all circumstances where a track outage is required for the performance of Maintenance Services (except emergency maintenance services), such maintenance shall be scheduled and the Party performing such maintenance shall provide to the other Party written notice of such maintenance work at least fifteen (15) calendar days in advance of any such track outage. Notwithstanding the foregoing, each Party performing Maintenance Service work shall make reasonable efforts to provide written notice of such thirty (30) days in advance of any such track outage. Notwithstanding any provision of this Agreement to the contrary, PAS and MassDOT acknowledge that one or more Service Suspensions may be necessary in order perform Maintenance Services. All Maintenance Services shall be performed in a manner to minimize, to the extent practicable, and to mitigate disruption to the Freight Rail Service and Excursion Passenger Service.

(h) The Party designated to perform the Maintenance Services shall provide and furnish all labor, administrative, professional, and supervisory personnel necessary for its performance of the Maintenance Services. Such personnel or subcontractor personnel involved in any aspect of providing services under this Agreement shall be subject to the direction, supervision, and control of the Party designated to perform said Maintenance Services. Said Party designated to perform such Maintenance Services shall be solely responsible for all labor relations issues relating to their employees (or those of their respective contractors) that arise in connection with the performance of services under this Agreement. Said Party designated to perform such Maintenance Services shall provide and furnish, or cause to be provided and furnished, all labor, administrative, professional, and supervisory personnel necessary for its performance of the Maintenance Services under this Section 3.1.

(i) In the event that the party responsible for Maintenance Services does not provide a particular item of Maintenance Services as required pursuant to this Section 3.1, the other Party may, at its option after providing notice of such Maintenance Service deficiencies to the responsible Party, such responsible Party's failure to correct such deficiencies in performing the Maintenance Services within seven (7) days of such notice, either with or without the consent or request of such responsible Party, either itself or through a contractor, provide said item of maintenance, and the responsible Party shall reimburse the other Party for all incremental costs incurred in rendering such item of Maintenance Services. The provision of Maintenance Services pursuant to this Section

3.1(i) shall not be considered a waiver of any other remedies available to the Parties under this Agreement.

3.2 Access for MassDOT.

Nothing in this Section 3 shall derogate from MassDOT's right to enter upon any portion of the Rail Operating Property for any purpose, provided that such entry does not unreasonably interfere with Freight Rail Service and provided that reasonable notice is provided and all applicable safety rules and practices are followed.

239033

3.3 Extension of Maintenance Services

Should MassDOT at any time acquire or utilize additional, contiguous property to the Rail Operating Property and extend any Excursion Passenger Service under this Agreement beyond the limits of the Property covered by the Purchase Contract, PAS shall maintain the additional property as an extension of the Maintenance Services provided under this Agreement in accordance with the terms of this Agreement.

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

SECTION 4. RESPONSIBILITY FOR MAINTENANCE SERVICES, EXCURSION PASSENGER SERVICE SUPPORT, AND CAPITAL EXPENSES

4.1 PAS Maintenance Services Responsibility.

PAS shall perform the Maintenance Services in accordance with Section 3.1.

4.2 MassDOT Excursion Passenger Service Support Responsibility.

MassDOT shall be solely responsible for the provision of the Excursion Passenger Service Support and maintenance of Excursion Passenger Service Equipment, which shall be performed at MassDOT's sole risk and expense and in such a manner as to not interfere with the provision of the Freight Rail Service.

4.3 Effect of Discontinuance.

If PAS discontinues its right to use all of the Rail Operating Property to provide Freight Rail Service under Section 2.4, MassDOT will perform the Maintenance Services and will be responsible for all costs involved in performing the Maintenance Services.

4.4 Responsibility for Cost of Maintenance Services

MassDOT shall be responsible for all costs associated with Maintenance Services provided under this Agreement. Such items shall include, without limitation, overhead charges, labor additives, fringe benefits, mobilization and demobilization costs, meals and lodging, flagging costs, material handling, vehicle and equipment additives, and disposal costs. PAS shall submit itemized invoices to MassDOT every thirty (30) days, together with such supporting documentation as will substantiate the billed amounts. MassDOT shall reimburse PAS within forty-five (45) days of receipt of said invoices. PAS shall provide MassDOT a fifteen thousand

dollars (\$15,000.00) annual credit ("Annual Credit") toward the cost of the Maintenance Services as full compensation for all PAS operations over the Property.-The Annual Credit will be adjusted annually for price level changes, beginning January 1, 2016, based on the relationship of the most recent Fourth Quarter Index (beginning with Fourth Quarter 2015) from the Association of American Railroads Quarterly Indices of Chargeout Prices and Wage Rates (Table C)-East, material prices, wage rates and supplements combined (excluding fuel), to the Fourth Quarter 2014 index value.

4.5 Responsibility for Capital Improvements.

239033

(a) In the event that a condition is identified on the Property that prevents the Rail Operating Property from maintaining a FRA Class I level and that can be remedied only by capital maintenance, MassDOT shall be responsible for such capital maintenance costs. Should MassDOT and PAS mutually agree that PAS is to perform the capital maintenance activities, such items shall include, without limitation, overhead charges, labor additives, fringe benefits, mobilization and demobilization costs, meals and lodging, flagging costs, material handling, vehicle and equipment additives and fuel costs. PAS shall submit itemized invoices to MassDOT every thirty (30) days, together with such supporting documentation as will substantiate the billed amounts. MassDOT shall reimburse PAS within forty-five (45) days of receipt of said invoices.

(b) PAS, in its sole and absolute discretion, may pay additional amounts towards the improvement of the Property, including capital projects and modifications to proposed capital improvements to be constructed by MassDOT, provided, however, that any such PAS-initiated capital projects or modifications to proposed MassDOT-initiated capital projects shall be subject to the written approval of MassDOT, which approval shall not be unreasonably withheld, conditioned or delayed. MassDOT shall provide PAS reasonable notification of contemplated MassDOT-initiated capital projects in order to effectuate the intent of this section.

4.6 PTC.

In the event that positive train control ("PTC") is required on any Rail Operating Property due to the presence of Excursion Passenger Service and not solely because of PAS operations, MassDOT shall, at its sole cost and expense, provide a PTC system that complies with applicable law and is fully interoperable with the PTC system adopted by the national freight system.

4.7 Regulatory Approval for Work on Rail Operating Property

MassDOT shall have the exclusive right to secure such approvals of regulatory or governmental bodies for such work on the Rail Operating Property as may be necessary, including, without limitation, the FRA and Massachusetts Department of Public Utilities, and no approval of PAS shall be required for the performance of any work on the Rail Operating Rail Property.

SECTION 5. FORCE ACCOUNT WORK

MassDOT may, to the extent permitted by applicable law and in its sole discretion, request that PAS perform work not otherwise required by this Agreement ("Force Account Work") on portions of the Rail Operating Property. All Force Account Work shall be performed pursuant to a Force Account Work Agreement reasonably acceptable to both parties.

SECTION 6. ACCESS, ALTERATIONS AND GOVERNMENTAL APPROVALS

6.1 Installation of Switches and Sidings for Freight Rail Service. 239033

PAS, at its own cost and expense, may install switches and sidings, including associated signaling to serve new locations on the Rail Operating Property. All such installations shall be subject to the prior written approval of MassDOT, which approval shall not be unreasonably withheld, conditioned or delayed. MassDOT shall make reasonable efforts to provide any such written approval within forty-five (45) days of the date PAS first requests approval.

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

6.2 Capacity Improvements.

Each Party shall have the right to propose the construction of additional improvements on the Property to increase capacity on the Line. The Parties agree to consider and use reasonable efforts to agree upon details related to the construction of such improvements, including the nature of such improvements, whether and how each Party will participate with respect to the construction of such improvements and the proportionate share of costs, if any, to be borne by each Party, and the benefits to be afforded to the Party(s) funding the costs of the construction of such improvements, such agreement not to be unreasonably withheld, conditioned or delayed. No capacity improvement shall unreasonably interfere with the provision of PAS Freight Rail Service or MassDOT Excursion Passenger Service.

6.3 Other MassDOT Improvements.

With respect to any MassDOT improvements affecting the Property not otherwise expressly provided for in this Agreement, including, without limitation, alterations thereto, the relocations, use of air or subsurface rights for development or other purposes, or granting of easements for utilities and crossings: (1) all such actions must not unreasonably interfere with the provision of PAS Freight Rail Service or violate the Clearances requirement set forth in Section 6.5; and (2) MassDOT shall provide notice and receive prior consent to such improvements from PAS, such consent not to be unreasonably withheld.

