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BEFORE THE
SURFACE TRANSPORTATION BOARD

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DOCKET NO. FD 31250 (Sub-No. 1)

NEW ENGLAND CENTRAL RAILROAD, INC.
--TRACKAGE RIGHTS TERMS AND CONDITIONS--
PAN AM SOUTHERN LLC

REPLY OF PAN AM SOUTHERN LLC TO RESPONSE
OF NEW ENGLAND CENTRAL RAILROAD, INC.

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A. Introduction

This Reply is filed by Pan Am Southern LLC (“PAS”) pursuant to the Board’s decision served on October 2, 2014 in response to the Reply of New England Central Railroad, Inc. (“NECR”) filed on October 9, 2014 (“NECR Reply”). NECR once again raises its procedural objections, and proceeds to proffer multiple reasons why the two unilateral operating restrictions at issue here do not violate the Trackage Rights Order (“TO”) issued by the Interstate Commerce Commission (“ICC”) in *Amtrak—Conveyance of Boston and Maine Interests in Connecticut River Line in Vermont and New Hampshire*, ICC Finance Docket 31250, 6 I.C.C.2d 539 (*Amtrak II*). NECR works hard to justify the reasonableness of its waybill requirement and the speed restrictions on foreign rail carriers, but it does not explain how these operating restrictions support the “most economical and efficient manner of movement of all traffic” as required by the TO. In reality, NECR’s operating restrictions are an impermissible commercial reaction to NECR’s recent competitive loss of a substantial customer on the Line¹ to PAS and NECR’s unsuccessful attempts to renegotiate the terms of the TO. Further, the imposition of the

¹ The definition of the Line is the same as that used in *Amtrak II*.

operating restrictions negatively affects PAS's ability to compete effectively with NECR for customers as envisioned by *Amtrak II*.

1. NECR's own interpretation of the TRO does not justify its unilateral imposition of an unreasonable waybill requirement.

PAS interprets the TO as allowing it to use its trackage rights over NECR to provide haulage service to NS and other carriers. PAS relies on the plain language of the TO as well as NECR's knowledge of the fact that PAS intended to use its trackage rights to provide haulage services to NS as a result of the transaction approved in *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). NECR disagrees with PAS's interpretation. However, instead of seeking a resolution of this dispute through proper methods², NECR engaged in self-help and began requiring PAS to provide waybill information for every car moved over NECR's line so that NECR could apply its own interpretation of the TO to PAS's traffic.

a. NECR's waybill requirement for PAS's trackage rights trains is far from routine.

NECR argues that carriers provide waybill information routinely in the normal course of rail operations and that its requirement that PAS provide this information to NECR for its traffic is not burdensome. Indeed, when rail carriers interchange traffic, it is "commonplace and customary, and is not a burden." See. NECR Reply of NECR to Claims of PAS ("NECR Reply"), p. 7. However, the traffic being affected here is not for interchange to NECR and

² NECR could have sought an injunction or some other type of equitable relief to address the interpretation of the TO language. See §9.5. It, in fact, has filed a motion to set trackage rights terms in Finance Docket No. 35842 and PAS expects that NECR will raise the interpretation issue in that proceeding as well.

NECR's position conflates the issues of how burdensome the requirement is, what the TO obligates PAS to do, and how NEC's requirement affects shippers.

For traffic interchanged with NECR, PAS electronically provides a 417 waybill,³ which is also referred to as a "movement waybill" or a "transportation waybill." Of course, PAS provides this information to NECR in the normal course of operations. The movement waybill accompanies a car as it moves between carriers and tells the carriers how a particular car is to be routed. If NECR is participating in the move as an interline partner or as a provider of haulage services to PAS, NECR must have this information so that it will know how to handle a particular car. However, PAS traffic moved by PAS via PAS's trackage rights over NECR is different because NECR never touches that traffic. PAS coordinates its train operations with NECR and provides car count, length of train, tonnage, crew identity, and time on duty for that purpose, but it does not provide waybills or other information for this traffic because NECR does not appear or participate in the routing for that traffic.

b. NECR's waybill requirement is detrimental to the affected shippers.