6.4 Access to Third Parties.

Subject to and consistent with the other provisions of this Agreement, including PAS's exclusive Freight Easement, in addition to access to third parties required to provide Excursion Passenger Service, MassDOT may grant access to the Property to third parties, including but not limited to utilities providers, to perform work on such third parties' own behalf. MassDOT shall provide at least fourteen (14) days prior written notice (or with respect to emergency services,

such lesser notice as is reasonable in the circumstances) to PAS of all such work that will have an impact on PAS operations. To the extent that any such work by third parties is performed on the Rail Operating Property, such work will be performed in accordance with the applicable operational and dispatching rules and regulations of PAS and such third parties shall be obligated to have received or to procure from PAS any railway worker protection training, flagging, employee in charge and other such services as are reasonably and customarily required by PAS and to compensate PAS in accordance with its customary policies and procedures for the provision of such required training, protection and other mandatory services. All such access pursuant to this Section 6.4 shall be at MassDOT's sole cost, risk and expense. 239033

6.5 Infrastructure Improvements or Modifications Affecting Dimensional Traffic.

MassDOT shall, in coordination with PAS, take reasonable steps to provide no less than existing clearances on the Rail Operating Property and maintain such clearances (Clearances) to no less than nine (9) feet from the centerline of track horizontally and no less than twenty three (23) feet from top of rail measured vertically. Notwithstanding the foregoing, Parties acknowledge that MassDOT reserves the right to construct high-level platforms at one or more stations and MassDOT may construct such high-level platforms provided the platforms do not interfere with Freight Rail Service and are constructed on portions of the Rail Operating Property that are solely used for the provision of Excursion Passenger Service. In exercising such reasonable steps and to the extent it is permitted to consent or withhold consent, MassDOT shall deny its consent to third parties that intend to construct or reconstruct infrastructure impacting the Rail Operating Property in a manner as to impact adversely the Clearances. Notwithstanding the foregoing or anything herein to the contrary, at any time MassDOT shall not be required to replace any existing structures on or adjacent to the Property with new structures to meet the dimensional clearance requirements set forth in this Section 6.5 where such clearances do not exist as of the Effective Date of this Agreement.

ENTERED
Office of Proceedings
AUGUST 14, 2015
Part of
Public Record

SECTION 7. MANAGEMENT AND CONTROL; DISPATCHING

7.1 Dispatching

PAS shall perform dispatching services on the Rail Operating Property. In the exercise of its dispatching control over the Rail Operating Property, PAS shall prioritize trains and resolve scheduling conflicts using best dispatching practices and in accordance with sound dispatching principles and this Agreement.

7.2 Dispatching Protocol

PAS shall, in consultation with MassDOT, establish a dispatching protocol that will minimize negative impacts on each Party's trains in all time periods while observing the operating windows described in Section 2.3. In no instances will either (i) MassDOT provide Excursion Passenger Service over the Rail Operating Property at the same time that PAS is providing Freight Rail Service or (ii) PAS provide Freight Service over the Rail Operating Property at the same time that MassDOT is providing Excursion Passenger Service.

7.3 Effect of Discontinuance.

If PAS discontinues its right to use all of the Rail Operating Property to provide Freight Rail Service under Section 2.4, MassDOT will perform dispatching services on the Rail Operating Property pursuant to the principles in this Section 7.

7.4 Security of Equipment.

Neither Party is responsible for the security of any railroad material and equipment owned by, operated by, or in the possession of the other Party or its Operating Contractor, located or stored on the Rail Operating Property and neither Party assumes liability for any loss of, damage to, or destruction of such property except as expressly set forth in Section 9 hereof.

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

SECTION 8. TERM

This Agreement shall commence on the Effective Date and shall be for a Term of thirty (30) years, unless terminated earlier pursuant to its terms. Notwithstanding the foregoing, the Parties agree that this Agreement shall remain in full force and effect during any interim period between the end of the Term of this Agreement (or the termination hereof for any reason other than mutual agreement of the Parties) and the execution of a new, revised, or extended operating agreement covering all of the Property. The Parties acknowledge that expiration or termination of this Agreement will not affect the validity, continuation or perpetual nature of the Freight Easement or any other easement rights vested in PAS with regard to the Property.

SECTION 9. INDEMNIFICATION, LIABILITY AND INVESTIGATION

9.1 Applicability.

The following provisions will, from the Effective Date of this Agreement, govern the apportionment of liability and risk of damage between the Parties for incidents which occur on or after such Effective Date of this Agreement. This Section is not intended to relieve any third party from any liability.

9.2 PAS Employees.

PAS agrees to assume all liability for, and bear all cost and expense in connection with, including reasonable attorney fees, irrespective of any negligence or fault of MassDOT, its Operating Contractor, or MassDOT Employees, or howsoever the same shall occur or be caused, any injury to or death of any PAS Employee, or for loss of, damage to, or destruction of the

property of any such PAS Employee, including reasonable attorney fees. PAS shall release, indemnify, and hold harmless MassDOT and its contractors (other than PAS) from and against any claims, damages, awards, or judgments, including punitive damages, arising from or related to this Section 9.2. It is expressly understood and agreed that PAS Employees furnished to MassDOT, and PAS Employees who are involved in PAS's provision of services to MassDOT, shall be regarded for purposes of this Section 9.2 as employees of PAS, and not of MassDOT. It is further agreed that PAS Employees who are also MassDOT Passengers at the time in question shall be treated as MassDOT Passengers and not PAS Employees, for purposes of this Section 9.2.

239033

9.3 MassDOT Employees.

ENTERED

MassDOT agrees to assume all liability for, and bear all cost and expense in connection with, including reasonable attorney fees, irrespective of any negligence or fault of PAS, its contractors, or PAS Employees, or howsoever the same shall occur or be caused, any injury to or death of any MassDOT Employee, or for loss of, damage to, or destruction of the property of any such MassDOT Employee, including reasonable attorney fees. MassDOT shall release, indemnify, and hold harmless PAS and its contractors from and against any claims, damages, awards, or judgments, including punitive damages, arising from or related to this Section 9.3. It is expressly understood and agreed that MassDOT Employees furnished to PAS, and MassDOT Employees who are involved in MassDOT's provision of services to PAS, shall be regarded for purposes of this Section 9.3 as employees of MassDOT, and not of PAS.

Office of Proceedings
August 14, 2015
Part of
Public Record

9.4 PAS Property.

PAS agrees to assume all liability for, and bear all cost and expense in connection with, including reasonable attorney fees, irrespective of any negligence or fault of MassDOT, its Operating Contractor, or MassDOT Employees, or howsoever the same shall occur or be caused, any loss of, damage to or destruction of any PAS locomotive, railroad car, including the contents thereof, and any other property, real or personal, or equipment owned by, leased to, used by or otherwise in the custody or possession of PAS or any PAS Employee, other than PAS equipment or property being used by MassDOT other than for PAS's account ("PAS Property"). PAS shall release, indemnify, and hold harmless MassDOT and its contractors (other than PAS) from and against any claims, damages, awards, or judgments, including punitive damages, arising from or related to this Section 9.4.

9.5 MassDOT Property.

MassDOT agrees to assume all liability for, and bear all cost and expense in connection with, including reasonable attorney fees, irrespective of any negligence or fault of PAS or PAS Employees, or howsoever the same shall occur or be caused, any loss of, damage to or destruction of any MassDOT Excursion Passenger Service Equipment, including the contents

thereof and any other property, real or personal, or equipment owned by, leased to, used by or otherwise in the custody or possession of MassDOT, its Operating Contractor, or any MassDOT Employee, other than MassDOT equipment or property being used by PAS other than for MassDOT's account ("MassDOT Property"). MassDOT shall release, indemnify, and hold harmless PAS and its contractors from and against any claims, damages, awards, or judgments, including punitive damages, arising from or related to this Section 9.5.

9.6 MassDOT Passengers.

239033

MassDOT agrees to assume all liability for, and bear all cost and expense in connection with, including reasonable attorney fees, irrespective of any negligence or fault of PAS or its Employees, or howsoever the same shall occur or be caused, any injuries to or death of any MassDOT Passenger and for loss of, damage to, or destruction of any property of any such MassDOT Passenger. MassDOT shall release, indemnify, and hold harmless PAS and its contractors from and against any claims, damages, awards, or judgments, including punitive damages, arising from or related to this Section 9.6.

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

9.7 Grade Crossings and Premises – PAS.

Subject to the provisions of Section 9.9, PAS agrees to assume all liability for, and bear all cost and expense in connection with, including reasonable attorney fees, irrespective of any negligence or fault of MassDOT, its Operating Contractor, or MassDOT Employees, or howsoever the same shall occur or be caused, any injury to or death of any person, or for loss of, damage to, or destruction of any property, real or personal, other than persons and property for which MassDOT is responsible under Sections 9.3, 9.5 and 9.6, if such injury, death, loss, damage or destruction either (i) arises from a collision of a vehicle or a person with a PAS Train at the intersection at grade of a street or road, whether public or private, and the Rail Operating Property, or (ii) is caused by the impact upon a person or property located on or off of the Rail Operating Property of a PAS Train or the impact upon such person or property of the explosion or release of the contents of such train. PAS shall release, indemnify, and hold harmless MassDOT and their contractors (other than PAS) from and against any claims, damages, awards, or judgments, including punitive damages, arising from or related to this Section 9.7.

9.8 Grade Crossings and Premises - MassDOT.

Subject to the provisions of Section 9.9, MassDOT agrees to assume all liability for, and bear all cost and expense in connection with, including reasonable attorney fees, irrespective of any negligence or fault of PAS or PAS Employees, or howsoever the same shall occur or be caused, any and all liability for injury to or death of any person, or for loss of, damage to, or destruction of any property, real or personal, other than persons and property for which PAS is responsible under Sections 9.2 and 9.4, if such injury, death, loss, damage or destruction either (i) arises from a collision of a vehicle or a person with a MassDOT Train at the intersection at

grade of a street or road, whether public or private, and the Rail Operating Property, or (ii) is caused by the impact upon a person or property located on or off of the Rail Operating Property of a MassDOT Train or the impact upon such person or property of the explosion or release of the contents of such train. MassDOT shall release, indemnify, and hold harmless PAS and its contractors from and against any claims, damages, awards, or judgments, including punitive damages, arising from or related to this Section 9.8.

9.9 Third Parties Off Premises: Joint Accidents.

239033

In the event that an accident involving both a MassDOT Train or other equipment which is MassDOT Property ("**MassDOT Equipment**") and a PAS Train or other equipment which is PAS Property ("**PAS Equipment**") results in the injury or death of any person, or damage to, or destruction of any property, other than persons or property specified in Sections 9.2, 9.3, 9.4, 9.5, and 9.6, and such injury, death, loss, damage or destruction occurs when such person or property is located off of the Rail Operating Property, then as between the parties:

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

- (a) PAS shall bear any and all of the financial responsibility for liability for such injury, death, loss, damage, or destruction, irrespective of any negligence or fault of MassDOT, its Operating Contractor, or MassDOT Employees, if, as between the Parties, the immediate cause of such injury, death, loss, damage, or destruction was (i) the impact of PAS Equipment, or the impact or release of the contents thereof, or (ii) the impact of any explosion of PAS Equipment, or the contents thereof, or (iii) a fire that originated in PAS Equipment, or the contents thereof;
- (b) MassDOT shall bear any and all of the financial responsibility for liability for such injury, death, loss, damage, or destruction, irrespective of any negligence or fault of PAS or PAS Employees, if, as between the Parties, the immediate cause of such injury, death, loss, damage or destruction was (i) the impact of MassDOT Equipment, or the impact or release of the contents thereof, or (ii) the impact of any explosion of MassDOT Equipment, or the contents thereof, or (iii) a fire that originated in MassDOT Equipment, or the contents thereof; and
- (c) If the Parties cannot agree whether the immediate cause of the injury, death, loss, damage or destruction in question is covered by subsection (a) or by subsection (b) above, PAS will assume control of the defense of the action and upon final resolution thereof (whether by settlement or judgment), the Parties shall resolve the question of the "immediate cause of such injury, death, loss, damage or destruction" using the dispute resolution procedures in this Agreement.

9.10 Third Parties: MassDOT Residuals.

MassDOT agrees to assume all liability for, and bear all cost and expense in connection with, including reasonable attorney fees, irrespective of any negligence or fault of PAS or PAS Employees, or howsoever the same shall occur or be caused, any and all liability for injury to or death of any person or for loss of, damage to or destruction of any property, other than persons or property for which PAS is responsible under Sections 9.2, 9.4, 9.7, or 9.9 where such injury, death, loss, damage, or destruction arises from activities conducted pursuant to this Agreement. MassDOT shall release, indemnify, and hold harmless PAS and its contractors from and against any claims, damages, awards, or judgments, including punitive damages, arising from or related to this Section 9.10. For purposes of this Section 9.10, the term "activities conducted pursuant to this Agreement" will include, without limitation, crossing or otherwise entering any of the PAS-retained property in North Adams, MA, while accessing, leaving, meeting a passenger, accessing or leaving, or otherwise in the area for any activity associated with the Excursion Passenger Services. Any improvements made to protect visitors drawn to the area by the Excursion Passenger Services, and any corresponding modifications to the allocation of liability assigned under this Section 9.10; will be addressed through a separate amendment to this Agreement.

9.11 Administration of Claims.

(a) Except as provided in Section 9.11(b) below, all claims, injuries, deaths, property damages and losses arising out of or connected with this Agreement shall be investigated, adjusted and defended by the Party bearing the liability, cost and expense therefor under the provisions of this Agreement.

(b) PAS will investigate, adjust and defend all freight loss and damage claims filed with it in accordance with applicable provisions of law, and will investigate, adjust and defend all claims for injury to and death of PAS's Employees for which either PAS or MassDOT solely or PAS and MassDOT jointly may have any liability under the provisions of this Agreement.

(c) The Party hereto receiving notice of the filing of a claim will promptly notify the other Parties of such filing where liability therefor may be joint or that of another Party. MassDOT and PAS will cooperate with each other in all such investigations, adjustments, and defenses, and MassDOT Parties and PAS will provide each other, upon request therefor, a copy of all documents and written communications and produce witnesses, experts or exhibits in their employment or control to assist in the preparation and defense of any such claim and/or litigation with respect thereto.

(d) In the event a claim or suit is asserted against any Party which is another Party's duty hereunder to investigate, adjust or defend, then, unless otherwise agreed, such other Party shall, upon request, take over the investigation, adjustment and defense of such claim or suit, and the Party relieved of duties in respect of such claim or suit shall

cooperate as requested by the Party investigating, adjusting or defending said claim or suit.

(e) All costs and expenses in connection with the investigation, adjustment and defense of any claim or suit under this Agreement shall be included as costs and expenses in applying the liability provisions set forth in this Agreement.

(f) PAS shall not settle or compromise any claim, demand, suit or cause of action of any PAS Employee for which MassDOT has any liability under this Agreement without the concurrence of MassDOT if the consideration for such settlement or compromise exceeds Fifty Thousand and no/100 Dollars (\$50,000.00).

(g) It is understood that nothing in this Section 9.11 shall modify or waive the conditions, obligations, assumptions, or apportionments provided in Section 9 or elsewhere in this Agreement.

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

SECTION 10. INSURANCE

10.1 PAS Requirements.

From and after the Effective Date, PAS shall procure and maintain general liability insurance with respect to Freight Rail Service with minimum limits of not less than \$7,500,000 per occurrence and in the aggregate, which insurance will cover PAS's liability under Section 9 above. PAS shall also procure and maintain worker's compensation insurance, employer liability and other insurance as required by law. All insurance herein provided for shall be in such form and written by such companies as may be reasonably approved by MassDOT, which approval shall not be unreasonably withheld. PAS will deliver to MassDOT certificates of insurance for all policies and name MassDOT as additional named insured as required under this Agreement.

10.2 MassDOT Requirements.

MassDOT, at its sole cost and expense, shall procure, directly or through a third party, and maintain or cause to be maintained, liability insurance with a limit equal to the statutory requirement imposed by Section 43 of Chapter 161A of Massachusetts General Laws (or its successor), or such other amount required by law, but in no case less than \$75,000,000, which insurance will cover MassDOT's liability under Section 9. The self-insured retention of such policy will not exceed the lesser of (i) \$7,500,000 or (ii) the requirements of Section 43 of Chapter 161A of Massachusetts General Laws, as the same may be amended or replaced from time to time. MassDOT will deliver to PAS certificates of insurance for all such policies and cause such policies to name PAS as an additional insured. In the event that MassDOT introduces Excursion Passenger Service, MassDOT shall also cause its Operating Contractor to procure and maintain insurance meeting the requirements of Mass. Gen. Laws Chapter 160, Section 234. Should MassDOT procure the insurance required through this Section 10.2 through a third party, MassDOT shall be responsible for coverage of any claims that would be paid through the self-insurance retention, and further shall procure a rider from the insurance provider that provides

assumed by a trustee or successor to such Party within sixty (60) days after such proceeding shall have commenced;

- (iii) The failure to perform any other material covenant or obligation in this Agreement, which failure shall have continued for more than thirty (30) days following the date of written notice thereof.

(b) Remedies

If an Event of Default shall occur, the Party not in default may exercise any or all of the following remedies:

- (i) Terminate this Agreement by and upon sixty (60) days' written notice to the defaulting Party; or
- (ii) Regardless of whether this Agreement is terminated pursuant to Section 11.1(b)(i), pursue any other remedy at law or in equity in any state or federal court in Massachusetts.

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

(c) Equitable Relief

The Parties hereto expressly acknowledge that the nature and purpose of this Agreement is such that damages may not be an adequate remedy for any default or breach so occurring, and that equitable relief, such as injunction, mandatory or otherwise, including specific performance, may be necessary in the event a Party fails to cure a breach or default so occurring; in such case, the aggrieved Party may take such legal action as it deems appropriate and may file immediately any and all pleadings in any state or federal court in Massachusetts to secure an injunction of the action or inaction resulting in such default or breach. Nothing contained in this Section 11 shall be construed to limit or restrict the Parties' rights and obligations under Section 11.2.