NECR makes light of PAS's assertion that providing the waybill information to NECR violates 49 U.S.C. §11904. See Footnote 5 in NECR Reply. That statute prohibits PAS from disclosing "information about the nature, kind, quantity, destination, consignee, or routing of property ... that may be used to the detriment of the shipper or consignee" It reassures the Board that there is "no basis for concern that disclosures to NECR (or a third party) would harm the shipper." Id. However, the facts of the current situation belie the truth of NECR's reassurances.

³ A 418 waybill is an electronically transmitted record sent in advance of the actual car movement, and contains similar information to the 417 waybill.

On a rumor that PAS might provide haulage services to another carrier over the line, NECR began requesting waybill information on all PAS trackage rights traffic in order to make sure that PAS was complying with its interpretation of the TO. See NECR Reply at 6. If NECR had learned that any of the PAS trackage rights traffic was haulage traffic PAS was moving for another carrier⁴, presumably NECR would have foreclosed that competitive alternative for the shipper. Or, perhaps NECR would have exacted a premium to permit the movement of the traffic.

NECR indicates that it is willing to allow PAS to redact certain information on the waybills or to provide waybill information to a third party so that the third party can apply NECR's unilateral interpretation of the TO. As accommodating as NECR seems willing to be, the end result is still an unnecessary and inefficient process which results in delay for the movement of the traffic. Perhaps NECR views the delay in the delivery of the shipper's freight caused by NECR's impermissible waybill requirement or the foreclosure of a competitive service alternative as constituting only minor detriment to that shipper, but this is incorrect.

c. NECR's waybill requirement contradicts the language of the TO.

Despite NECR's claims that its waybill requirement only introduces a small amount of delay or has to date only affected only nine cars, NECR's requirement still violates the plain language of the TO. The TO clearly prohibits Section 5.1 of the TO provides:

The trains, locomotives, cars and equipment of [PAS], [NECR], Amtrak, and any other present or future user of the Line or any portion thereof, shall be operated

⁴ PAS has not provided haulage service to any carrier other than NS. And, despite NECR's position that the TO does not allow PAS to offer haulage services, NECR seems to accept PAS's provision of haulage services to NS. NECR justifies this position due the fact that it entered into a settlement agreement with PAS as part of the PAS Control Proceeding. However, PAS's ability to provide haulage services to NS was not discussed as part of any settlement agreement with NECR and is in fact not included in the actual settlement agreement filed with the Board.

without prejudice or partiality to any party to this Agreement ... and in such a manner as will result in the most economical and efficient manner of movement of all traffic.

(Emphasis added). Delaying traffic in order to obtain waybill information from a receiving carrier or working through the Board's Office of Public Assistance, Governmental Affairs and Compliance or some other third party is not "the most economical and efficient manner in which to move traffic." See NECR Reply at 7. No matter how hard NECR tries to justify its actions, it still has not explained how its arbitrary waybill requirement satisfies the provisions of the TO.

2. NECR offers no reasonable justification for its unilateral imposition of an unreasonable speed restriction.

NECR next attempts to justify its unilateral imposition of speed restrictions on foreign carriers established by NECR Daily Operating Bulletin No 139 (the "Daily Bulletin"). It argues that the speed of the PAS's trackage rights trains are restricted by the condition of the track at the time the TO was entered because the compensation paid by PAS to NECR for the trackage rights was set based on the condition of the track at that time. Then, NECR argues its speed restrictions as applied to PAS are permissible because another foreign railroad is subject to similar speed restrictions on a different part of NECR's system. Finally, NECR posits that it only makes sense to apply a speed restriction to foreign trains running over its property because those trains might be carrying TIH/PIH commodities. All of these arguments are wholly without merit and completely disregard the effect that NECR's impermissible actions have on customers or connecting carriers.

a. The TO does not correlate the condition of the line to the amount of trackage rights compensation paid to NECR.

Section 3.3 of the TO expressly sets the compensation to be paid by PAS to NECR. That provision does not require compensation to be adjusted based on the condition of the line.⁵ Moreover, the TO allows NECR to reopen the terms of the arrangement and ask the Board to set terms of the trackage rights arrangement if the parties do not voluntarily agree on new terms after a certain period. See Section 2.2 of the TO. NECR has already initiated a proceeding asking the Board to set terms. NECR's position that the compensation set by the TO does not adequately reflect the current condition of the line is not supported by the plain language of the TO and is an inadequate justification for why NEC implemented its speed restriction of foreign carriers.

b. The Daily Bulletin discriminates between the operations of NECR and PAS.