(d) No Implied Waiver

An Event of Default shall not be waived or satisfied by the failure of a Party to provide written notice thereof to another Party, nor shall a failure to provide written notice be considered a waiver of any other remedies available to any Party under this Agreement or otherwise.

11.2 Termination; Effect of Termination.

(a) Termination

This Agreement may be terminated as provided in Section 11.1 or by mutual agreement of the Parties, upon such terms and conditions as the Parties may mutually agree to. Such termination shall be effective in accordance with a written agreement by the Parties. Termination under this Section shall not constitute a waiver of the rights of any Party to damages or other remedies related to this Agreement, except to the extent

that the mutual agreement terminating this Agreement so specifies. The Parties agree and acknowledge that any termination of this Agreement does not affect the validity, continuation or perpetual nature of the Freight Easement with regard to the Property.

(b) Survival of Obligations

Expiration or termination of this Agreement for any reason, in whole or in part, shall not relieve or release any Party from any obligation assumed or from any liability which may have arisen or been incurred by any Party under the terms of this Agreement prior to the expiration or termination hereof. The foregoing provision shall apply whether or not it is so expressly stated elsewhere in this Agreement, including without limitation, where a right of termination, in whole or in part, is expressly accorded either to or by the Parties. All obligations for indemnification and insurance coverage shall survive expiration or termination of this Agreement with respect to events that occur during the term of this Agreement. Expiration or termination of this Agreement shall not effect a termination of either party's underlying rights of movement with respect to the Property.

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

11.3 Interest.

Where the time period during which interest accrues regarding a matter in dispute is specifically established elsewhere in this Agreement, that time period shall apply for purposes of disputes under this Agreement. For any other dispute under this Agreement, interest shall accrue from the date that payment was due, at the Effective Interest Rate.

SECTION 12. EQUAL EMPLOYMENT OPPORTUNITY

12.1 Fair Employment Practices.

PAS agrees that it will comply with all applicable federal, state, and local laws and regulations relating to fair employment practices and non-discrimination against employees or applicants for employment because of race, religion, creed, color, sex, national origin, disability or sexual orientation.

12.2 Subcontracts.

To the extent such laws or regulations are applicable to any particular subcontractor, PAS shall insert provisions similar to those appearing in Section 13.1 above in each subcontract, except subcontracts for standard commercial supplies, raw materials, or construction.

SECTION 13. DISADVANTAGED BUSINESS ENTERPRISES.

PAS shall comply with all applicable federal laws and regulations relating to Disadvantaged Business Enterprises, including but not limited to regulations issued by the U.S. Department of Transportation (49 C.F.R. Part 23).

SECTION 14. EMPLOYEE WAGES AND BENEFITS

Each Party (or its contractors) shall be solely responsible for the determination of and payment of wages and benefits and other terms and conditions of employment of all such Party's employees; provided, however, that such Party shall comply with any applicable mandatory federal or state prevailing wage rate, safety, or wage/hour laws. Each Party agrees to indemnify and hold harmless the other Party and its parent corporation, subsidiaries and affiliates, and all their respective directors, officers, agents and employees from and against any and all costs and payments, including benefits, allowances and arbitration, administrative and litigation expenses, arising out of claims or grievances made by or on behalf of its own employees, pursuant to a collective bargaining agreement. It is the intention of the Parties that each Party shall bear the full costs of protection of its own employees under employee protective conditions which may be imposed, and of grievances filed by its own employee arising under its collective bargaining agreements with its employees.

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

SECTION 15. RESERVED

SECTION 16. GENERAL PROVISIONS

16.1 Additional Properties.

The Parties may by mutual written agreement add additional rail line segments or other trackage to the Property as defined herein (and designate an Effective Date with respect thereto). Provided appropriate regulatory approvals are sought and obtained in advance of any such transactions, the segments of railroad so added shall be subject to all of the rights and obligations set forth in this Agreement, and, to the extent permitted by law, these segments of rail line and/or track shall thereafter cease to be governed by any other agreements (including operating and trackage rights agreements) that previously had been in effect with respect to any such segments of railroad.

16.2 Ownership of Service Equipment.

As used in this Agreement, whenever reference is made to the trains, locomotives, cars or equipment of, or in the account of, one of the Parties hereto such expression means the trains, locomotives, cars or equipment in the possession of or operated by or on behalf of one of the Parties and including such trains, locomotives, cars or equipment which are owned by, leased to, or the responsibility of such Party.

16.3 Compliance with Laws and Operating Rules.

(a) Compliance with Federal, State, and Local Laws, Regulations, and Rules

PAS and MassDOT shall comply with the provisions of applicable federal, state, and local laws, regulations, and rules respecting the operation, condition, inspection, and safety of the trains, locomotives, cars and equipment it or any affiliate or contractor

operates over the Property. PAS and MassDOT shall each indemnify, protect, defend, and save the other, and its officers, agents, and employees harmless from all fines and penalties imposed under such laws, rules, and regulations by any governmental or regulatory agency, or court having jurisdiction over the Property, when the imposition of same is related to the failure of such Party to comply with its obligations under this Section 17.3(a). Nothing in this Section 17.3 shall alter, modify or amend Section 9 or Section 10 of this Agreement.

(b) Operating Rules

239033

In its use of the Rail Operating Property, each Party shall comply in all respects with the operating rules and regulations of the Party responsible for dispatching pursuant to Section 7, and the movement of each Party's trains, locomotives, cars and equipment over the Rail Operating Property shall be subject at all times to the orders of transportation officers of such dispatching Party.

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

(c) Party Employees

PAS or its contractor shall provide and qualify its own employees, at its sole cost and expense, for the operation of PAS Trains, locomotives, rail cars and rail equipment over the Property. MassDOT or its contractor shall provide and qualify its employees, at its sole cost and expense, for the operation of MassDOT Trains, locomotives, rail cars and rail equipment over the Property. Each PAS Employee and each MassDOT Employee who will operate trains, locomotives, rail cars and rail equipment over the Property must be qualified for operation thereover. For purposes of this Section 17.3(c), any employee of PAS qualified to operate over the Property prior to the Effective Date will be deemed qualified for operation over the Property as herein contemplated as of the Effective Date.

(d) Investigations or Hearings for Violations

Each party shall conduct investigations or hearings concerning a violation of any operating rule or practice by their own employees. The other party shall be notified in advance of any such investigation or hearing and such investigation or hearing may be attended by any official designated by the other party. Any such investigation or hearing shall be conducted in accordance with the collective bargaining agreements, if any, that pertain to said employee or employees.

(e) Exclusion of Violators

MassDOT shall have the right to exclude from the Property any PAS Employee, except officers, whom MassDOT determines, based on the investigation or hearing described above, to be in violation of the applicable rules, regulations, orders, practices or instructions issued by timetable or otherwise, provided that MassDOT may exclude any PAS Employee, except officers, from the Property prior to such determination for alleged violations of MassDOT's rules regarding use of intoxicating beverages or drugs, or for alleged insubordination. PAS shall release, indemnify, defend and save harmless

MassDOT and its officers, agents and employees from and against any and all claims and expenses arising from such exclusion.

16.4 Disabled Trains/Wreck Clearing.

(a) MassDOT Assistance

If by reason of any mechanical failure or any other cause not resulting from an accident or derailment, a train or locomotive of PAS becomes stalled and unable to proceed under its own power, or if in emergencies crippled or otherwise defective cars are separated from PAS's trains on the Rail Operating Property, PAS shall furnish motive power or such other assistance as may be necessary to haul, help or push such locomotives or cars, or to properly move the disabled equipment off the Rail Operating Property. PAS may request that MassDOT furnish assistance as may be necessary to haul, help or push such trains, locomotives or cars, or to properly move the disabled equipment off the Rail Operating Property. PAS shall reimburse MassDOT for direct costs incurred in rendering any assistance to disabled PAS Trains, locomotives or cars.

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

(b) Repairs, Adjustment, Transfer of Lading

If it becomes necessary to make repairs to or adjust or transfer the lading of such crippled or defective cars in order to move them off the Rail Operating Property, such work shall be done by PAS or MassDOT or by the Parties' respective contractors. PAS shall reimburse MassDOT for direct costs incurred in rendering any such assistance.

(c) Wreck Clearing

Each Party shall have full responsibility for rerailling wrecking service or wrecking train service, including without limitation the removal of damaged equipment, repair and restoration of road bed, track, signals, communication systems and all other right of way structures and facilities affected by such wrecks ("**Wreck Clearing**") during the period in which such Party has the responsibility to maintain such portion of the Property. The liability, cost and expense of the foregoing, including, without limitation, loss of, damage to or destruction of any property whatsoever and injury to or death of any person or persons whomsoever resulting therefrom, shall be allocated and apportioned in accordance with the provisions of Section 9 hereof. All trains, locomotives, rail cars, and rail equipment and salvage from the same so picked up and removed which are owned by PAS shall be promptly delivered to it. Each Party shall perform its services under this Section in an expeditious manner in order to restore rail service on the line.

16.5 Operating Duties in Regard to Safety.

Each Party shall take all reasonable safety precautions and shall provide all reasonable protection to prevent damage, injury, death, or loss to: all employees, passengers, and customers of the other Parties and all tracks, bridges, and other equipment related to the Property. Unless otherwise provided by law, each Party will be responsible to give all notices and comply with all applicable laws, rules, regulations and

lawful orders of any public agency in connection with its operations under this Agreement bearing on the safety of persons or property or their protection from damage, injury, death or loss. Without limitation, this obligation shall include observance of all safety rules and regulations administered by the Federal Railroad Administration or Massachusetts Department of Public Utilities including, for example: the FRA's regulations at 49 CFR Subtitle B, Chapter II; all applicable regulations regarding the transport of hazardous materials or wastes prescribed by the U.S. Department of Transportation including 49 CFR Parts 171 et seq., and prescribed by the U.S. Environmental Protection Agency, including 40 CFR Part 263; and all applicable safety rules and other operating procedures of general applicability and future effect issued by MassDOT and forwarded in writing to PAS. Upon request, each Party shall promptly furnish to the other Parties evidence reasonably satisfactory to the other Parties demonstrating compliance with the above. Nothing in this Section shall prevent a Party from modifying or amending Section 9 or Section 10 of this Agreement.

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

SECTION 17. ASSIGNMENT

17.1 Assignment by PAS.

PAS may assign to any Person, in whole but not in part, all of its rights, interests or obligations under this Agreement, subject to the following conditions: (i) that PAS shall provide to MassDOT with sixty (60) days prior written notice of such proposed assignment, (ii) that any such assignment must be accompanied by an assignment to such Person of all of PAS's rights under the Freight Easement, and (iii) that the assignee assume, by written agreement reasonably acceptable to MassDOT, all of PAS's obligations under this Agreement. No fees or other amounts shall be due or payable under this Agreement with respect to any such assignment of the Freight Easement or this Agreement; provided however that PAS shall have no right to partially assign its rights to perform Freight Rail Service on any portion of the Property such that PAS and such assignee both are performing Freight Rail Service. In the event of an assignment of this Agreement by PAS to an affiliate of PAS, PAS shall unconditionally guarantee to MassDOT the performance of all obligations of PAS under this Agreement by any such affiliate. Nothing in this Section 18 shall prevent or impede PAS from transferring the Freight Easement in accordance with its terms and generally applicable law.

17.2 Release and Discharge.

Except as is otherwise provided in Section 18.1 of this Agreement, any assignment of this Agreement, in whole or in part, by PAS, its successors or assigns, shall release and discharge PAS: (i) from the performance of its obligations and covenants under this Agreement, or with respect to the part hereof so assigned, as the case may be, from and after the date of such assignment, and (ii) from any liability, cost and expense arising out of or connected with this Agreement, or with respect to the part thereof so assigned, as the case may be, from and after the date of such assignment.

17.3 Assignment by MassDOT.

MassDOT may only assign, in whole or in part, any of its rights, interests or obligations under this Agreement to another Massachusetts state agency or authority; provided however, that MassDOT must provide to PAS sixty (60) days' prior written notice of such proposed assignment and assignee assumes, by written agreement reasonably acceptable to PAS, all of MassDOT's obligations under this Agreement, and provided further, that such assignment must not impair or adversely affect any rights of PAS hereunder or as required by law. Notwithstanding the foregoing, MassDOT may not partially assign its rights to operate Excursion Passenger Services over the Rail Operating Property.

17.4 Survival of Liability.

239033

Assignment of this Agreement, in whole or in part, shall not relieve or release any Party from any obligation assumed or from any liability which may have arisen or been incurred by such Party under the terms of this Agreement prior to the assignment hereof. The foregoing provision shall apply whether or not it is so expressly stated elsewhere in this Agreement where a right of assignment, in whole or in part, is expressly accorded any Party.

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

SECTION 18. FORCE MAJEURE

Each Party will be excused from performance of any of its obligations to the other under this Agreement other than those set forth in Section 10, where such non-performance is occasioned by any event beyond the non-performing Party's control which shall include, without limitation, any applicable order, rule, or regulation of any Federal, State (other than any such rule or regulation (i) which is enacted solely by MassDOT and (ii) which is not enacted pursuant to State legislation), or local government body, agent, or instrumentality; work stoppage; natural disaster; terrorist act or threatened act of terrorism; or civil disorder; provided, however, that the Party excused hereunder shall use all reasonable efforts to minimize its non-performance and to overcome, remedy, or remove such event in the shortest practical time. The obligations set forth in Section 10 are not excused hereunder.

SECTION 19. MISCELLANEOUS.

19.1 Applicable Law.

This Agreement, and the transactions to which it relates, will be governed by and construed and enforced in accordance with the law of the Commonwealth of Massachusetts. Any claim or legal action by one Party against the other shall be commenced and maintained in any state or federal court located in Massachusetts and both Parties hereby submit to the jurisdiction and venue of any such court.

19.2 Entire Agreement.

This Agreement, including the Exhibits hereto, represents the entire agreement between the Parties hereto with respect to the Property from and after the Effective Date with respect to the Property, and this Agreement supersedes any and all prior discussions, proposals and communications between MassDOT and PAS with respect to the Property.

19.3 Notices.

All notices pursuant to this Agreement shall be in writing and shall be deemed effective: (i) on the date given if delivered by hand or transmitted by facsimile on a weekday, or on the next succeeding weekday if not given on a weekday, (ii) one weekday after delivery to a reputable overnight courier service, and (iii) five (5) days after having been deposited with the U.S. Postal Service, postage prepaid. MassDOT shall be responsible for providing any notices to its operating contractor.

Notices to MassDOT shall be addressed to:

Massachusetts Department of Transportation
10 Park Plaza
Boston, MA 02116
Attention: Deputy Rail Administrator

with a copy to:

Massachusetts Department of Transportation
10 Park Plaza
Boston, MA 02116
Attention: General Counsel

with an additional copy to:

Goulston & Storrs
400 Atlantic Avenue
Boston, MA 02110-3333
Attention: Peter Kochansky, Esq.

Notices to PAS shall be addressed to:

General Manager
Pan Am Southern LLC
1700 Iron Horse Park
North Billerica, MA 01862

with a copy to:

Law Department
Pan Am Southern LLC
1700 Iron Horse Park
North Billerica, MA 01862

with a copy to:

239033

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

Vice President Law
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

19.4 No Waiver.

No failure on the part of any Party to exercise, and no delay in exercising, any right, power or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or remedy. The remedies of the Parties provided herein are cumulative and not exclusive of any remedies provided for by law.

19.5 Survival of Indemnification and Insurance Obligations.

The indemnification obligations of PAS and MassDOT hereunder (and all other obligations) that arise but which are not satisfied during the Term of this Agreement shall survive the termination of this Agreement.

19.6 Headings.

The section headings appearing herein are intended solely for convenience of reference and shall not be construed as affecting the interpretation of any provision hereof.

19.7 Successors and Assigns.

This Agreement shall be binding upon, and inure to the benefit of the respective successors and assigns of the Parties.

19.8 No Benefit to Third Parties.

Nothing in this Agreement shall be deemed to create any right in any Person not a party hereto other than permitted successors and assigns of the Parties, and this Agreement shall not be construed in any respect to be a contract in whole or in part for the benefit of a third party except as aforesaid.

19.9 Representations and Warranties.

The Parties represent and warrant to each other that, except with respect to a challenge by any union representing any MassDOT or PAS Employees, (i) the Parties have the power and authority to enter into this Agreement and to carry out their respective obligations hereunder; (ii) the Parties have taken all legal action necessary to authorize them to enter into and perform their respective obligations hereunder; (iii) entering into and performing this Agreement does not violate any statute, rule, regulation, order, writ, injunction, or decree of any court, administrative agency or governmental body, or violate any contract or agreement by which any Party hereto is bound; (iv) there is no known litigation or proceeding pending or threatened against a Party, or

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

any other action, which could materially or adversely affect the performance of this Agreement; and (v) the Parties have obtained all approvals as may be required to permit their respective performance of the obligations of this Agreement. Except as expressly provided herein, the Parties make no representations or warranties and waive no rights or remedies.

19.10 No Personal Recourse.

No recourse shall be had by any Party for any claim against any officer, director, stockholder, employee or agent of any other Party alleging personal liability on the part of such Person with respect to performance of MassDOT's or PAS's obligations under this Agreement.

19.11 Record Keeping.

MassDOT shall have the right, upon reasonable notice, to inspect, examine and audit during normal business hours all operating and accounting records and supporting documents of PAS including, without limitation, dispatching records, and all other books and records that relate to the performance of this Agreement. Nothing in this Agreement shall be construed as obligating PAS to retain books or records beyond the period specified in regulations of the STB, of the former Interstate Commerce Commission or of the Federal Railroad Administration.