NECR next justifies its actions by citing speed restrictions that apply to Canadian National Railway ("CN") over the northern portion of NECR's lines. See NECR Reply at 8. NECR's argument misses the point because the TO does not govern the relationship between NECR and another carrier. The TO requires that the trains of PAS and NECR be operated "without prejudice or partiality." §5.1 of the TO. That NECR may impose a speed restriction on another carrier is irrelevant to the question of whether the trains of PAS and NECR are being operated without prejudice.

NECR attempts to gloss over its actions by hiding behind the guise of safety. It claims that it is only prudent to restrict the speed of foreign carriers moving over its lines because such

⁵ Section 3.2 of the TO actually says is that. "[NECR] shall keep the Line, at all times throughout the term of this Agreement or any extensions thereof, in *not less than FRA Class II condition*. Section 3.3 of the TO provides that PAS's compensation is in "full compensation of any and all obligations of [PAS] to pay for the trackage rights provided herein or contribute towards the costs of dispatching, maintenance and repair of the Line."

trains could be moving TIH/PIH or hazardous materials. NECR ignores the fact it already has an operating rule that addresses the movement of TIH/PIH or hazardous materials and that foreign rail carriers operating over its lines are subject to that rule, regardless of whether those carriers provide commodity information to NECR. Moreover, should PAS crews fail to abide by the NECR operating rules, NECR has the option to discipline such employees by excluding them from operation on the Line. Clearly, NECR already has an applicable operating rule in place to deal with its safety issues and even has processes in place to deal with carriers that do not abide by those rules. §5.3 of the TO. As such, NECR's unilateral general speed restriction on all foreign carriers is completely unnecessary.

c. The unilateral operating restrictions imposed by NECR have had an adverse impact on the operations of PAS and the service to its customers.

Throughout its Reply, NECR insists that the waybill requirement and the speed restriction have had—and will have—minimal adverse impact on PAS operations and the needs of its customers. However, adverse impacts have already been realized, and are only expected to increase as adverse winter weather conditions further affect operations on the Line. For example, while NECR claims that CMQR has provided waybill information for its cars, PAS is not aware that this has actually happened with regard to CMQR traffic moving in the account of PAS. To the contrary, PAS was required to hold six cars routed for CMQR at East Deerfield, Massachusetts for over 80 days as the waybill dispute continued, and these cars were finally moved by rerouting them to Northern Maine Junction, a distance of approximately 277 additional miles.⁶

⁶ These cars were not subject to the temporary arrangement with OPAGAC referenced in the NECR Reply, as they had already been moved by the time OPAGAC assistance became an option.

In addition, a substantial customer of PAS on the Line, which is a former customer of NECR, has been and will continue to be adversely impacted by the speed restriction. This customer provides for almost 40% of the entire demand for propane in New Hampshire and Vermont, and the delays resulting from the speed restriction will result in a decrease in the number of switches that PAS can provide to this customer. The end result of a loss of one to two switches per week could be a decrease in available propane by approximately 4-6 million gallons per month. Consequently, NECR's claims that the unilateral operating restrictions are reasonable and will not adversely affect PAS or its customers ring hollow.

B. Conclusion

For the foregoing reasons, PAS requests that the Board find that NECR has failed to demonstrate how its unilateral actions are consistent with the terms of the TO. NECR's concerns are more appropriately addressed by the Board in the context of the proceeding to set terms of the trackage rights agreement or by a court of competent jurisdiction in the context of a dispute about the construction of the language of the TO. There is no justification for NECR's waybill requirement or its speed restriction on foreign roads found anywhere in the agreement. As such, the Board should order NECR to remove both operating restrictions immediately.

Respectfully submitted,



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Dated: October 16, 2014

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VERIFICATION

I, Michael Rooks, General Manager of Pan Am Southern LLC, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file the foregoing document.

Executed on October 16, 2014


Michael Rooks

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was served on the following by e mail where indicated, and by U.S. first class mail, postage pre-paid on:

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