19.12 Waivability of Time Limits.

Any time limits specified under a provision of this Agreement may be suspended by mutual written agreement of the Parties.

19.13 Operations during Dispute.

During the pendency of any dispute between the Parties, the business and the operations to be conducted under this Agreement, to the extent that they are the subject of any such dispute, shall continue to be transacted and used in the manner and form existing prior to the arising of any such controversy.

19.14 Controlling Agreement.

In the event of any conflict between the text of this Agreement and that of any Exhibit hereto, the text of this Agreement shall control except to the extent that this Agreement makes specific reference to a provision of any Exhibit as defining the obligations of a Party hereunder.

19.15 Severability.

In the event that any provision of this Agreement is found to be invalid or unenforceable in any respect, the remaining provisions shall nevertheless be binding with the same effect as if the invalid or unenforceable provision was originally deleted.

19.16 Amendment.

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

This Agreement and the Exhibits hereto and thereto may be amended from time to time during the Term of this Agreement. MassDOT or PAS may request in writing such amendments or modifications. However, no such amendments or modification shall be effective unless evidenced by a written amendment to this Agreement executed by duly authorized representatives of all Parties hereto.

19.17 No Joint Enterprise.

This Agreement shall in no way be considered as establishing either a joint facility or a joint enterprise between MassDOT and PAS.

19.18 Status of Work under Agreement.

In the performance of work under this Agreement the Parties shall be deemed to be independent contractors and no Party shall be deemed to be an agent of any other Party. Notwithstanding the foregoing, for purposes of Section 9 no Party shall be deemed to be a "contractor" of any other Party.

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

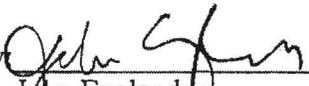
[Remainder of Page Intentionally Left Blank]

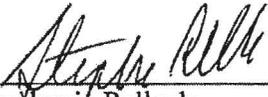
IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be signed as of the date first written above, in duplicate, each of which shall be considered an original.

APPROVAL AS TO FORM

MASSACHUSETTS DEPARTMENT
OF TRANSPORTATION

239033

By: 
John Englander
General Counsel

By: 
Stephanie Pollack
Secretary & Chief Executive Officer

ENTERED

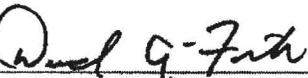
Office of Proceedings

August 14, 2015

Part of

Public Record

PAN AM SOUTHERN LLC

By: 
David A. Fink
President

239033

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. FD 35943

**MASSACHUSETTS DEPARTMENT OF TRANSPORTATION
– ACQUISITION EXEMPTION –
CERTAIN ASSETS OF PAN AM SOUTHERN LLC**

239033

MOTION TO DISMISS

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

EXHIBIT C

DRAFT RELEASE DEED

This instrument prepared by
or under the direction of:

239033

RELEASE DEED

ENTERED
Office of Proceedings
August 14, 2015

Part of
Public Record

THIS RELEASE DEED, made this ___ day of _____, 2015, between PAN AM SOUTHERN LLC, a Delaware limited liability company, having an address of 1700 Bellerica, Massachusetts, hereinafter called "**Grantor**", and the MASSACHUSETTS DEPARTMENT OF TRANSPORTATION, whose mailing address is 10 Park Plaza, Boston, Massachusetts 02116, hereinafter called "**Grantee**,"

(Wherever used herein, the terms "Grantor" and "Grantee" may be construed in the singular or plural as the context may require or admit, and for purposes of exceptions, reservations and/or covenants, shall include the heirs, legal representatives and assigns of individuals or the successors and assigns of corporations or state agencies.)

WITNESSETH:

WHEREAS, Grantor has interests in a line of railroad known generally as the Adams Branch from North Adams, Massachusetts to Adams, Massachusetts between Engineering Station 739+20 in Adams, Massachusetts and Engineering Station 981+45 in North Adams, Massachusetts, and certain adjoining property; and

WHEREAS, pursuant to a certain Purchase and Sale Contract dated as of June 26, 2015, between Grantee and Grantor (as amended, the "**Purchase Contract**"), Grantee agreed to acquire Grantor's interests in such properties and such line of railroad (as hereinafter more particularly described) for the purposes of accommodating public demand for passenger rail service, roadways and other public purposes including the continued provision of rail freight service by Grantor and excursion train service; and

WHEREAS, the parties desire that Grantee acquire Grantor's interest in such properties and line of railroad and that Grantor retain, and not transfer to the Grantee, a perpetual easement in gross over a portion of such properties and line of railroad, limited for the purpose of the exclusive provision of rail freight service subject to the terms and conditions set forth herein;

WHEREAS, it being the intention of the parties that Grantor remain, and the Grantee not become, the rail carrier subject to the Interstate Commerce Act, as revised, the Railway Labor Act, as revised, or any other federal law relating to the provision of railroad transportation on such properties;

NOW THEREFORE, that Grantor, in consideration of the sum of One Million Five Hundred Thousand Dollars (\$1,500,000.00) paid, does hereby release and grant to Grantee all right, title and interest of Grantor in and to those certain tracts or parcels of land situated, lying and being in Berkshire County, Massachusetts, more particularly described in Exhibit A attached hereto and incorporated herein (the "Land");

BUT EXCLUDING and excepting unto Grantor those rights and interests listed on Exhibit B attached hereto and incorporated herein, as well as all privileges, hereditaments and appurtenances appertaining to any such rights and interests, and the rights and interests related to the Retained Freight Easement (as hereinafter defined) (the "Excluded Property");

TOGETHER WITH all tracks, rails, ties, switches, crossings, bridges, buildings, structures, facilities, signals, crossing protection devices, communication lines, poles, radio masts and other fixtures and improvements which are affixed as of the date hereof to the Land (other than any such property included within the Excluded Property) as well as all privileges, appurtenances appertaining to the Land or any of the foregoing (other than the Excluded Property) (the "Ancillary Property" and together with the Land and Grantor's Passenger Operating Rights, the "Property").

THE PROPERTY IS CONVEYED EXPRESSLY SUBJECT TO: (a) those rights, interests, contracts, agreements, leases, licenses and easements which are listed or described on Exhibit C attached hereto and incorporated hereof; and (b) the Retained Freight Easement (as hereinafter defined).

RESERVING unto Grantor, its successors and assigns, an EASEMENT IN GROSS (the "Retained Freight Easement") IN PERPETUITY (as hereinafter defined) FOR RAILROAD PURPOSES (as hereinafter defined) in, over or on the Property within the Land; including, but not limited to, the use of all the tracks or Trackage (as hereinafter defined) within the Property; but SUBJECT TO:

1. The terms, conditions and limitations of that certain Operating Agreement dated June 26, 2015 and effective of even date herewith, between Grantor and Grantee, recorded with the Northern Berkshire District Registry of Deeds herewith (the "Operating Agreement").
2. Grantor and Grantee each agree to reasonably consider any requests by the other Party to execute and record any instrument necessary to properly reflect any changes in location or area that are not presently reflected in Exhibit A or to reflect any full or partial release of any rights or property hereunder.
3. Grantor and Grantee agree that the Retained Freight Easement is not retained to the exclusion of the use of the Property by Grantee and its assigns, except that Grantor shall be the exclusive provider of Rail Freight Service (as hereinafter defined), and as otherwise set forth in said Operating Agreement.
4. Grantor and Grantee agree that use of the Property by Grantee and its assigns will not be to the exclusion of Grantor's exercise of the Retained Freight Easement, as more specifically set forth in said Operating Agreement.

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

5. Transfer of the Retained Freight Easement shall be governed by the provisions of Exhibit D and Exhibit E attached hereto.

6. Definitions of Retained Freight Easement Terms:

(a) Perpetuity: Until this Retained Freight Easement is abandoned or terminated, as may be provided in the Operating Agreement herein referenced. In the event of abandonment or termination of any portion of this Retained Freight Easement as may be provided in the Operating Agreement, such portion thereof shall automatically be extinguished.

239033

(b) Trackage: The railway tracks now or hereafter located on, in or below the Property, and all supporting materials, facilities and structures appurtenant thereto (rails, ties, tie plates, ballast, drainage structures), together with existing or future control devices, signals, switches, communication lines and poles necessary for the safe operation of rail freight; whether main, spur, siding or sidetrack(s); those existing items being the items hereinabove conveyed to Grantee. August 14, 2015

(c) Railroad Purposes: The right to use all Trackage on the Property for the exclusive provision of Rail Freight Service, together with the right of ingress and egress over the Property and any adjacent property owned by Grantee to and from said Trackage and facilities located within the Property, provided, however, Grantee or its assignees may use said Trackage for its own freight needs, being the transport of railroad materials, equipment, ballast, rails and the like owned by Grantee, but not common or contract carriage of freight.

(d) Rail Freight Service: The transportation by rail of property and movable articles of every kind, character and description over the Property, including but not limited to rail freight transportation service to current and future industries, customers and facilities located along the Property, and supporting activities, over the Property.

GRANTEE HEREBY ACKNOWLEDGES THAT THE SUBJECT PROPERTY IS TRANSFERRED AS IS, WHERE IS AND WITH ALL FAULTS, DEFECTS AND CONDITIONS OF ANY KIND, NATURE OR DESCRIPTION AS OF THE DATE HEREOF, AND THAT, EXCEPT AS SET FORTH IN THE PURCHASE CONTRACT, THERE HAVE BEEN NO REPRESENTATIONS, WARRANTIES, GUARANTEES, STATEMENTS OR INFORMATION, EXPRESSED OR IMPLIED, PERTAINING TO SUCH PROPERTY, TITLE THERETO, THE VALUE, DESIGN OR CONDITION THEREOF, ITS MERCHANTABILITY OR SUITABILITY FOR ANY USE OR PURPOSE OR ANY OTHER MATTER WHATSOEVER, MADE TO OR FURNISHED TO GRANTEE BY GRANTOR OR ANY OF ITS OFFICERS, AGENTS OR EMPLOYEES.

In the event of a conflict between the provisions of this Deed, the Purchase Contract and/or the Operating Agreement, the provisions of the Operating Agreement shall control over the provisions of either this Deed or the Purchase Contract, and the provisions of this Deed shall control over the Purchase Contract. The Operating Agreement and the Purchase Contract are retained at the offices of the Grantee.

By the recording of this deed, Grantee agrees that the covenants of Grantee herein shall run with title to the Property conveyed, and bind Grantee, Grantee's successors and assigns, and anyone claiming title to or holding Property through Grantee, for the continuing benefit of, and remaining enforceable by, Grantor, its successors and assigns.

Plans prepared for Grantee are referred to in the Exhibits to this Deed (the "**Plans**"). Notwithstanding such reference, Grantor has not reviewed and is not obligated to review the Plans, Grantor does not and shall not warrant the accuracy, correctness, or legal sufficiency of the Plans, nor shall reference to the Plans create any covenant or warranty of title with respect to the property shown thereon.

No deed excise stamps are affixed hereto as none are required by law.

This conveyance does not constitute the sale or transfer of all or substantially all of the assets of the Grantor in Massachusetts.

[signature page to follow]

239033

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

IN WITNESS WHEREOF, PAN AM SOUTHERN LLC, pursuant to due limited liability company authority, has caused its name to be executed under seal by its officers hereunto duly authorized.

PAN AM SOUTHERN LLC

By: _____
Name: David A. Fink
Title: President

239033

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

ENTERED
Office of Proceedings
August 14, 2015

On this ____ day of June, 2015, before me, the undersigned Notary Public, personally appeared the above-named David A. Fink proved to me by satisfactory evidence of identification, being (check whichever applies): driver's license or other state or federal governmental document bearing a photographic image; oath or affirmation of a credible witness known to me who knows the above signatory; or my own personal knowledge of the identity of the signatory, to be the person whose name is signed above, and acknowledged the foregoing to be signed by him as his free act and deed, voluntarily for its stated purpose, as President of Pan Am Southern LLC.

Part of
Public Record

Notary Public (print name)
My Commission Expires: _____
Qualified in the Commonwealth of Massachusetts

EXHIBIT A

**Adams Industrial Track [Adams Branch]
Pittsfield and North Adams Railroad Co. Valuation Maps V.7/15 to V.7/19
Station 739+20 (Adams) to Station 981+45 (North Adams)
Mile Post 14.0 to Mile Post 18.5
Located in Adams & North Adams (Berkshire County), Massachusetts**

Description of Land

239033

The "Land" is comprised of whatever right, title and interest that Grantor has in the property described below, whether a fee title interest, an easement interest, or otherwise, and, to the extent Grantor's interest consists of an easement interest, this Release Deed and Assignment of Easement Rights shall serve as a grant and assignment of that interest by Grantor to Grantee.

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

All right, title and interest of Pan Am Southern LLC in that line of railroad being a portion of the former railroad known as the "Adams Industrial Track," said line of railroad extending in a generally northerly direction on, over and across a portion of Berkshire County, Massachusetts, in the Town of Adams and the City of North Adams.

Said line of railroad including right of way of varying width and irregular shape and including the mainline track and other railroad tracks and appurtenances supporting the maintenance and operation of the mainline track, and described as follows:

Beginning at Railroad Valuation Station 739+20, more or less, in the Town of Adams, said beginning being substantially as shown on Valuation Section Map V7/15, thence in a northerly direction for a distance of 24225 feet, more or less, to Railroad Valuation Station 981+45, said last station being the point of termination and being substantially as shown on Valuation Section Map V7/19. Said line of railroad being substantially as shown on attached Valuation Section Maps V7/15 through V7/19 inclusive, attached hereto and made a part hereof.

For grantor's title, see Quitclaim Deed of Boston and Maine Corporation to Pan Am Southern LLC, dated April 9, 2009 and recorded with Berkshire County North District Registry of Deeds at Book 1367, Page 182.

EXHIBIT B
Excluded Property Description

1. The Retained Freight Easement (as defined in the deed to which this exhibit is attached).
2. The Operating Agreement (as defined in the deed to which this exhibit is attached).

239033

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

EXHIBIT C

List of Title Exceptions

The Property is conveyed subject to, and, as the case may be, with the benefit of, the following matters to the extent in force and effect and applicable to the Property:

1. [To be inserted]
2. [To be inserted]

239033

GENERAL TITLE EXCEPTIONS:

The Property is also conveyed subject to, and, as the case may be, with the benefit of the following:

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

A. Pan Am Southern LLC ("PAS") acquired an easement for railroad purposes in certain portions of the Property by virtue of the original takings and locations of the railroad as filed with the County Commissioner, and continues to hold an easement interest, only, in certain portions of the Property as a result thereof.

B. PAS acquired easements for railroad purposes in certain portions of the Property by virtue of deeds out of portions of the original railroad line with reservations of easements and by virtue of takings and grants of easements, and continues to hold an easement interest, only, in certain portions of the Property as a result thereof.

C. Title to land located within public or private streets is subject to the rights of all persons lawfully entitled thereto.

EXHIBIT D
Provisions Relating to Transfer of Retained Freight Easement

Subject to this Exhibit D, the entirety of the Retained Freight Easement with respect to all or a portion of the Property shall be assignable, provided, however, that Grantor shall not have the right to split or share the Retained Freight Easement with respect to the Property or any portion thereof. Except as hereinafter set forth with respect to transfers to a Related Party (hereinafter defined), neither Grantor, a Related Party, as hereinafter defined, nor any subsequent holder of the benefit of the Retained Freight Easement (each of Grantor, a Related Party and a subsequent holder being a "**Benefitted Holder**"), shall sell, lease, license or otherwise transfer (each such transaction being a "**Transfer**") the benefit of the Retained Freight Easement, in whole or in part, or any interest therein (any such interest being an "**Easement Interest**") to a third party without the prior written consent of Grantee, which consent shall not be unreasonably withheld or delayed for any transferee meeting the standards set forth on **Exhibit E** (the "**Transferee Standards**"), provided that the Grantee, after reasonable inquiry and reasonable cooperation from the Grantor, a Related Party, or the Benefitted Holder, as applicable, has sufficient information to make such a determination. Notwithstanding the foregoing to the contrary, no Benefitted Holder shall be required to obtain Grantee's consent for a Transfer of an Easement Interest to a Related Party of the Benefitted Holder which is making the Transfer.

239033
ENTERED
Office of Proceedings
August 14, 2015
Part of

Public Record

Grantor, a Related Party or the Benefitted Holder, as the case may be, shall deliver to Grantee written notice of every proposed Transfer of an Easement Interest not less than sixty (60) days prior to the effective date of the Transfer of the Easement Interest. Within such sixty (60) day period, if the Transfer is not to a Related Party, Grantee shall either (i) consent to such transfer, such consent not to be unreasonably withheld, conditioned or delayed for any proposed transferee meeting the Transferee Standards, provided that the Grantee after reasonable inquiry has sufficient information to make such a determination, or (ii) state in detail the reasons for denial of consent, why Grantee contends that the proposed transferee does not meet the Transferee Standards, or what information Grantee lacks to make such a determination, as the case may be. The preceding notification provision shall apply to each Transfer by Grantor, a Related Party and by each Benefitted Holder; provided, however, that Grantee shall not have any right to approve or withhold approval of a transfer to a Related Party. For the purposes of the this Deed, "**Related Party**" shall mean any person, firm, partnership, corporation or other entity now or hereafter affiliated with, or a Member of, such Benefitted Holder or with which Grantor enters into a merger, reorganization, or sale of all or substantially all of such Benefitted Holder's assets.

EXHIBIT E
Transferee Standards

In accordance with the provisions set forth in Exhibit D of this Deed (“**Exhibit D**”), no Benefitted Holder (as defined in Exhibit D) shall sell, lease, license or otherwise transfer (each such transaction being a “**Transfer**”) the benefit of the Retained Freight Easement, in whole or in part, or any interest therein (any such interest being an “**Easement Interest**”) to any person other than a Related Party (as defined in Exhibit D) (a “**Transferee**”) without the prior written consent of Grantee. Such prior written consent shall not be unreasonably withheld or delayed unless the transferee fails to meet any of the following criteria (collectively, the “**Transferee Standards**”):

239033

1. Freight Rail Operations Experience:

- ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record
- a. The Transferee has a minimum of two (2) years prior experience conducting freight rail operations in the United States (“**U.S. Freight Operations**”) or controlled by a company that owns or controls at least one other rail carrier that has a minimum of two (2) years prior experience conducting U.S. Freight Operations. Any such company, rail carrier owned by such holding company, and any other entity that owns or controls the Transferee, or is owned or controlled by the Transferee, referred to herein as an “**Affiliate**” of the Transferee.
 - b. Such U.S. Freight Operations have been conducted in a reasonably safe manner as demonstrated through publicly available records and information reported to the Federal Railroad Administration under 49 CFR Part 225.

2. Financial Capacity: The Transferee has the financial capacity required to satisfy the financial obligations described in the then-current trackage rights or operating agreement between the Benefitted Holder and the Grantee.

3. Ability to Secure and Maintain Insurance Coverage: In the event that the Benefitted Holder’s interest in the Operating Agreement between the Benefitted Holder and the Grantee is to be assigned to the Transferee, and if such agreement requires the Benefitted Holder to maintain certain insurance coverage, the Transferee has the ability to secure and maintain insurance coverage in the amounts and on the terms required by such agreement.

4. Legal Matters: Neither the Transferee nor any Affiliate, nor any officer, director or department head of the Transferee or any Affiliate within the preceding five (5) years:

- a. has been convicted by a court of competent jurisdiction of any criminal charge of fraud, bribery, collusion, conspiracy, or any act in violation of state or federal antitrust law in connection with the bidding upon, award of, or performance of any contract with any public entity;
- b. has had a judgment entered against it, in a state or federal court, on any civil claim of fraud, bribery, collusion, conspiracy, or any action in violation of state or federal antitrust law in connection with the bidding upon, award of, or performance of any public works contract with any public entity;

- c. has been terminated or debarred on any contract issued by any public entity, including, but not limited to, the Grantee, or otherwise declared ineligible to contract with any public entity and such debarment remains in effect; or
- d. is at the time of the proposed Transfer in default under or otherwise failing to perform any material obligations contained in any contract or agreement with the Grantee, and the Grantee has noticed the Transferee about such default or material nonperformance and otherwise exercised its contractual rights under such contract or agreement with respect to the same.
- e. The Transferee may satisfy this Section 4 by certifying compliance in an affidavit.

239033

- 5. Interchange: The Transferee shall comply with all applicable STB rules and regulations when filing for STB approval or exemption of the transfer of the Retained Freight Easement.

ENTERED

Notwithstanding any provision of this Exhibit E to the contrary, upon the request of the Transferor or the Benefitted Holder, Grantee may, in its sole discretion, waive all or any portion of the Transferee Standards. No such waiver shall be effective unless evidenced by a written instrument executed by a duly authorized representative of Grantee.

Office of Proceedings

August 14, 2015

Part of

Public Record

239033

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. FD 35943

**MASSACHUSETTS DEPARTMENT OF TRANSPORTATION
– ACQUISITION EXEMPTION –
CERTAIN ASSETS OF PAN AM SOUTHERN LLC**

239033

MOTION TO DISMISS

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

EXHIBIT D

VERIFIED STATEMENT OF ANDREW JACOBS

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

VERIFIED STATEMENT OF ANDREW JACOBS

My name is Andrew Jacobs. I am General Manager for Pan Am Southern LLC. I have been in this position since May 1, 2015, during which time I have had operational responsibility for freight operations, including over the Adams Branch. Prior to assuming the position of General Manager, I was an Assistant Superintendent for Springfield Terminal Railway Company for six years. In my current position, I oversee and manage day-to-day operations of all freight and passenger operations on PAS lines, including an average of 30 daily local and through freight trains over the entire PAS system. Through this oversight, I am responsible for the overall safety and service performance of PAS operations, ensuring that traffic is delivered to and received from the fourteen carriers that connect to PAS in the most efficient manner possible. In addition, I oversee operations of two intermodal facilities and two automotive facilities located on PAS, ensuring that their service needs are met.

Pan Am Southern LLC ("PAS") is an existing rail carrier that owns or has operating rights over more than 400 miles of track in New York, Massachusetts, Vermont, and Connecticut. PAS performs railroad operations through its designated operator, the Springfield Terminal Railway Company ("Springfield Terminal"). *See Norfolk Southern Railway Company, Pan Am Railways, Inc. et al.-Joint Control and Operating/Pooling Agreements-Pan Am Southern LLC*, STB Finance Docket No. 35147 (served March 10, 2009). Particularly relevant to this proceeding, PAS owns certain right-of-way and trackage known generally as the "Adams

239033

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

Branch.” A portion of this Adams Branch owned by PAS extends from Station 739+20 in Adams, Massachusetts, to Station 981+45 in North Adams, Massachusetts.

PAS has agreed to sell the above-described portion of the Adams Branch to the Massachusetts Department of Transportation ("MassDOT"). MassDOT is purchasing this portion of the Adams Branch as part of a plan to provide excursion passenger service over the line.

Under its sale agreement with MassDOT, PAS will retain an exclusive, irrevocable, ~~239033~~, assignable, divisible, licensable and transferable freight easement over the Adams Branch, thereby enabling PAS to continue to fulfill its common carrier obligation on this segment of the Adams Branch once the track segment is sold.

Future freight and excursion passenger operations will be governed by the terms of a carefully-crafted and perpetual operating agreement (the "2015 Operating Agreement") between PAS and MassDOT, which contemplates generally PAS or its contractor performing freight service on weekdays and MassDOT or its contractor performing excursion passenger service on weekends and holidays. The 2015 Operating Agreement was developed through extensive consultation between the parties, and is designed to accommodate freight traffic after the introduction of excursion passenger train service on this portion of the Adams Branch. Among other things, the 2015 Operating Agreement provides that MassDOT will not assume a common carrier status on the Adams Branch, will have no right to conduct common carrier freight operations, and thus reinforced the parties' understanding that MassDOT will not hold itself out to freight shippers as a rail common carrier.

In my view, the 2015 Operating Agreement assures that PAS can fulfill its current and foreseeable rail freight service obligations to customers without undue interference from the MassDOT. For example, PAS will have the exclusive right to use the rail operating property

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

during a defined freight operating window between Monday and Friday each week. PAS will also have the right to fund and construct improvements to increase the capacity of the line for freight purposes. MassDOT, in turn, will have the exclusive right to run excursion passenger trains during a defined excursion operating window between Friday and Monday each week. Each of PAS and MassDOT has the discretion to run as many train round trips it deems necessary during its respective operating window.

239033

For context, PAS currently operates freight service two days each week with additional local service as demand requires. The terms of the 2015 Operating Agreement that PAS has negotiated will allow PAS and Springfield Terminal to meet their common carrier obligations by providing service to customers consistent with current operating patterns once MassDOT has acquired the subject Adams Branch segment.

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

PAS has been designated to remain as the provider of dispatching and maintenance under the terms of the 2015 Operating Agreement. Additionally, PAS will have the right to request or perform additional maintenance at any time beyond the maintenance obligations set by the 2015 Operating Agreement. Based on MassDOT's assurances and my experience with the freight operations over this portion of the Adams Branch, I am confident that PAS will be able to continue to fully satisfy its common carrier freight obligations and provide similar levels of service to its customers on the Adams Branch under the terms of the retained freight easement and 2015 Operating Agreement without undue interference from MassDOT following MassDOT's purchase of the portion of the Adams Branch. As I have explained in the above portion of my verified statement, the 2015 Operating Agreement is the product of negotiations among PAS and MassDOT to make appropriate arrangements for safety, capacity, dispatching,

maintenance, liability, and scheduling in a well-reasoned and thoughtful manner,
accommodating the respective needs of all stakeholders in and users of the Adams Branch.

239033

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

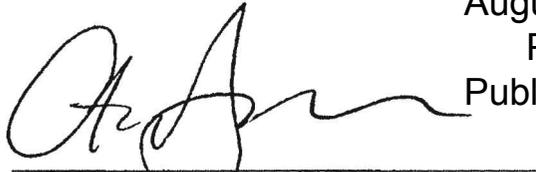
Verification

I, Andrew Jacobs, verify under penalty of perjury that I am General Manager of Pan Am Southern LLC, that I have read the foregoing document and know its contents, and that the same is true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on August 6, 2015

239033

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record



General Manager
Pan Am Southern, LLC